JUDGMENT OF THE COURT (Sixth Chamber)

15 March 2001 *

In Case C-147/00,

Commission of the European Communities, represented by J.-F. Pasquier and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and D. Colas, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that

— by failing to take all necessary measures to ensure that, within 10 years of notification of Council Directive 76/160/EEC of 8 December 1975 concern-

* Language of the case: French.

ing the quality of bathing water (OJ 1976 L 31, p. 1), the quality of bathing water conformed to the limit values set in accordance with the directive, contrary to Article 4(1) thereof,

— by failing to carry out sampling operations, the minimum frequency of which is laid down in the Annex to Directive 76/160 in respect of all parameters and all bathing waters, contrary to Article 6(1), and

— by failing to carry out the sampling operations for the 'total coliform' parameter,

the French Republic has failed to take all measures to comply with its obligations under Directive 76/160 and has failed to fulfil its obligations under Articles 3, 4, 5 and 6 of that directive,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, J.-P. Puissochet, F. Macken, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 April 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that:

— by failing to take all necessary measures to ensure that, within 10 years of the notification of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1), the quality of bathing water conformed to the limit values set in accordance with the directive, contrary to Article 4(1) thereof,

— by failing to carry out sampling operations, the minimum frequency of which is laid down in the Annex to Directive 76/160 in respect of all parameters and all bathing waters, contrary to Article 6(1), and

— by failing to carry out the sampling operations for the 'total coliform' parameter,

the French Republic has failed to take all measures to comply with its obligations under Directive 76/160 and has failed to fulfil its obligations under Articles 3, 4, 5 and 6 of that directive.

Legal background

2 Article 1(2) of the directive provides:

'[F]or the purposes of this Directive:

(a) "bathing water" means all running or still fresh waters or parts thereof and seawater, in which:

— bathing is explicitly authorised by the competent authorities of each member State, or

— bathing is not prohibited and is traditionally practised by a large number of bathers'.

3 According to Article 3(1) of the directive, 'Member States shall set, for all bathing areas or for each individual bathing area, the values applicable to bathing water for the parameters given in the Annex'. Among other parameters, the annex to the directive contains those relating to 'total coliform' in point 1 and 'fæcal coliform' in point 2.

4 According to Article 3(2) of the directive: '[T]he values set pursuant to paragraph 1 may not be less stringent than those given in column I of the Annex.'

5 Under Article 4(1) of the directive the Member States are required to take all necessary measures to ensure that, within 10 years following the notification of the directive, the quality of bathing water should conform to the limit values set in accordance with Article 3. Since that notification was given on 10 December 1975, French bathing waters ought to have been brought into line with the directive by 10 December 1985 at the latest.

6 Article 5 of the directive specifies the results which must be attained by analyses of bathing-water samples if, pursuant to Article 4, those bathing waters are to be deemed to conform to the relevant parameters.

7 Article 6(1) of the directive states that the competent authorities in the Member States are to carry out sampling operations the minimum frequency of which is laid down in the Annex.

8 Article 12 of the directive provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification.

9 Article 13 of the directive, as amended by Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain directives relating to the environment (OJ 1991 L 377, p. 48), provides that every year, and for the first time by 31 December 1993, the Member States are to send to the Commission a report on the implementation of the directive in the current year. That report is to be made to the Commission before the end of the year in question. The Commission is to publish a Community report on the implementation of the directive (the 'consolidated report') within four months of receiving the reports from the Member States.

10 The French authorities communicated to the Commission, as measures transposing the directive into national law, Decree No 91-980 of 20 September 1991 amending Decree No 81/324 laying down the hygiene and safety rules applicable to swimming pools and specified bathing places and the Order of 29 November 1991 enacted in order to implement Decree No 91-980 of 20 September 1991.

Facts and pre-litigation procedure

11 The French authorities forwarded to the Commission reports concerning the application of the directive for 1995, 1996 and 1997. The Commission noticed several *lacunae* in the application of the directive. In consequence, it initiated two separate pre-litigation procedures, which it has joined in this action because they are connected.

12 In the first place, by formal notice of 5 September 1996 and a reasoned opinion of 5 August 1998 ('the first reasoned opinion'), the Commission alleges that, by failing to take all necessary measures to ensure that, within 10 years of the notification of the directive, the quality of bathing water conformed to the requirements of the directive, contrary to Article 4(1) thereof, and by failing to carry out sampling operations, the minimum frequency of which is laid down in the Annex to Directive 76/160 in respect of all parameters and all bathing waters, contrary to Article 6(1), the French Republic had failed to fulfil its obligations under the directive. The Commission allowed the French Republic a period of two months from notification of the first reasoned opinion to comply therewith.

13 By letter of 13 October 1998 the French authorities replied that conformity of bathing areas with the requirements of the directive had risen from 60% in 1980 to 93% in 1997. They undertook to do everything to ensure that all bathing areas would by 1999 comply with the mandatory limit values set by the directive. The same undertaking was entered into with regard to sampling and taking into consideration the physical and chemical parameters in the determination of conformity.

14 Since no further information was received from the French authorities to justify the conclusion that those undertakings had been complied with, the Commission concluded that the infringement still continued and therefore brought the present action.

15 In the second place, by formal notice of 11 November 1999 and a reasoned opinion of 6 August 1999 ('the second reasoned opinion'), the Commission alleged that the French Republic had not carried out sampling operations for the 'total coliform' parameter, contrary to its obligations under Articles 3, 4, 5 and 6

of the directive. The Commission gave the French Republic two months from its notification in which to comply with the second reasoned opinion.

16 By letter of 5 October 1999 the French authorities replied that since the 1995 bathing season they had stopped measuring total coliform and fæcal coliform and instead had been measuring *escherichia coli* using the more efficient 'microplate' method, while still continuing to measure fæcal streptococcus, so that they considered that they observed the spirit of the directive and attained the fundamental objective of protecting the health of bathers.

17 Furthermore, at a 'package' meeting held on 3 February 2000 concerning pre-litigation environmental issues, the French authorities forwarded to the Commission circulars DGS/DE No 99/311 and DGS No 99/312, issued on 31 May 1999, which provide for several measures intended to ensure that the French Republic complies with its obligations under the directive.

18 Nevertheless, the Commission considered it necessary to take further steps in the infringement procedure by bringing this action.

19 Since the application under Article 226 EC was lodged, the French authorities have issued circular DGS/DAGPB No 2000/312 of the Minister for Employment and Solidarity of 7 June 2000, which is likewise intended to ensure the compliance of the French Republic with its obligations under Community law and a copy of which has been produced, annexed to the defence lodged in these proceedings on 26 June 2000.

The alleged infringements and the Court's findings

20 In its application the Commission raises three complaints against the French Republic, namely: first, failure to observe the mandatory limit values set by the directive; second, the insufficient number of samples taken and, third, the abandonment of the 'total coliform' parameter.

The first complaint: non-compliance with the mandatory value limits set by the directive

21 The Commission claims that, in the light of detailed examination of the French Government's report on the quality of bathing water for 1995, the quality of bathing water in France that year did not comply, as required by Article 5 of the directive, with the limit values specified in Column I of the Annex to the directive. In addition, the French authorities' reports on the quality of bathing water for 1996 and 1997 provide confirmation that that non-compliance persisted. Given that, in its submission, the directive imposes on the Member States a clear and unconditional obligation to achieve a certain result, namely the observance of mandatory limit values, the Commission concludes that the French Republic has failed to fulfil its obligations under the directive.

22 The French Government does not deny that in 1995, 1996 and 1997 certain bathing areas did not comply with the mandatory value limits set by the directive. It points out, none the less, that the levels of non-compliance observed and cited by the Commission in its consolidated report for 1998 (European Commission, Quality of Bathing Waters (Bathing Season 1998), EUR 18831, May 1999, pp. 137 to 138) indicate a gradual improvement in the French data. It considers that those figures may yet undergo substantial and rapid improvement and that

the measures taken to that end from 31 May 1999 — and accordingly applicable during the 1999 bathing season — make it possible to bring about such improvement. Circular DGS No 99/311, issued on 31 May 1999, includes an annex laying down several measures designed to ensure that the French Republic complies with its obligations under Community law and Circular DGS No 99/312, issued the same day, also contributes to the increase in sampling frequency, which should of itself contribute to an improvement in the level of compliance of French bathing waters with the quality standards laid down by the directive. In addition, Circular No DGS/DAGPB No 2000/312, issued on 7 June 2000, provides confirmation that those measures have been continued for the 2000 season.

23 Consequently, the French Government considers that it is not certain that, when the time-limit prescribed by the first reasoned opinion expired, the infringement alleged by the Commission was still in existence. In those circumstances, it requests the Court to declare that the Commission has not established that the infringement found for the years 1995 to 1997 lasted beyond the expiry of the time-limit set by the first reasoned opinion.

24 In response to this, the Commission states that Circular DGS/DE No 99/311 and DGS No 99/312 do no more than indicate the means employed, and cannot demonstrate compliance with the mandatory value limits set by the directive. Furthermore, the French authorities have not supplied the information concerning the quality of their bathing waters for 1999, in contravention of Article 13 of the directive, as amended.

25 The French Government points out that, according to the case-law of the Court, it is for the Commission to prove the existence of the alleged failure to fulfil obligations, and it may not rely on any presumption for that purpose. So far as concerns the data for 1999 and 2000, the French Government does not deny that they have not yet been supplied or that that failure constitutes an infringement of

Article 13 of the directive, as amended, but it stresses that that infringement is not the same as that in issue in this action, in which the only infringement alleged is that of Articles 3, 4, 5 and 6 of the directive. Moreover, since such a complaint was not made during the pre-litigation procedure, it is not open to the Commission to raise it at this stage of the proceedings.

26 It must 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, in particular, Case C-384/99 *Commission* v *Belgium* [2000] ECR I-10633, paragraph 16).

27 It is also settled case-law, as the French Government points out, that in the context of proceedings under Article 226 EC for failure to fulfil obligations it is for the Commission to prove the existence of the alleged failure, and it may not rely on any presumption for that purpose (see, *inter alia*, Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 42).

28 In this instance the first reasoned opinion, which relates to the first two complaints, prescribed a time-limit of two months from its notification for the French Republic to comply with its requirements. Since that reasoned opinion was notified on 5 August 1998, the time-limit expired on 5 October 1998. The question whether the French Republic has failed to fulfil its obligations must, therefore, be determined as at that date.

29 It is not disputed that during the 1995, 1996 and 1997 bathing seasons French bathing waters did not comply with the limit values set by the directive. The Commission's consolidated report for 1998, which has not been challenged by the French Government, states that, despite some improvement, those values were

still not complied with during the 1998 bathing season. According to the report, the percentage of bathing areas not complying with the mandatory values in 1998 was 5.5% of coastal waters and 4.2% of inland waters.

30 That consolidated report states that, so far as concerns continental France, the 1998 bathing season ran 'from 29 April to 30 September' for coastal waters and 'for two to three months, generally July and August' for inland waters. So far as concerns the overseas departments, it states that the bathing season lasts the year round for coastal waters and 'six to 12 months' for inland waters. It follows that on 5 August 1998, the date on which the first reasoned opinion was issued, the failure to fulfil obligations was established.

31 What is more, the French Government does not claim that it complied with the reasoned opinion within the period of two months from the issuing of that opinion. In reality, it merely invokes some hypothetical improvement which did not, moreover, take place until after 31 May 1999 at the earliest, that being the date on which Circulars DGS/DE No 99/311 and DGS No 99/312 were issued, that is to say, some months after the expiry of the period prescribed by the first reasoned opinion.

32 It must therefore be found that as at 5 October 1998 the French Republic had not put an end to the failure to fulfil its obligations as alleged by the Commission in its first complaint.

The second complaint: insufficient sampling

33 The Commission claims that in 1995, 1996 and 1997 the number of sampling operations in several bathing areas, although rising, was still too low to comply

with the minimum frequency set by the directive. In addition, the French Government ceased using the 'total coliform' parameter.

34 The French Government does not deny that in certain areas the frequency of sampling did not comply with the directive for 1995, 1996 and 1997, but it points out that there was a constant reduction in the percentage of insufficiently sampled areas between 1995 and 1998. Furthermore, it submits that the measures contained in Circulars DGS/DE No 99/311 and DGS No 99/312, issued on 31 May 1999, and in Circular DGS/DAGPB No 2000/312, issued on 7 June 2000, ought to complete the process of compliance, which had in any event already been achieved by the date on which the period prescribed by the first reasoned opinion concerning coastal waters expired. Those circulars provide for greater frequency of sampling where it is still too low, and for alteration of the method of measurement, in order to respond to the Commission's observations.

35 The Commission states that a reference to a hypothetical improvement is insufficient and argues that, since the French authorities have not forwarded the data for 1999, it may with justification be presumed that the infringement continued in 1999. It adds that, although sampling in the coastal areas was sufficient in 1998, sampling in 4.4% of inland areas was still insufficient that year.

36 As in the previous complaint, the French Government stresses that the Commission is obliged to prove the alleged failure without relying on any presumption or on a failure to supply information which was not raised in the pre-litigation procedure.

37 It should be observed, in the first place, that both in its consolidated report for 1998 and in its reply, the Commission acknowledged that the coastal waters were sufficiently sampled in 1998. Accordingly, its complaint now relates only to inland waters.

38 The French Government accepts that that complaint is well founded for 1995, 1996 and 1997. In addition, the Commission's consolidated report for 1998 points out that 4.4% of bathing areas in inland waters were insufficiently sampled, which the French Government does not dispute. Even though that percentage is an improvement on the previous year's, it must be observed that the failure to fulfil obligations still existed when the first reasoned opinion was issued.

39 Furthermore, the French Government does not claim to have complied with the first reasoned opinion during the period of two months from the date of its issue. In reality, that Government is merely pointing to a hypothetical improvement which took place, at the earliest, after 31 May 1999, and in any event outside the period prescribed by the first reasoned opinion.

40 Accordingly, it must be found that as at 5 October 1998 the French Republic had not put an end to the failure alleged by the Commission in its second complaint in so far as it relates to the frequency of sampling inland bathing waters.

The third complaint: abandonment of the 'total coliform' parameter

41 The Commission claims that the 'total coliform' parameter forms part of the directive. Accordingly, by ceasing to measure it, the French authorities infringed a clear obligation under Articles 3, 4, 5 and 6 of the directive.

42 The French Government acknowledges that ceasing to measure the 'total coliform' parameter makes it impossible for it to comply with all the rules in the directive, but maintains that it has put an end to that infringement by issuing Circular DGS/DAGPB No 2000/312 of 7 June 2000, which ordered that that parameter should once again be measured.

43 It is common ground that on 6 October 1999, the date on which the period prescribed in the second reasoned opinion expired, the French authorities were not measuring the 'total coliform' parameter. That infringement must accordingly be found to be established.

44 In light of all the foregoing considerations, it must be declared that:

— by failing to take all the measures necessary to ensure that, within 10 years of the notification of the directive, the quality of bathing water conformed to the limit values set in accordance with the directive, contrary to Article 4(1) thereof,

— by failing to carry out sampling operations in line with the minimum frequency laid down in the Annex to the directive in respect of inland bathing waters, contrary to Article 6(1), and

— by failing to carry out sampling operations for the 'total coliform' parameter,

the French Republic has failed to fulfil its obligations under Articles 3, 4, 5 and 6 of the directive.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that,**

— **by failing to take all the measures necessary to ensure that, within 10 years of the notification of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, the quality of bathing water conformed to the limit values set in accordance with the directive, contrary to Article 4(1) thereof;**

— by failing to carry out sampling operations in line with the minimum frequency laid down in the Annex to Directive 76/160 in respect of inland bathing waters, contrary to Article 6(1), and

— by failing to carry out sampling operations for the 'total coliform' parameter,

the French Republic has failed to fulfil its obligations under Articles 3, 4, 5 and 6 of Directive 76/160;

2. Orders the French Republic to pay the costs.

Gulmann Puissochet Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 15 March 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber