JUDGMENT OF THE COURT (Sixth Chamber)

30 January 2003 *

In Case C-226/01,

Commission of the European Communities, represented by H.C. Støvlbæk, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Denmark, represented by J. Molde and J. Bering Liisberg, 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 the quality of its bathing water conforms to the limit values laid down by Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1) and by failing to adhere to the minimum

* Language of the case: Danish.

sampling frequencies required by that directive, the Kingdom of Denmark has failed to fulfil its obligations under Articles 4(1) and 6(1) of the same directive,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, C. Gulmann, V. Skouris and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 19 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 17 October 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 6 June 2001, 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 the quality of its bathing water conformed to the limit values laid down by Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1, 'the Directive') and by failing to adhere to the minimum sampling frequencies required by that directive, the Kingdom of Denmark has failed to fulfil its obligations under Articles 4(1) and 6(1) of the same directive.

Legal framework

2 Article 1(2)(a) of the Directive provides:

'For the purposes of this Directive:

(a) "bathing water" means all running or still fresh waters or parts thereof and sea water, 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 Article 3(1) of the Directive provides that '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'.

4 Article 3(2) provides that '[t]he values set pursuant to paragraph 1 may not be less stringent than those given in column I of the Annex'. The Annex to the Directive contains 19 parameters, as well as mandatory limit values for most of those parameters.

5 Under Article 4(1) of the Directive, the Member States were required to take all necessary measures to ensure that, within 10 years following the notification of the Directive, the quality of bathing water conforms to the limit values set in accordance with Article 3 of the Directive.

6 Article 5 of the Directive provides:

'1. For the purposes of Article 4, bathing water shall be deemed to conform to the relevant parameters:

if samples of that water, taken at the same sampling point and at the intervals specified in the Annex, show that it conforms to the parametric values for the quality of the water concerned, in the case of:

— 95% of the samples for parameters corresponding to those specified in column I of the Annex;

— 90% of the samples in all other cases with the exception of the "total coliform" and "faecal coliform" parameters where the percentage may be 80%

and if, in the case of the 5, 10 or 20% of the samples which do not comply:

— the water does not deviate from the parametric values in question by more than 50%, except for microbiological parameters, pH and dissolved oxygen;

— consecutive water samples taken at statistically suitable intervals do not deviate from the relevant parametric values.

2. Deviations from the values referred to in Article 3 shall not be taken into consideration in the calculation of the percentage referred to in paragraph 1 when they are the result of floods, other natural disasters or abnormal weather conditions.'

7 Article 6(1) of the Directive provides 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 8 provides for the possibility of derogations from the Directive:

(a) in the case of certain parameters marked (0) in the Annex, because of exceptional weather or geographical conditions; and

(b) when bathing water undergoes natural enrichment in certain substances causing a deviation from the values prescribed in the Annex.

9 According to the third and fourth paragraphs of Article 8 of the Directive, in no case may the derogations disregard the requirements essential for public health

protection and that, where a Member State derogates from the provisions of the directive, it must forthwith notify the Commission thereof, 'stating its reasons and the periods anticipated'.

10 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, the Member States are to send to the Commission a report on the implementation of the Directive in the current year. The report must be made to the Commission before the end of the year in question.

11 The Directive was notified to the Kingdom of Denmark on 10 December 1975.

Facts and pre-litigation procedure

12 The Danish Government sent the Commission reports on the implementation of the Directive for the 1995, 1996, 1997 and 1998 bathing seasons. The Commission found therein a number of lacunae in the application of the Directive. On 4 August 1999, it therefore sent that government a letter of formal notice concerning those omissions and invited it to submit its observations on the matter.

13 The Danish Government replied by letter of 1 October 1999, setting out the measures put into effect to deal with deviations from the limit values laid down in the Directive.

14 The Commission considered that the Danish Government had not taken all necessary measures to ensure that the quality of bathing water conformed to the limit values laid down in the Directive and to ensure compliance with the minimum sampling frequencies. On 7 April 2000, it therefore sent a reasoned opinion to the Kingdom of Denmark, in which it found that there was infringement of Articles 4(1) and 6(1) of the Directive and calling on Denmark to adopt the necessary measures to comply with that opinion within two months of the date of its notification.

15 The Danish Government replied by letters of 7 and 8 June 2000, setting out the steps taken in Denmark with a view to achieving overall improvement in purification of residual water and water quality, and describing more specifically the measures taken during the past 20 years to deal with various sources of pollution in bathing waters.

16 The Commission nevertheless took the view that the infringement was continuing and it therefore brought the present action.

The action

The complaint concerning the quality of bathing water

Arguments of the parties

17 Whilst specifying that the present action concerns only the years 1995 to 1998, the Commission maintains that the quality of bathing water in Denmark did not

comply fully with the limit values set by the Directive for each of the years in the period 1995 to 2000. The following table shows the rates of compliance:

Year	Compliance with the mandatory values, expressed as a percentage	
	Sea water	Fresh water
1995	91.1	82.9
1996	97.2	88.5
1997	95.4	87.5
1998	94.3	90.3
1999	92.7	93.8
2000	95.8	92.2

18 In its defence, the Danish Government disputes the Commission's calculation of the rates of compliance on several grounds. First, it maintains, the vast majority of the deviations should be characterised as 'fortuitous', since they are possibly of animal origin and occur suddenly, in the form of isolated deviations scattered across various bathing areas. Second, the calculation method used by the Commission does not take account of the measures, such as bathing bans, taken to deal with specific instances of deviations. Of the 1 300 existing bathing resorts in Denmark, formal bathing bans are imposed in 15 to 17 of them each year during the summer season. Third, the Commission's calculation of the deviations is based on figures which are valid for one year at a time. This calculation method gives a distorted statistical picture of the quality of bathing water in Denmark and finds no support in the Directive.

19 Whilst noting, like the Commission, that the present action concerns only the years 1995 to 1998, the Danish Government submits the table reproduced below on the compliance of bathing water in Denmark with the mandatory limit values for the years 1995 to 2000. It explains that the figures in this table have been adjusted to take account of fortuitous deviations, communication of erroneous information and the introduction of bathing bans.

Year	Compliance with the mandatory values, expressed as a percentage	
	Sea water	Fresh water
1995	95.6	85.6
1996	99.3	90.3
1997	98.8	91.1
1998	98.8	92.1
1999	98.4	94.7
2000	98.7	94.8

20 For the period 1995 to 1998, there were 140 deviations in all, in 130 bathing areas, 82 of which were attributable to fortuitous occurrences (through, in particular, birds and other animals). The Danish Government submits that 30 other deviations were due to waste water and that, in those cases, remedial measures were taken. In the remaining 28 cases, the bathing resort in question was put under surveillance. Lastly, the data for 1999 and 2000 confirm that, in general, the deviations were fortuitous.

21 The Danish Government acknowledges that, according to the case-law of the Court, the Directive imposes on the Member States the obligation to take all necessary measures to ensure compliance with it. The Court has, however, left

open the possibility that deviations may be compatible with the Directive, provided that it is established that it was impossible to prevent them.

22 According to the Danish Government, deviations due to excreta from birds or other animals, or to sudden, heavy precipitation, are of a fortuitous nature, which is why it is impossible to foresee where they will occur. Deviations of this nature are due to general circumstances which make compliance with the Directive impossible. The Danish Government submits that most of the infringements which occurred in the 1995 to 1998 period were due to fortuitous deviations which were caused by nature and which it was absolutely impossible to guard against effectively.

Findings of the Court

23 As a preliminary point, it should be recalled that it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining 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-220/99 *Commission* v *France* [2001] ECR I-5831, paragraph 33; and Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711, paragraph 8). It follows that, in the present case, only the bathing seasons 1995 to 1998 are relevant for determining whether there were infringements as alleged.

24 Under Article 4(1) of the Directive, Member States are to take all necessary measures to ensure that the quality of bathing water conforms to the limit values set in accordance with Article 3 (see Case C-92/96 *Commission* v *Spain* [1998] ECR I-505, paragraph 27; and Case C-307/98 *Commission* v *Belgium* [2000] ECR I-3933, paragraph 48).

25 In that regard, the conformity of the quality of bathing water to the limit values set by the Directive must be assessed each year and not over a number of years, as the Danish Government has argued. Article 13 of the Directive, as amended by Directive 91/692, requires the Member States to send to the Commission each year a report on the implementation of the Directive for the current year. It is not consonant with the objective of public-health protection pursued by the Directive for there to be a period of several years during which the Member States are free not to take any action. That interpretation is confirmed by paragraph 34 of the judgment in Case C-198/97 *Commission* v *Germany* [1999] ECR I-3257, where the Court held that deviations even in a single season constitute an infringement of the Directive.

26 The Directive requires the Member States to ensure that, each year, 100% of their bathing areas conform to the limit values laid down in column I of the Annex to the Directive. Under Article 5(1) of the Directive, bathing water is to be deemed to conform to those relevant parameters when a certain percentage of the samples of that water, taken at the frequencies specified in the Annex to the Directive, complies with the values laid down therein.

27 The figures provided by the Commission in its application show that, for each of the years in the period 1995 to 1998, a certain proportion of the bathing areas in Denmark — both fresh- and sea-water areas — did not conform to the mandatory limit values set by the Directive.

28 The Danish Government disputes the figures relied on by the Commission and proposes that they be corrected to take account of the impact of the deviations it characterises as 'fortuitous', errors in the transmission of data and bathing bans.

Those corrections result in the figures showing higher rates of compliance with the mandatory limit values than those alleged by the Commission.

29 However, even taking into account the figures suggested by the defendant Member State, it is clear that, during the years 1995 to 1998, a certain proportion of the bathing-water areas in Denmark, both fresh- and sea-water areas, still did not conform to the mandatory limit values set by the Directive. It follows that there must be a finding of infringement so far as the complaint regarding the quality of bathing water in Denmark is concerned, without its being necessary to consider whether the corrections proposed by the Danish Government are justified.

The complaint concerning the frequency of sampling

30 The Commission submits that in seven bathing areas the minimum sampling frequency, as required by Article 6(1) of and the Annex to the Directive, read in conjunction, was not complied with during the period 1995 to 1998.

31 The Danish Government does not dispute this, but claims that on an annual basis the infringement concerns a mere 0.2% of the 1 300 bathing resorts in Denmark. It adds that the insufficient number of samples did not conceal a decrease in the quality of the bathing water at the local level and that the Danish authorities remedied these deficiencies, ensuring that they would not recur. It therefore maintains that the insufficient number of local samples comes within the *de minimis* rule and that, accordingly, there is no infringement of the Directive, as considered in the light of its purpose.

32 It is clear that the infringement alleged against the Danish Government is of limited scope and has negligible practical consequences. However, as the Court has held (see Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575, paragraphs 6 and 19; Case C-404/99 *Commission* v *France* [2001] ECR I-2667, paragraph 51), an action against a Member State for failure to fulfil its obligations is objective in nature and, consequently, where a Member State fails to fulfil its obligations under the Treaty or under secondary legislation, the infringement exists regardless of the frequency or the scale of the circumstances complained of.

33 It follows that, in the present case, the infringement is established so far as the complaint about the frequency of sampling is concerned.

34 It must therefore be held that, by failing, during the years 1995 to 1998, to take all necessary measures to ensure that the quality of its bathing water conformed to the mandatory limit values laid down in the Directive and by failing, during the same years, to adhere to the minimum sampling frequencies required by the Directive, the Kingdom of Denmark has failed to fulfil its obligations under Articles 4(1) and 6(1) of the Directive.

Costs

35 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 in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Denmark 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, during the years 1995 to 1998, to take all necessary measures to ensure that the quality of its bathing water conformed to the limit values laid down in Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water and by failing, during the same years, to adhere to the minimum sampling frequencies required by that directive, the Kingdom of Denmark has failed to fulfil its obligations under Articles 4(1) and 6(1) of the same directive;**

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

Puissochet Schintgen Gulmann

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 30 January 2003.

R. Grass — Registrar

J.-P. Puissochet — President of the Sixth Chamber