JUDGMENT OF THE COURT (First Chamber)

15 December 2005 *

In Case C-26/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 27 January 2004,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by E. Braquehais Conesa, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, J.N. Cunha Rodrigues (Rapporteur) and E. Levits, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2005,

gives the following

Judgment

1 By its application the Commission of the European Communities requests the Court to declare that, by failing to officially designate the beaches of 'Vilela/A Videira', 'Niño do Corvo' and 'Canabal', located in the municipality of Moaña, in the province of Pontevedra, Comunidad Autónoma de Galicia, as bathing areas and, by failing to adopt a pollution reduction programme for the Ría de Vigo, the Kingdom of Spain has failed to fulfil its obligations under, respectively, Article 4(1) of Council Directive

76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1) and Article 5 of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters (OJ 1979 L 281, p. 47).

Law

2 Article 1(2)(a) of Directive 76/160 defines bathing water as:

'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 Under Article 3(1) of that directive, Member States are to set, for all bathing areas or for each individual bathing area, the values applicable to bathing water for the parameters given in the Annex to that directive.

4 Article 4(1) of that directive provides:

'Member States shall take all necessary measures to ensure that, within 10 years following the notification of this Directive, the quality of bathing water conforms to the limit values set in accordance with Article 3.'

5 Article 1 of Directive 79/923 states:

'This Directive concerns the quality of shellfish waters and applies to those coastal and brackish waters designated by the Member States as needing protection or improvement in order to support shellfish (bivalve and gasteropod molluscs) life and growth and thus to contribute to the high quality of shellfish products directly edible by man.'

6 Under Article 4(1) of that directive:

'Member States shall, initially within a two-year period following the notification of this directive, designate shellfish waters.'

7 Article 5 of that directive provides:

'Member States shall establish programmes in order to reduce pollution and to ensure that designated waters conform, within six years following designation in accordance with Article 4, to both the values set by the Member States in accordance with Article 3 and the comments contained in columns G and I of the Annex.'

8 Parameter 10 of the Annex to Directive 79/923, entitled 'Faecal coliforms/100 ml', indicates a reference value of '≤ 300 in the shellfish flesh and intervalvular liquid'. That value appears in column 'G' of that annex, which makes it, in principle, a guide rather than a mandatory value for Member States, in accordance with Article 3(2) of that directive.

9 Nevertheless, footnote 1 relating to parameter 10 provides: 'However, pending the adoption of a Directive on the protection of consumers of shellfish products, it is essential that this value be observed in waters in which live shellfish directly edible by man.'

10 Since Article 395 of the Act concerning the conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23) does not provide for any derogation from Directives 76/160 and 79/923 in favour of the Kingdom of Spain, the quality of Spanish bathing water should have conformed to the mandatory limit values set by Directive 76/160 as from 1 January 1986 and the programmes referred to in Article 5 of Directive 79/923 should have been implemented by 30 October 1987 at the latest.

The pre-litigation procedure

11 Taking the view that the Kingdom of Spain had failed to fulfil its obligations under Directives 76/160 and 79/923, the Commission initiated the procedure for failure to fulfil obligations laid down by Article 226 EC by letter of formal notice of 25 January 2001.

12 Having rejected the arguments put forward by the Spanish Government in response to that letter of formal notice, the Commission called on the Kingdom of Spain, in a reasoned opinion of 1 July 2002, to take all the measures necessary to comply with that opinion within two months of its receipt.

13 Since the Spanish Government did not reply to that reasoned opinion, the Commission brought the present action.

The action

The first claim, concerning infringement of Directive 76/160

14 As the Commission states in its reply, the infringement alleged against the Kingdom of Spain in the first claim is the failure to designate three beaches on the Galician coast as bathing areas rather than the failure to comply with the mandatory limit values set by Directive 76/160.

15 Article 4(1) of Directive 76/160 does not expressly impose the obligation on Member States to officially designate beaches or other places as bathing areas.

16 On the contrary, Article 1(2)(a) of that directive defines bathing waters as being those in which bathing is either explicitly authorised by the competent authorities of each Member State or is not prohibited and is traditionally practised by a large number of bathers. It follows from the second part of that definition that it is permissible for Member States to allow bathing in certain waters without necessarily designating them as bathing areas.

17 As pointed out by the Advocate General at point 14 of his Opinion, the absence in Directive 76/160 of an obligation to officially designate the relevant waters is emphasised by the fact that other directives relating to the protection of the environment and public health do contain an express provision requiring Member States to officially designate or identify certain areas or waters by a certain date.

18 It follows that Article 4(1) of Directive 76/160 does not impose on Member States the obligation to officially designate bathing areas as the Commission claims.

19 Consequently, the first claim is unfounded and must therefore be dismissed.

The second claim, concerning infringement of Article 5 of Directive 79/923

20 It is common ground between the parties that the waters of the Ría de Vigo have been designated by the Kingdom of Spain as shellfish waters in accordance with Article 4 of Directive 79/923.

21 In its defence, the Kingdom of Spain maintains, principally, that the scope of that directive, defined in Article 1, is limited to waters where shellfish which are 'directly edible by man' live. The directive has a single objective: to improve of the quality of waters used for the cultivation of shellfish directly edible by man. According to the Kingdom of Spain, no area of the Ría de Vigo is an area producing shellfish intended for direct human consumption. The Ría de Vigo produces only shellfish which undergo purification treatment, or re-laying in beds, prior to consumption. Consequently, the failure to comply with the reference value provided for in Directive 79/923 does not constitute an infringement of Article 5 of that directive.

22 That argument cannot be accepted. Article 1 of Directive 79/923 provides that it applies to those coastal and brackish waters designated by the Member States as needing protection or improvement in order to support shellfish life and growth 'and thus to contribute to the high quality of shellfish products directly edible by man'. As stated by the Advocate General at point 43 of his Opinion, the phrase 'and thus to contribute to the high quality of shellfish products directly edible by man' does not limit the scope of the directive to that aim, but rather indicates that it simultaneously pursues a further objective which may be achieved by the same means, the use of the adverb 'thus' being significant in this respect. It follows from that wording that the directive applies to all shellfish waters, whether the shellfish living in them are intended for direct human consumption or for consumption after treatment.

23 That interpretation is confirmed by the wording of footnote 1 concerning parameter 10 in the Annex to Directive 79/923. That footnote specified that the guide value for coliforms must, for a certain period, be regarded as mandatory 'in waters in which live shellfish directly edible by man'. It follows that the value set remains the guide value for waters in which shellfish which are not directly edible by man live, which indicates that the directive does apply to such waters.

24 Such an interpretation is also in accordance with the objective of Directive 79/923, as shown by the preamble to that directive. It follows, in particular, from the 1st, 3rd, 7th and 10th recitals in that preamble that its aim is the protection of shellfish water quality in general, whether or not the shellfish that live in those waters are intended for direct human consumption.

25 It follows that, by reason of Article 1, Directive 79/923 applies to the waters of the Ría de Vigo.

26 The Kingdom of Spain maintains, in the alternative, that it has adopted an overall programme to reduce pollution in the Ría de Vigo and that a programme of gradual pollution reduction measures has been drawn up. Consequently, the Spanish authorities have acted in accordance with Article 5 of Directive 79/923.

27 The Commission does not dispute the existence of those programmes but considers that they are general sewage treatment programmes which do not fulfil the criteria for a pollution reduction programme specific to shellfish waters, within the meaning of Article 5 of Directive 79/923.

28 It follows from Case C-298/95 *Commission* v *Germany* [1996] ECR I-6747, paragraph 24, that Article 5 of Directive 79/923 imposes on Member States the obligation to establish specific programmes in order to reduce pollution of shellfish waters.

29 Since the pollution reduction programmes referred to by the Kingdom of Spain in its defence are not specific programmes in order to reduce the pollution of shellfish waters, the alleged failure is established.

30 Accordingly, the Commission's second claim must be regarded as well founded.

31 Consequently, it must be held that, by failing to adopt a pollution reduction programme for the shellfish waters of the Ría de Vigo, the Kingdom of Spain failed to fulfil its obligations under Article 5 of Directive 79/923.

Costs

32 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, under the first subparagraph of Article 69(3), where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs. Since the Commission and the Kingdom of Spain have each been unsuccessful in part in their pleas, they must be ordered to bear their own costs.

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

1. **Declares that, by failing to adopt a pollution reduction programme for the shellfish waters of the Ría de Vigo, the Kingdom of Spain has failed to fulfil its obligations under Article 5 of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters;**

2. **Dismisses the remainder of the action;**

3. **Orders the Commission of the European Communities and the Kingdom of Spain to bear their own costs.**

[Signatures]