

JUDGMENT OF THE COURT (First Chamber)

22 December 2010 (*)

(Failure of a Member State to fulfil obligations – Environment – Directive 2000/60/EC – Articles 8 and 15 – Status of inland surface water – Establishment and making operational of monitoring programmes – Failure – Submission of summary reports on those monitoring programmes – Failure)

In Case C-351/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 28 August 2009,

European Commission, represented by S. Pardo Quintillán and K. Xuereb, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Malta, represented by S. Camilleri, D. Mangion, P. Grech and Y. Rizzo, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J. - J. Kasel, M. Ilešič, M. Safjan (Rapporteur) and M. Berger, Judges,

Advocate General: J. Mazák,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 November 2010,

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

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, in having failed, firstly, to establish monitoring programmes on the status of inland surface water and make them operational in accordance with Article 8(1) and (2) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1) and, secondly, to submit summary reports on the monitoring programmes on the status of inland surface water in accordance with Article 15(2) of that directive, the Republic of Malta has failed to fulfil its obligations under Articles 8 and 15 of that directive.

Legal context

2 In accordance with Article 1 thereof, the purpose of Directive 2000/60 is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater.

3 Article 2 of that directive includes the following definition:

‘(10) “Body of surface water” means a discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water’.

4 Article 8 of that directive, entitled ‘Monitoring of surface water status, groundwater status and protected areas’, provides, at paragraphs 1 and 2:

‘1. Member States shall ensure the establishment of programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district:

– for surface waters such programmes shall cover:

(i) the volume and level or rate of flow to the extent relevant for ecological and chemical status and ecological potential, and

(ii) the ecological and chemical status and ecological potential;

– for groundwaters such programmes shall cover monitoring of the chemical and quantitative status,

– for protected areas the above programmes shall be supplemented by those specifications contained in Community legislation under which the individual protected areas have been established.

2. These programmes shall be operational at the latest six years after the date of entry into force of this Directive unless otherwise specified in the legislation concerned. Such monitoring shall be in accordance with the requirements of Annex V.'

5 Article 15 of that directive, entitled 'Reporting', provides, at paragraph 2:

'Member States shall submit summary reports of:

– the analyses required under Article 5, and

– the monitoring programmes designed under Article 8,

undertaken for the purposes of the first river basin management plan within three months of their completion.'

6 Directive 2000/60 entered into force on 22 December 2000. Consequently, Member States were obliged to establish and make operational the monitoring programmes required under Article 8(1) of that directive by 22 December 2006 at the latest and to submit summary reports on those monitoring programmes to the Commission, in accordance with Article 15(2) of that directive, by 22 March 2007 at the latest.

The background to the dispute and the pre-litigation procedure

7 The Republic of Malta, pursuant to Article 15(2) of Directive 2000/60, submitted, in October 2007, a summary report on the monitoring programmes required under Article 8(1) of that directive.

8 Taking the view that the report failed to deal with surface water, the Commission commenced proceedings for failure to fulfil obligations under the first paragraph of Article 226 EC. In accordance with that provision and after giving the Republic of Malta formal notice on 27 June 2008 to submit its observations, the Commission sent a reasoned opinion on 2 February 2009 requesting that Member State to take the necessary measures to comply with its obligations under Articles 8 and 15 of Directive 2000/60 within two months of receipt of the opinion.

9 On 29 July 2009, the Republic of Malta replied to the reasoned opinion that, in respect of inland surface water, the summary report required pursuant to Article 15 of Directive 2000/60 would be submitted to the Commission in March 2010, at the same time as the first water catchment management plan.

10 Being of the opinion, in those circumstances, that the Republic of Malta had failed in its obligations under Articles 8 and 15 of Directive 2000/60, the Commission brought this action.

The action

Arguments of the parties

11 In its application, the Commission emphasises that the obligation to submit summary reports on monitoring programmes on the status of inland water, in accordance with Article 15(2) of Directive 2000/60, is distinct from the submission of the first water catchment management plan.

12 Therefore, in failing to submit summary reports on the monitoring programmes on the status of inland surface water by the date specified by Directive 2000/60, the Republic of Malta had failed to fulfil its obligations under Article 15(2) of that directive.

13 The Commission also considers that, in the absence of information concerning those reports, the Republic of Malta has failed to fulfil the obligation to establish and make

operational the monitoring programmes on the status of inland surface water required under Article 8(1) and (2) of Directive 2000/60.

14 In its defence, the Republic of Malta indicated that it expected to submit monitoring programmes on the status of surface water by the end of October 2009, rather than March 2010, as it had previously indicated. It added that it would submit summary reports on the monitoring programmes on the status of inland surface water by the end of October 2009.

15 In its reply, the Commission examines the document entitled ‘Summary Report for Surface Waters – Inland and Transitional Waters’, dated October 2009, which was submitted to it by the Republic of Malta. The Commission submits that that report does not contain the monitoring programmes on the status of surface water mentioned in the defence.

16 Furthermore, the Commission disputes the reasoning expounded in that report, according to which the fulfilment of its obligations under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) would dispense the Republic of Malta from having to fulfil its obligations under Directive 2000/60.

17 In its rejoinder, the Republic of Malta disputes the substance of the Commission’s action, and submits two pleas in law supporting its position.

18 The Republic of Malta submits, firstly, that, because of its very small size and Mediterranean climate, its bodies of inland surface water, which are extremely small, do not lend themselves to the application of Directive 2000/60 as regards both the monitoring system classifications and the intercalibration process.

19 It states that, in relation to the characteristics of those water bodies, it bases its submissions on the scientific report written by Professor Schembri, dated April 2008 and entitled ‘The applicability of the monitoring and management criteria of the Water Framework Directive (2000/60/EC) to the inland surface water bodies identified for Malta. Report commissioned by the Malta Environment and Planning Authority’.

20 Secondly, in the alternative, the Republic of Malta submits that the Member States must have the discretion to decide whether the objectives of Directive 2000/60 can be achieved without the identification of every minor element of inland surface water as a ‘surface water body’, within the meaning of that directive. In this regard, Maltese inland surface waters, although distinct and significant, are minor given their extremely small size. In any event, given that the water bodies in question are extremely small, the application of Directive 92/43

and of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as well as national legislation would allow the Republic of Malta to fulfil its obligations under Directive 2000/60.

Findings of the Court

21 As regards the pleas in defence in respect of the substance of the case relied upon by the Republic of Malta, it must be pointed out that, under Article 42(2) of the Rules of Procedure of the Court of Justice, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

22 In this case, those pleas in defence in respect of the substance of the case were advanced for the first time in the rejoinder.

23 Further, those pleas in defence are not based on matters of law or of fact which have come to light in the course of the procedure. Essentially, those pleas relate to the characteristics of Maltese surface water, which are described in Professor Schembri's report. That report, to which the Republic of Malta refers on numerous occasions in its rejoinder and which, according to the Republic of Malta, is the scientific basis of its reasoning, is dated April 2008, which is over a year before this application was commenced.

24 Therefore, the claims for dismissal of the substance of the action and the underlying pleas advanced for the first time in the rejoinder must be considered as late and, therefore, inadmissible (see Case C-471/98 *Commission v Belgium* [2002] ECR I-9681, paragraphs 41 to 43, and Case C-526/08 *Commission v Luxembourg* [2010] ECR I-0000, paragraphs 48 to 50).

25 It must therefore be examined whether the failure to fulfil obligations has been established on the basis of the grounds put forward by the Commission, without taking account of the arguments raised by the Republic of Malta in its rejoinder.

26 In this regard, it is undisputed that, at the date relevant for ascertaining whether there was a failure to fulfil obligations, which is determined by the expiry of the deadline laid down in the reasoned opinion (see, in particular, Case C-173/01 *Commission v Greece* [2002] ECR I-6129, paragraph 7, and Case C-487/08 *Commission v Spain* [2010] ECR I-0000, paragraph 34), the Republic of Malta, firstly, had not established monitoring programmes for the status of inland surface water and made them operational in accordance with Article 8(1) and (2) of

Directive 2000/60 and, secondly, had failed to submit summary reports on those monitoring programmes in accordance with Article 15(2) of that directive.

27 The failure to fulfil its obligations has, in those circumstances, been established.

28 In light of the considerations set out above, it is held that, in failing, firstly, to establish monitoring programmes on the status of inland surface water and make them operational in accordance with Article 8(1) and (2) of Directive 2000/60 and, secondly, to submit summary reports on the monitoring programmes on the status of inland surface water in accordance with Article 15(2) of that directive, the Republic of Malta has failed to fulfil its obligations under Articles 8 and 15 of that directive.

Costs

29 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 against the Republic of Malta and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (First Chamber):

1. Declares that, in failing, firstly, to establish monitoring programmes on the status of inland surface water and make them operational in accordance with Article 8(1) and (2) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, and, secondly, to submit summary reports on the monitoring programmes on the status of inland surface water in accordance with Article 15(2) of that directive, the Republic of Malta has failed to fulfil its obligations under Articles 8 and 15 of that directive.

2. Orders the Republic of Malta to pay the costs.

[Signatures]

* Language of the case: English.