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Provisional text

JUDGMENT OF THE COURT (Third Chamber)

22 February 2018 (*)

(Failure of a Member State to fulfil obligations — Directive 2008/50/EC — Ambient air quality — Article 13(1) — Article 22(3) — Annex XI — Concentration of particulate matter PM10 in ambient air — Exceedance of limit values in certain zones and agglomerations — Article 23(1) — Air quality plans — Exceedance period ‘as short as possible’ — Absence of appropriate actions in ambient air quality protection programmes — Incorrect transposition)

In Case C-336/16,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 15 June 2016,

European Commission, represented by K. Herrmann, K. Petersen and E. Manhaeve, acting as Agents,

applicant,

v

Republic of Poland, represented by B. Majczyna, D. Krawczyk and K. Majcher, acting as Agents,

defendant,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský (Rapporteur), M. Safjan, D. Šváby and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 7 September 2017,

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 the Republic of Poland has failed to fulfil its obligations under, respectively, Article 13(1), in conjunction with Annex XI, the second subparagraph of Article 23(1), and Article 22(3) of, in conjunction with Annex XI to, Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1), for the following reasons:

- since 2007 and up to at least 2013, the daily limit values for particulate matter PM¹⁰ ('PM¹⁰') were exceeded in 35 zones for the assessment and management of ambient air quality and the annual limit values for PM¹⁰ were exceeded in 9 zones for the assessment and management of ambient air quality, and no information has been provided to indicate that this situation has improved;
- no appropriate measures have been adopted, in ambient air quality programmes, to ensure that the exceedance period of PM¹⁰ limit values is kept as short as possible;
- the daily limit values, increased by the margin of tolerance, were exceeded from 1 January 2010 to 10 June 2011 in zone 14.17 — Radom, in zone 14.18 — Pruszków-Żyrardów, and in zone 16.15 — Kędzierzyn-Koźle, as well as from 1 January 2011 to 10 June 2011 in zone 30.3 — Ostrów-Kępnio; and
- the second subparagraph of Article 23(1) of the Directive was not correctly implemented.

Legal context

EU law

Directive 96/62/EC

2 Article 7 of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55), entitled 'Improvement of ambient air quality — General requirements', provided as follows:

'1. Member States shall take the necessary measures to ensure compliance with the limit values.

...

3. Member States shall draw up action plans indicating the measures to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence. Such plans may, depending on the individual case, provide for measures to control and, where necessary, suspend activities, including motor-vehicle traffic, which contribute to the limit values being exceeded.'

3 Article 11 of that directive required Member States to provide the Commission annually with reports on compliance with the daily and annual limit values to be observed for air pollutants, including PM¹⁰.

Directive 1999/30/EC

4 Under Article 5(1) of Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41):

‘Member States shall take the measures necessary to ensure that concentrations of PM¹⁰ in ambient air, as assessed in accordance with Article 7, do not exceed the limit values laid down in Section I of Annex III as from the dates specified therein.

...’

5 With regard to PM¹⁰, the date as from which the limit values were to be met was 1 January 2005.

6 Article 5(4) of that directive provided:

‘Where the limit values for PM¹⁰ laid down in Section I of Annex III are exceeded owing to concentrations of PM¹⁰ in ambient air due to natural events which result in concentrations significantly in excess of normal background levels from natural sources, Member States shall inform the Commission in accordance with Article 11(1) of Directive [96/62], providing the necessary justification to demonstrate that such exceedances are due to natural events. In such cases, Member States shall be obliged to implement action plans in accordance with Article 8(3) of Directive [96/62] only where the limit values laid down in Section I of Annex III are exceeded owing to causes other than natural events.’

7 Under Article 12 of Directive 1999/30, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 19 July 2001.

Directive 2008/50

8 Directive 2008/50, which entered into force on 11 June 2008, is a codification of five pre-existing legislative measures relating to the assessment and management of ambient air quality, including Directive 96/62 and Directive 1999/30.

9 Those directives were repealed by Article 31 of Directive 2008/50, with effect from 11 June 2010, without prejudice to the obligations on the Member States relating to the time limits for transposition or application of those directives.

10 Under Article 2.5, 2.8 and 2.16 to 2.18 of Directive 2008/50:

‘For the purposes of this Directive:

...

5. “limit value” shall mean a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained;

...

8. “air quality plans” shall mean plans that set out measures in order to attain the limit values or target values;

...

16. “zone” shall mean part of the territory of a Member State, as delimited by that Member State for the purposes of air quality assessment and management;

17. “agglomeration” shall mean a zone that is a conurbation with a population in excess of 250 000 inhabitants or, where the population is 250 000 inhabitants or less, with a given population density per km² to be established by the Member States;

18. “PM¹⁰” shall mean particulate matter which passes through a size-selective inlet as defined in the reference method for the sampling and measurement of PM¹⁰, EN 12341, with a 50% efficiency cut-off at 10 µm aerodynamic diameter’.

11 Article 13 of that directive, entitled ‘Limit values and alert thresholds for the protection of human health’, provides, in paragraph 1:

‘Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM¹⁰, lead and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.

...

Compliance with this requirement shall be assessed in accordance with Annex III.

The margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and Article 23(1).’

12 Article 22 of Directive 2008/50, entitled ‘Postponement of attainment deadlines and exemption from the obligation to apply certain limit values’, provides:

‘1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of five years for that particular zone or agglomeration, on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan shall be supplemented by the information listed in Section B of Annex XV related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline.

2. Where, in a given zone or agglomeration, conformity with the limit values for PM¹⁰ as specified in Annex XI cannot be achieved because of site-specific dispersion characteristics, adverse climatic conditions or transboundary contributions, a Member State shall be exempt from the obligation to apply those limit values until 11 June 2011 provided that the conditions laid down in paragraph 1 are fulfilled and that the Member State shows that all appropriate measures have been taken at national, regional and local level to meet the deadlines.

3. Where a Member State applies paragraphs 1 or 2, it shall ensure that the limit value for each pollutant is not exceeded by more than the maximum margin of tolerance specified in Annex XI for each of the pollutants concerned.

...’

13 Article 23 of that directive, entitled ‘Air quality plans’, states, in paragraph 1:

‘Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.

In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.

Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed.

Where air quality plans must be prepared or implemented in respect of several pollutants, Member States shall, where appropriate, prepare and implement integrated air quality plans covering all pollutants concerned.’

14 Under Annex XI to Directive 2008/50, entitled ‘Limit values for the protection of human health’, as regards PM¹⁰, the daily limit value is 50 µg/m³, which must not be exceeded more than 35 times in a calendar year, and the annual limit value is 40 µg/m³, which must not be exceeded.

Polish law

15 Directive 2008/50 was transposed into Polish law by the Prawo Ochrony Środowiska (Law on Environmental Protection) of 27 April 2001 (Dz.U. 2001, No 62, item 627) in the version applicable to the present dispute (‘the POŚ Law’). Under Article 91(1) of that law:

‘As regards the zones referred to in point 1 of Article 89(1) [zones in which the level of substances in the air exceeds the threshold], the Voivodship administration, within 15 months of the date of receipt of the results of the assessment of the levels of substances in the air and of the classification of the zones referred to in Article 89(1), shall prepare and submit to the mayors of towns and villages, the heads of urban administrations and presidents of local authorities, for their opinion, a draft resolution seeking to set out an air quality plan designed to achieve the thresholds for air-borne substances and to establish the exposure concentration obligation.’

16 Article 91(3a) of the Law provides that:

‘As regards zones in which the substances thresholds are exceeded, the Voivodship administration shall prepare a draft resolution seeking to establish or to update the air quality plan which, taken as a whole, constitutes the short-term action plan referred to in Article 92.’

17 Article 92(1) of the POŚ Law provides as follows:

‘Where there is a risk of exceedance, in a given zone, of the alert level relating to a limit value or a target value of a substance in the air, the Voivodship administration, within 15 months of the day on

which it received the information regarding that risk from the Voivodship Environmental Protection Inspectorate, shall prepare and submit to the mayors of towns and villages, the heads of urban administration and presidents of local authorities, for their opinion, a draft resolution seeking to establish a short-term action plan, with the objective of:

- (1) reducing the risk of such exceedances occurring;
- (2) restricting the effects and the duration of existing exceedances.’

18 On 11 September 2012, the Polish Minister for the Environment adopted the regulation on air quality plans and short-term action plans. That regulation sets out in detail the requirements to be met by air quality plans and short-term plans, their form and the material to be included therein.

Pre-litigation procedure

19 PM¹⁰ is composed of a mixture of organic and non-organic substances present in the air. It may contain toxic substances such as polycyclic aromatic hydrocarbons, heavy metals, dioxin and furan. It contains elements with a diameter of less than 10 micrometres which may enter the upper respiratory tract and the lungs.

20 On 12 November 2008, the Republic of Poland sent to the Commission, pursuant to Article 22(2) of Directive 2008/50, a notification seeking an extension of the deadline set for complying with the limit values for PM¹⁰ concentrations in ambient air.

21 On 2 February 2009, the Commission sent to the Republic of Poland a letter of formal notice requesting it to put an end to the infringement of the obligation not to exceed the limit values for PM¹⁰ concentrations in ambient air stemming from Article 5(1) of Directive 1999/30. The Commission also identified, in that letter, 9 zones in which, in 2006 and 2007, exceedances of the limit values for those particulates had been noted and in respect of which the Republic of Poland had not sought an extension of the deadline for the application of those values.

22 By letter of 31 March 2009, the Polish authorities, in answer to that letter of formal notice, informed the Commission of their intention to send an additional notification concerning the application of the time extension and of a number of actions seeking to provide a comprehensive solution to the air quality problem.

23 The Republic of Poland accordingly issued a notification subsequently, submitting that it was entitled to benefit from an exemption from the obligation to apply the limit values for PM¹⁰ concentrations in 83 zones. On 11 December 2009, the Commission took the decision not to raise any objection to the application of such an exemption for three zones, namely Radom, Pruszków-Żyrardów and Ostrów-Kępnno, and expressed the view that the exemption could also apply, under certain conditions, to two other zones, namely Oleski and Kędzierzyn-Koźle.

24 On 4 and 12 January 2010, the Republic of Poland sent a second notification to the Commission with a view to obtaining an exemption pursuant to Article 22(2) of Directive 2008/50. By decision of 22 October 2010, the Commission raised objections to that exemption.

25 On 15 June 2010, the Republic of Poland sent a third notification to the Commission with a view to obtaining an exemption pursuant to that provision. By decision of 22 March 2011, the Commission also raised objections to that exemption.

26 On 1 October 2010, the Commission issued a reasoned opinion in which it concluded that the Republic of Poland had failed to fulfil its obligations under Article 13(1) of Directive 2008/50, owing to non-compliance with the daily limit values for PM¹⁰ concentrations in several zones and agglomerations.

27 On 30 November 2010, the Polish authorities replied to that reasoned opinion by stating that it was difficult not to exceed those limit values in the light of special climatic conditions, significant sources of air pollution, the socio-economic situation of the country, as well as its historical and cultural context.

28 By letter of 26 April 2013, the Commission sent to the Republic of Poland a supplementary letter of formal notice, in which it expressed the view that that Member State had infringed Article 13(1) of, and Annex XI to, Directive 2008/50, as well as Articles 22(3) and 23(1) of that directive.

29 The Commission also decided to reopen the infringement proceedings since the delimitation of the Polish territory into zones within the meaning of Article 2.16 of Directive 2008/50 had been modified in the course of 2010.

30 On 26 June 2013, the Polish authorities replied to the Commission's supplementary letter of formal notice.

31 By letter of 31 March 2014, the Commission sent to the Republic of Poland a second supplementary letter of formal notice, in which it expressed the view that that Member State had infringed the second subparagraph of Article 23(1) of Directive 2008/50. In that regard, the Commission raised a new complaint, based on the incorrect transposition in Polish law of the obligations set out in that provision.

32 On 5 May 2014, the Polish authorities replied to the Commission's second supplementary letter of formal notice.

33 On 27 February 2015, the Commission issued a supplementary reasoned opinion in which it concluded that the Republic of Poland had failed to fulfil its obligations under Article 13(1), Annex XI and Article 22(3) of Directive 2008/50, by reason, first, of non-compliance between 2007 and 2013, and again later, with the daily limit values for PM¹⁰ concentrations in 35 zones, with the annual limit values for PM¹⁰ concentrations in 9 zones and, second, of non-compliance with those daily limit values increased by the margin of tolerance in three zones, between 1 January 2010 and 10 June 2011, and in one zone, between 1 January 2010 and 10 June 2011. Moreover, the Commission took the view that the Republic of Poland had infringed the second subparagraph of Article 23(1) of, and Annex XV.A to, that directive by failing to take measures to ensure that the period of exceedance of the value limits for PM¹⁰ concentrations in ambient air was as short as possible and by incorrectly transposing into Polish law the obligations set out in Directive 2008/50.

34 On 27 April 2015, in response to that supplementary reasoned opinion, the Republic of Poland reported a systematic improvement of air quality in Poland, as reflected in a downward trend in the exceedances of the limit values for PM¹⁰ concentrations. While acknowledging that the air quality criteria had not yet been complied with, the Polish authorities stated that they were seeking to improve that situation and that a series of draft laws were in the process of being adopted to that end.

35 In those circumstances, the Commission brought the present action.

The action

The first complaint, alleging infringement of the provisions of Article 13(1) of Directive 2008/50 in conjunction with those of Annex XI thereto

Admissibility

– *Arguments of the parties*

36 The Republic of Poland contests the admissibility of the first complaint in that it does not meet the requirements of clarity and precision laid down in the Court's case-law.

37 The first complaint, it submits, criticises the exceedances of the daily and annual limit values for PM¹⁰ concentrations in the zones mentioned, not solely for the period 2007 to 2013, but also for the period after 2013, as the wording 'and up to at least 2013' used by the Commission shows. Furthermore, given that the argument substantiating the first complaint refers to the expression 'maintaining an exceedance', the Republic of Poland argues that it is uncertain whether the alleged failure to act also concerns possible exceedances which may have occurred in 2014, 2015 or 2016.

38 For its part, the Commission considers that the time frame fixed in the application is sufficiently clear, particularly as it seeks to highlight a general and systematic failure to act. It argues that such a failure to comply with the obligations of EU directives in the field of environmental protection has been recognised in the case-law of the Court.

39 It notes, in addition, that the words 'and up to at least 2013' must be understood as covering the general and persistent exceedances of the daily and annual values for PM¹⁰ concentrations reported both in the 2014 database, themselves mentioned in the grounds of the first complaint in paragraphs 50 to 53 of the application, and in the 2015 database, taken as a whole, mentioned in the reply, showing that those exceedances did not end and that they still persisted on the expiry of the deadline set in the reasoned opinion, in this instance on 27 April 2015.

40 The Republic of Poland maintains, moreover, that the Commission has not demonstrated that the Polish authorities failed to adopt measures to comply with the requirements of Directive 2008/50, which is a premiss for any finding of a general and persistent infringement.

– *Findings of the Court*

41 Under Article 13(1) of Directive 2008/50, Member States are required to ensure that, throughout the zones and agglomerations of their territory, ambient air levels, inter alia of PM¹⁰, do not exceed the limit values laid down in Annex XI to that directive.

42 From the outset, before responding to the arguments of the Republic of Poland, the Court must examine of its own motion whether the conditions laid down in Article 258 TFEU are met and, therefore, must verify whether the first complaint is admissible in so far as it seeks a declaration that the Republic of Poland has failed to meet its obligations as from 2007.

43 In this regard, in accordance with its Article 34, Directive 2008/50, which is the only directive referred to by the Commission in its action, entered into force on 11 June 2008, and under Article 33(1) thereof, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with it by 11 June 2010. However, that directive

replaced, in accordance with recital 3, five acts of EU law, including Directive 1999/30, which specified limit values which had to be complied with as from 1 January 2005.

44 According to the Court's case-law, a complaint seeking a declaration of a failure to fulfil obligations which were created in the original version of an EU measure, subsequently amended or repealed, and which were maintained in force under the provisions of a new EU measure, is admissible. Conversely, the subject matter of the dispute cannot be extended to obligations arising under new provisions which do not correspond to those arising under the original version of the measure concerned, for otherwise it would constitute a breach of the essential procedural requirements of infringement proceedings (judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 52 and the case-law cited).

45 More specifically, the Court has held that the provisions of Article 5 of, in conjunction with Annex III to, Directive 1999/30, which covered the period preceding the implementation of Directive 2008/50, were maintained in the provisions of Article 13(1) of, in conjunction with Annex XI to, that latter directive (see, to that effect, judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraphs 53 and 54).

46 In the light of that case-law, the first complaint must be considered admissible in so far as it seeks a declaration that the Republic of Poland has failed to meet its obligations as from 2007.

47 As regards the argument put forward by the Republic of Poland, as set out in paragraph 37 of the present judgment, it follows from settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined on the basis of the position in which the Member State found itself on the expiry of the deadline laid down in the reasoned opinion, and that any subsequent changes cannot be taken into account (see, inter alia, judgment of 27 November 1990, *Commission v Greece*, C-200/88, EU:C:1990:422, paragraph 13).

48 However, if, as is the case here, an action brought under Article 258 TFEU seeks a declaration of a systematic and persistent failure to comply with the provisions referred to, the Court allows the production of additional evidence intended, at the stage of proceedings before it, to support the proposition that the failure thus alleged is general and consistent (see, to that effect, judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 42 and the case-law cited).

49 The Court, in particular, has already had the opportunity to point out that, in such circumstances, the subject matter of an action for allegedly persistent failure to fulfil obligations may extend to events which took place after the reasoned opinion, provided that they are of the same kind as the events to which the opinion referred and constitute the same conduct (judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 43).

50 In the present case, the period laid down in the supplementary reasoned opinion, which is the only one of relevance, expired on 27 April 2015.

51 Although, as concerns 2015, the data on air quality which were sent by the Polish authorities in September 2016 are in part facts which arose after that supplementary reasoned opinion, those facts must be regarded as being of the same kind as those which were covered by that reasoned opinion and, therefore, as constituting the same conduct on the part of the Member State concerned.

52 Consequently, the Commission could legitimately mention those data, of which it became aware only after the supplementary reasoned opinion had been issued, in order to find that the

Republic of Poland had systematically and persistently failed to comply with the provisions of Article 13(1) of Directive 2008/50 and of Annex XI thereto. In those circumstances, the mere fact that the Commission does not indicate the date up to which the Republic of Poland had allegedly failed to fulfil its obligations under those provisions, read together, is not such as to render the first complaint inadmissible.

53 As regards the Republic of Poland's argument detailed in paragraph 40 of the present judgment, suffice it to note that the alleged failure covered by the first complaint concerns the exceedance of the limit values for PM¹⁰ concentrations in ambient air, in contravention of Article 13(1) of Directive 2008/50, in conjunction with Annex XI thereto, without the adoption of possible measures in order to comply with those provisions being at issue.

54 Accordingly, the first complaint, alleging infringement of the provisions of Article 13(1) of Directive 2008/50, in conjunction with those of Annex XI thereto, being sufficiently clear and precise, must be declared admissible for the period from 2007 to 2015 inclusive.

Substance

– Arguments of the parties

55 By its first complaint, the Commission claims that the Republic of Poland has failed to fulfil its obligations under the provisions of Article 13(1) of Directive 2008/50, in conjunction with those of Annex XI thereto, given that those obligations entered into force on 1 January 2005, in accordance with the combined provisions of Article 5(1) of Directive 1999/30 and Annex III thereto, and have not been modified by Article 13(1) of Directive 2008/50.

56 The Commission takes as a basis an exceedance, first, of the daily limit values for PM¹⁰ concentrations in ambient air and, second, of the annual limit values applicable to those concentrations.

57 According to the Commission, an exceedance of the daily limit values for PM¹⁰ concentrations persisted in Poland, at the end of 2014, in 42 zones and agglomerations, as well as an exceedance of the annual limit values for PM¹⁰ concentrations in 16 zones and agglomerations. Those data submitted by the Commission were not, moreover, contested by the Republic of Poland in the reply to the supplementary reasoned opinion.

58 The Republic of Poland contends that the first complaint is unfounded. In that regard, it submits that air quality plans have been adopted in line with the legislative changes introduced to transpose into Polish law the provisions of Directive 2008/50, following which the results of the latest comprehensive assessments of ambient air quality carried out by the national environmental monitoring authority show a downward trend of pollutant values between 2010 and 2015, illustrated by, inter alia, the comparison of data collected for 2014 and 2015.

59 The Commission, in its reply, acknowledges this downward trend between 2014 and 2015. However, it observes that this trend is due to particularly high exceedance rates recorded in the course of 2014. In addition, it argues that the PM¹⁰ concentration levels in ambient air exceeding the limit values set in Annex XI to Directive 2008/50 continue to occur not only in identical zones, but in a number of zones additional to those identified in the supplementary reasoned opinion, on the basis of 2013 data.

60 In its rejoinder, the Republic of Poland contends that the Commission has not submitted evidence proving the persistent nature of the exceedance of the permitted values for PM¹⁰ concentrations in ambient air.

– *Findings of the Court*

61 The complaint alleging infringement of the obligation set out in the first subparagraph of Article 13(1) of Directive 2008/50 must be assessed taking into account the settled case-law according to which the procedure provided for in Article 258 TFEU presupposes an objective finding that a Member State has failed to fulfil its obligations under the FEU Treaty or secondary legislation (see judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 68 and the case-law cited).

62 It follows that, in the present case, the fact that the limit values applicable to PM¹⁰ concentrations in ambient air were exceeded is sufficient in itself to make it possible to establish an infringement of the provisions of Article 13(1) of Directive 2008/50, in conjunction with those of Annex XI thereto (judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 69).

63 In the present case, data derived from the annual reports on air quality submitted by the Republic of Poland, pursuant to Article 27 of Directive 2008/50, show that between 2007 and 2015 inclusive that Member State regularly exceeded, first, the daily limit values for PM¹⁰ concentrations in 35 zones and, second, the annual limit values of such concentrations in 9 zones.

64 It follows that the exceedance thus established must be regarded as persistent, without the Commission being required to provide additional evidence to that effect.

65 Contrary to the Republic of Poland's assertions, a possible partial downward trend highlighted by the data collected, which does not, however, result in compliance by that Member State with the limit values which it is obliged to respect, cannot invalidate the finding of failure to fulfil obligations attributable to the Republic of Poland in that regard.

66 In those circumstances, the first complaint must be upheld.

The second complaint, alleging infringement of the second subparagraph of Article 23(1) of Directive 2008/50

Admissibility

– *Arguments of the parties*

67 The Republic of Poland contests the admissibility of the second complaint on the ground that its wording is inconsistent, vague and imprecise and that the Court cannot, without ruling *ultra petita*, give judgment on its merits.

68 More specifically, it claims, first, that the Commission failed to explain why the measures taken in the plans covered by that complaint were not appropriate, but merely expressed the view that the occurrence of exceedances of the limit values for PM¹⁰ concentrations in a given zone or agglomeration implies that the measures laid down in those plans are ineffective.

69 Second, according to the Republic of Poland, the second complaint relates to a period which is not covered by Directive 2008/50, since the obligation laid down in the second subparagraph of Article 23(1) of Directive 2008/50 was laid down for the first time by that directive and is not included in Directive 1999/30 or in Directive 96/62, which were repealed by Directive 2008/50.

70 According to the Republic of Poland, the second subparagraph of Article 23(1) of Directive 2008/50 cannot be applied retroactively to situations which arose prior to the deadline for transposition of that directive, that is to say, before 11 June 2010.

71 The Commission submits that those arguments are unfounded.

72 First of all, it argues, it is clear from the pre-litigation procedure and from the Commission's correspondence with the Polish authorities that, because of the absence of legal provisions adopted at national level, the plans adopted at regional level lacked effectiveness.

73 The Commission argues, next, that the general and persistent failure to comply with the provisions of Article 13(1) of Directive 2008/50, in conjunction with those of Annex XI thereto, is indicative of, or even a constituent element of, an infringement of the second subparagraph of Article 23(1) of that directive. Its second complaint accordingly concerns the lack of appropriate action and the ineffectiveness of all the programmes established for all the zones displaying persistent exceedances of the limit values for PM¹⁰ concentrations in ambient air.

74 Finally, as regards the argument relating to the alleged retroactive application of the second subparagraph of Article 23(1) of Directive 2008/50, the Commission considers that, in fact, a complaint relating to the failure to fulfil the obligation laid down in that provision can only be made, for the first time, once the deadline for transposition of Directive 2008/50 has expired. It also claims that the obligations imposed by that provision are not subject to an annual evaluation and that, consequently, the second complaint does not merely concern certain years during which the failure occurred, but a general failure to meet the obligations laid down in that provision.

– *Findings of the Court*

75 The second subparagraph of Article 23(1) of Directive 2008/50 provides that, in the event of exceedances of those limit values for which the attainment deadline has already expired, the air quality plans must set out appropriate measures in order that the exceedance period can be kept as short as possible.

76 It must be noted that that provision establishes a direct link between, first, the exceedance of the limit values for PM¹⁰ concentrations, as laid down in the provisions of Article 13(1) of Directive 2008/50, in conjunction with those of Annex XI thereto, and, second, the drawing up of such plans.

77 The Republic of Poland complains, in essence, that the Commission concluded, on the basis of a mere finding that limit values had been exceeded, that it had failed to adopt the appropriate measures mentioned in the second subparagraph of Article 23(1) of Directive 2008/50.

78 Nevertheless, even if that factor were considered to be relevant to the assessment of the admissibility of the second complaint, it appears in any event that the Commission does not merely establish such a schematic causation. It puts forward several concrete elements underpinning its finding.

79 As regards the allegedly retroactive application of the second subparagraph of Article 23(1) of Directive 2008/50, it must be noted that the Commission gave no indication of the start date in its second complaint as set out in paragraph 1 of the present judgment. Accordingly, the Commission cannot be criticised for extending the complaint to cover the period preceding the date by which the Member States had to comply with the obligation laid down in that provision. Indeed, it ruled out such an extension of its complaint, as stated in paragraph 74 of the present judgment.

80 In the light of the foregoing considerations, it must be held that the second complaint, alleging infringement of the second subparagraph of Article 23(1) of Directive 2008/50, is admissible.

Substance

– Arguments of the parties

81 By its second complaint, the Commission claims that the Republic of Poland has failed to fulfil its obligations under Article 23(1) of Directive 2008/50.

82 While, in the context of the implementation of that article, the Member State concerned enjoys, with respect to its air quality plans, a certain degree of discretion in the choice of the measures to take, that degree of discretion is reduced by the condition that those measures must be appropriate and effective to resolve as quickly as possible the problem of PM¹⁰ emissions in a given zone and consequently bring to an end the infringement of Article 13(1) of Directive 2008/50.

83 First, in the Commission's view, the measures adopted by the Republic of Poland are ineffective, as shown by the systematic and persistent exceedances of the daily limit values for PM¹⁰ concentrations in 35 zones and of the annual limit values for PM¹⁰ concentrations in 9 zones.

84 Second, it follows from the analysis of the air quality plans submitted by the Republic of Poland that these do not include appropriate measures making it possible for the exceedance period to be as short as possible.

85 In particular, the air quality plans lay down periods for putting an end to the exceedances of the limit values for PM¹⁰ concentrations in ambient air that expire on different dates, depending on the different zones, falling between 2020 and 2024, thus clearly exceeding the Republic of Poland's discretion.

86 Furthermore, the Commission takes the view that, although the individual heating of buildings has been the main source of air pollution by PM¹⁰ in a large number of zones, the boiler replacement plan could be only of uncertain effectiveness, due to a lack of quality criteria imposed on the boilers installed to replace the old ones.

87 Finally, the Commission criticises the air quality plans relating to certain specific areas. By way of example, it notes that in the Warsaw agglomeration, where transport accounts for the main source of emissions, the air quality plan does not, however, provide any information on either the existence or the nature of the measures implemented in the field of transport.

88 According to the Republic of Poland, in the first place, assuming that the national corrective measures are ineffective because of the alleged infringements of Article 13 of Directive 2008/50, read in conjunction with Annex XI thereto, the Commission erroneously interpreted the second

subparagraph of Article 23(1) of that directive. If that were the case, only the measures leading to the immediate cessation of the exceedances would be effective.

89 In the second place, in its opinion, the corrective measures to be adopted have significant socio-economic consequences, especially by requiring populations to use more expensive fuels, which has an impact, in particular, on their health. Similarly, the precarious nature of Polish society is a barrier to any extensive use of renewable energy sources.

90 In this context, the Republic of Poland points out that, because of the necessary and significant financial resources required for the reduction of polluting emissions, the local authorities rightly considered that the deadlines prescribed for the plans at issue, which expire between 2020 and 2024, are as short as possible.

91 Furthermore, although, in exercising its discretion, the Republic of Poland was entitled to take account of certain of those parameters, the Commission merely granted the protection of human health overall precedence without carrying out, as required, a specific assessment of the national corrective measures.

92 In the third place, the Republic of Poland disputes the Commission's statement that the boiler replacement programme does not impose any quality criteria. In its opinion, the financing of the purchase of heating equipment is already, in part, subject to selection criteria for boilers which meet certain emission standards.

– *Findings of the Court*

93 The Court has held that air quality plans may be adopted only on the basis of the balance between the aim of minimising the risk of pollution and the various opposing public and private interests (judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 106).

94 Therefore, the fact that a Member State exceeds the limit values for PM¹⁰ concentrations in ambient air is not in itself sufficient to find that that Member State has failed to fulfil its obligations under the second subparagraph of Article 23(1) of Directive 2008/50 (judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 107).

95 In this regard, it follows from that provision that, while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible (judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 109 and the case-law cited).

96 In those circumstances, it is necessary to ascertain on the basis of a case-by-case analysis whether the plans drawn up by the Member State concerned comply with the second subparagraph of Article 23(1) of Directive 2008/50 (judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraph 108).

97 In the present case, first of all, the obligation to establish air quality plans, in the event of exceedances of the limit values for PM¹⁰ concentrations in ambient air, has been binding on the Member State concerned since 11 June 2010.

98 As is apparent from paragraph 63 of the present judgment, exceedances of the limit values had already been recorded in Poland at that date.

99 However, it is common ground that the plans adopted subsequently by the Republic of Poland set the expiry of the periods prescribed for putting an end to such exceedances between 2020 and 2024, depending on the different zones, which makes it possible for the Member State concerned to put an end to such exceedances only 10, or even 14, years after the date on which those exceedances were recorded.

100 In this regard, the Republic of Poland contends that the deadlines which it set are fully adapted to the scale of the structural changes necessary to bring an end to the exceedances of the limit values for PM¹⁰ concentrations in ambient air, highlighting difficulties arising from the socio-economic and financial challenge of the major technical investments to be carried out.

101 However, while such factors may be taken into account in the context of the balancing exercise referred to in paragraph 93 of the present judgment, the fact remains that it has not been established that the difficulties referred to by the Republic of Poland, which are not exceptional, are such as to rule out the possibility of having set shorter periods, especially since a large portion of the measures envisaged are connected with the replacement of individual and collective boilers by more efficient equipment.

102 It follows that that argument of the Republic of Poland cannot, in itself, justify such long periods for putting an end to those exceedances in the light of the requirement seeking to ensure that the exceedance period is as short as possible.

103 In this context, the adoption of the additional measures referred to by the Republic of Poland, which, it is common ground, cannot, in themselves, actually put an end to the recorded exceedances of the limit values for PM¹⁰ concentrations in ambient air, is not sufficient to satisfy the obligations arising under Article 23(1) of Directive 2008/50.

104 It follows from all of the foregoing that the second complaint must be upheld.

The third complaint, alleging infringement of the provisions of Article 22(3) of Directive 2008/50, in conjunction with those of Annex XI thereto

Arguments of the parties

105 By its third complaint, the Commission claims that the Republic of Poland failed to fulfil its obligations under Article 22(3) of Directive 2008/50, in conjunction with those of Annex XI thereto, by having exceeded the daily limit values for PM¹⁰ concentrations, increased by the margin of tolerance, from 1 January 2010 to 10 June 2011 in three zones, namely Radom, Pruszków-Żyrardów and Kędzierzyn-Koźle, as well as from 1 January 2011 to 10 June 2011 in the Ostrów-Kępno zone.

106 It submits that the Republic of Poland was required, during the period for which the exemption granted by the Commission, as stated in paragraph 23 of this judgment, was in force, for these four zones, pursuant to Article 22(3) of Directive 2008/50, not to exceed the daily limit values for PM¹⁰ concentrations in ambient air, increased by the margin of tolerance of 50%, in accordance with Annex XI to that directive. However, it is clear from the figures provided by that Member State that PM¹⁰ concentrations, in the four zones at issue, and up to the end of that exemption, exceeded the applicable limits increased by the margins of tolerance.

107 For its part, the Republic of Poland contends that the third complaint is unfounded, and argues that the data submitted by the Commission lack precision by referring to different data which relate, not to the daily limit values, but to annual limit values.

108 In its reply, the Commission maintains that the Republic of Poland's argument is irrelevant in that the data which it submitted concern the annual values for PM¹⁰ concentrations in ambient air, and not the daily values, the latter, however, being the only values covered by the third complaint.

Findings of the Court

109 It must be noted, at the outset, that, in accordance with Article 22(2) of Directive 2008/50, where, in a given zone or agglomeration, conformity with the limit values for PM¹⁰ as specified in Annex XI to that directive cannot be achieved because of site-specific dispersion characteristics, adverse climatic conditions or transboundary contributions, a Member State is exempt from the obligation to apply those limit values until 11 June 2011 provided that the conditions laid down in Article 22(1) are fulfilled and that the Member State shows that all appropriate measures have been taken at national, regional and local level to respect the deadlines.

110 Article 22(3) of that directive provides in this respect that, when applying paragraph 2 of that article, the Member State concerned must ensure that the limit value for each pollutant is not exceeded by more than the maximum margin of tolerance specified in Annex XI to Directive 2008/50 for each of the pollutants concerned. For PM¹⁰, that margin of tolerance is fixed at 50% of the limit values.

111 From the outset, it must be noted that the argument of the Republic of Poland, set out in paragraph 107 of the present judgment, is irrelevant, since it relates to the data on exceedances of annual limit values applicable to concentrations of PM¹⁰ in ambient air, whereas the Commission in its third complaint actually refers only to the exceedance of daily limits. The Court will therefore give a ruling solely on the allegation that the daily limits for PM¹⁰ concentrations in ambient air were exceeded.

112 In this respect, it should be recalled that the Republic of Poland lodged, in the course of 2008, an application under Article 22(2) of Directive 2008/50 concerning the limit values for PM¹⁰ concentrations in 83 zones. By decision of 11 December 2009, the Commission decided not to raise any objection, until 11 June 2011, to the application of the exemption covering the obligation to respect the daily limit values for PM¹⁰ concentrations in four zones, namely Radom, Pruszków-Żyrardów, Kędzierzyn-Koźle and Ostrów-Kępnno.

113 For those four zones, the effect of the Commission's decision was that the Republic of Poland was under an obligation to ensure, until 11 June 2011, in accordance with Article 22(2) of Directive 2008/50, conformity with the daily limit value for PM¹⁰ concentrations in ambient air, increased by the margin of tolerance of 50%, in accordance with Annex XI to that directive.

114 It is apparent from the data provided on 26 June 2013 by the Republic of Poland to the Commission, in reply to the supplementary letter of formal notice of 26 April 2013, that exceedances of the daily limit values for PM¹⁰ concentrations in ambient air, increased by the 50% margin of tolerance, had been recorded between 1 January 2010 and 10 June 2011 in the Radom, Pruszków-Żyrardów and Kędzierzyn-Koźle zones and that such exceedances had been recorded between 1 January 2011 and 10 June 2011 in the Ostrów-Kępnno zone.

115 In those circumstances, and having regard to the case-law cited in paragraph 62 of the present judgment, which should, in this context, be applied by analogy, it must be held that the Republic of Poland has failed to fulfil its obligations under the provisions of Article 22(3) of Directive 2008/50, in conjunction with those of Annex XI thereto.

116 The third complaint must accordingly be upheld.

The fourth complaint, alleging infringement of the second subparagraph of Article 23(1) of Directive 2008/50 by reason of its incorrect transposition

Arguments of the parties

117 By its fourth complaint, the Commission alleges that, notwithstanding the second subparagraph of Article 23(1) of Directive 2008/50, which requires that, where limit values are exceeded, the plans at issue must set out appropriate measures for the exceedance period to be as short as possible, neither Articles 91 and 92 of the POŚ Law nor the regulation concerning the air quality plans and short-term action plans expressly include such a requirement.

118 The Commission contends, in particular, that the non-inclusion of the express condition that air quality plans must include measures designed to reduce the period during which the limit values for PM¹⁰ concentrations are exceeded in a given zone precludes compliance with the requirement to take, in those plans, measures to put an end to the exceedance as soon as possible.

119 For its part, the Republic of Poland disputes the fourth complaint and seeks to show that, despite the lack of a provision expressly laying down that condition, the nature of the measures actually laid down in the air quality plans and short-term action plans meets the requirements of the proper transposition of the second subparagraph of Article 23(1) of Directive 2008/50.

Findings of the Court

120 According to settled case-law, transposing a directive into national law does not necessarily require its provisions to be copied verbatim in express, specific law or regulation; a general legal context may be sufficient, provided that it does effectively ensure the full application of the directive in a sufficiently clear and precise manner (judgment of 30 June 2016, *Commission v Poland*, C-648/13, EU:C:2016:490, paragraph 73 and the case-law cited).

121 In that regard, first, as the Commission's first three complaints have been upheld, the view must be taken that the Republic of Poland does not ensure the full application of Directive 2008/50. Although that Member State relies on elements from the national legal framework to maintain that it ensures a correct application in the light of compliance with the requirement stemming from the second subparagraph of Article 23(1) of that directive, it nevertheless does not put forward any evidence in support of that argument.

122 Second, none of the plans on air quality adopted by the Member State concerned, whether at national or at regional level, included an express reference to the requirement that those plans had to make it possible to limit exceedances of limit values to the shortest possible period.

123 In those circumstances, the transposition into national law of Directive 2008/50 by the Republic of Poland cannot, having regard to its general legal context, ensure the full and effective application of that directive.

124 In those circumstances, the fourth complaint relied on by the Commission must be upheld.

125 In the light of all of the foregoing, it must be held that the Republic of Poland has failed to fulfil its obligations under, respectively, Article 13(1), in conjunction with Annex XI, the second

subparagraph of Article 23(1), and Article 22(3) of, in conjunction with Annex XI to, Directive 2008/50/EC, for the following reasons:

- since 2007 and up to 2015 inclusive, the daily limit values for PM¹⁰ concentrations were exceeded in 35 zones for the assessment and management of ambient air quality and the annual limit values for PM¹⁰ concentrations were exceeded in 9 zones for the assessment and management of ambient air quality;
- no appropriate measures have been adopted in ambient air quality programmes to ensure that the exceedance period of PM¹⁰ concentrations limit values is kept as short as possible;
- the daily limit values for PM¹⁰ concentrations in ambient air, increased by the margin of tolerance, were exceeded from 1 January 2010 to 10 June 2011 in the Radom, Pruszków-Żyrardów, Kędzierzyn-Koźle zones, as well as from 1 January 2011 to 10 June 2011 in the Ostrów-Kępnio zone; and
- the second subparagraph of Article 23(1) of Directive 2008/50 was not correctly implemented.

Costs

126 Under Article 138(1) 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 to be awarded against the Republic of Poland and the latter has, in essence, been unsuccessful, the Republic of Poland must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby rules:

1. The Republic of Poland has failed to fulfil its obligations under, respectively, Article 13(1), in conjunction with Annex XI, the second subparagraph of Article 23(1), and Article 22(3) of, in conjunction with Annex XI to, Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, for the following reasons:

- **since 2007 and up to 2015 inclusive, the daily limit values for particulate matter PM¹⁰ concentrations were exceeded in 35 zones for the assessment and management of ambient air quality and the annual limit values for particulate matter PM¹⁰ concentrations were exceeded in 9 zones for the assessment and management of ambient air quality;**
- **no appropriate measures have been incorporated in ambient air quality programmes to ensure that the exceedance period of particulate matter PM¹⁰ concentrations limit values is kept as short as possible;**
- **the daily limit values for particulate matter PM¹⁰ concentrations in ambient air, increased by the margin of tolerance, were exceeded from 1 January 2010 to 10 June 2011 in the Radom, Pruszków-Żyrardów, Kędzierzyn-Koźle zones, as well as from 1 January 2011 to 10 June 2011 in the Ostrów-Kępnio zone; and**
- **the second subparagraph of Article 23(1) of Directive 2008/50 was not correctly implemented.**

2. **The Republic of Poland is ordered to pay the costs.**

[Signatures]

* Language of the case: Polish.
