The Portuguese environment before the EU Court of Justice and the EU Commission

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SUMÁRIO

O artigo descreve e avalia o escrutínio que o TJUE e a Comissão têm vindo a desenvolver relativamente à proteção do ambiente em Portugal, desde a adesão à EU, em 1986, até 2020 baseando-se nos casos decididos pelo TJUE contra Portugal bem como nos relatórios de execução da Comissão Europeia. Será analisado o cumprimento nos setores de acesso à informação, participação na tomada de decisões e acesso à justiça em matéria ambiental; avaliação do impacte ambiental; conservação da natureza e proteção da biodiversidade; gestão da água; poluição atmosférica; ruído; gestão de resíduos e medidas relativas às alterações climáticas.

Esta análise mostra que a transposição tardia das diretivas ambientais da UE parece ser mais a regra do que a exceção. Há legislação da UE que Portugal não transpôs de todo para o direito nacional e teve de ser lembrado das suas obrigações pelo Tribunal de Justiça. Várias destas diretivas da UE, em particular no sector da água, existiam no momento da adesão de Portugal à UE em 1986, quando Portugal praticamente não possuía legislação ambiental nacional própria.

No entanto, Portugal também se atrasou na transposição posterior da legislação ambiental da UE, tal como a diretiva-quadro da água de 2000, a diretiva sobre o ruído ambiental de 2002 e a legislação sobre a avaliação do impacto ambiental para planos e programas.

O artigo conclui que a vigilância que a Comissão e o Tribunal de Justiça exercem sobre o ambiente em Portugal não é forte. O excesso de tolerância conduz a cada vez mais disposições legais que, na prática, não são aplicadas, o que mina a credibilidade das instituições legisladoras.

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ENSURE COMPLIANCE WITH EU LAW

The EU Commission has the obligation to ensure, under the control of the Court of Justice of the European Union (CJEU) the application of EU (environmental) law, Article 17 TEU.

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The following contribution tries to describe and assess the scrutiny which the CJEU and the Commission undertook with regard to the protection of the environment in Portugal. This assessment is limited to the respect of EU environmental law and thus does not cover all environmental protection measures undertaken by Portugal. For example, the measures to protect forests against fires and to minimize the negative consequences of such fires are not subject to binding EU provisions and are therefore not screened.

The assessment covers the period from Portugal's accession to the EU in 1986 until 30 March 2020. It is exclusively based on publicly available sources. This has the disadvantage that numerous issues of which the European Commission has knowledge, including cases, where the Commission initiated formal proceedings against Portugal for reason of non-compliance with EU environmental law, are not covered. Indeed, the Commission — and all Member States continuously agree — keeps the prejudicial procedure under Article 258 TFEU in environmental matters strictly confidential. It was supported in this by the CJEU which held that there existed a relationship of mutual confidence between the Commission and the Member States in question which allowed both sides to discuss openly and find out-of-court solutions to a case of non-compliance; this mutual confidence would be destroyed, if the Commission's letters of formal notice and reasoned opinions were made public [2]. Decade-long criticism of this understanding of EU transparency and democracy provisions remained without effect.

Since 1986, the Commission, based on Articles 258 and 260 TFEU, obtained overall 31 court judgments in environmental matters against Portugal [3], which will be more closely examined hereafter. The first judgment dated of 28 May 1998 [4], thus twelve years after the accession. In this regard, Portugal was better treated than for example Spain, which had acceded to the EU at the same time and against which the first CJEU judgment was handed out in 1991, five years after Spain's accession [5]; overall, the Commission obtained in environmental matters 52 court judgments against Spain. Portugal had obtained more or less the same treatment as Greece, which had adhered to the EU in 1981 and against which the first judgment was brought out eleven years later [6]; overall, the Commission obtained 49 judgments against Greece.

Under Article 267 TFEU, national courts may ask the CJEU for a preliminary ruling on the interpretation of EU law. Portuguese courts never used this possibility in environmental

2 CJEU, joined cases C-514/11P and 605/11P, LPN and Finland v. Commission, ECLI:EU:C:2013: 738. Consistent case-law.

3 All data which are mentioned hereafter, are based on the author's own findings.

4 CJEU, case C-213/97, Commission v. Portugal, judgment of 28 May 1998, ECLI:EU:C:1998:268. The case concerned water legislation.

5 CJEU, case C-192/90, Commission v. Spain, judgment of 10 December 1991, ECLI:EU:C:1991: 465. The case concerned waste legislation.

6 CJEU, case C-45/91, Commission v. Greece, judgment of 7 April 1992, ECLI:EU:C1992:164. The case concerned waste issues.

matters, in difference to Greece (five cases), Spain (seven cases) and far away from the intellectual curiosity of Italian judges, who caused 56 court decisions under Article 267 TFEU in environmental matters. Portugal is the only Member State of EU-15 where no preliminary judgments under Article 267 TFEU was asked for in environmental matters [7]. Portuguese authors may examine in more detail, why their courts are so reserved to ask for the interpretation of EU environmental law, though this law does play a very significant role in Portuguese legislation and practice. Lack of knowledge of EU environmental law, of Article 267 TFEU, the consideration that environmental protection (by the EU) is a not really important, a certain conservativism of the judges, the normal attitude of a judge that he (she) knows best, or the fear of delaying decisions [8] may be among the reasons.

The CJEU can only deal with cases that are brought before it, and only within the limits of the object of litigation [9]. Under Articles 258 and 260 TFEU, the Commission limits the application to the CJEU almost entirely to cases, where a piece of EU environmental legislation was not transposed or was transposed incompletely or incorrectly. It clarified this policy in a communication of 2007 [10],where it declared that it would give priority in the monitoring of EU law to three cases:

— the non-communication of national transposing legislation or other notification obligations;
— breaches of EU law raising questions of principle;
— non-compliance with a judgment by the CJEU (Article 260 TFEU).

Thus, the Commission does not normally apply to the Court, when the national legislation has well transposed a provision of EU law, but the provision is not applied, in a specific case or generally; some exceptions appear to be made in cases which concern the protection of the biodiversity.

The Commission does not have environmental inspectors, but it has the possibility to go to a Member State and visit a place, in order to find out about the environmental situation [11]; only, it hardly ever makes use of this possibility. Cases on the bad application of EU environmental law — air or water pollution, biodiversity impairment, illegal landfills etc — would

7 Of the States, which adhered to the EU since 2004, no preliminary questions, which led to a judgment, were asked in environmental matters by Lithuania, Malta, Cyprus, Slovenia and Czechia.

8 On average, the procedure under Article 267 TFEU takes in environmental matters 16 to 17 months.

9 It is true that the Court's discretion is larger in cases which are submitted to it under Article 267 TFEU; however, this aspect will not further be discussed here, as Portuguese courts never submitted an environmental case on the basis of that Article.

10 Commission, COM (2007) 502.

11 See, for example, CJEU, cases C-103/00, Commission v. Greece, ECLI:EU:C:2002:60, paragraph 8; C-504/14, Commission v. Greece, ECLI:EU:C:2016:105, paragraph 15.

thus mostly be brought to the Commission's attention by private complainants. However, the Commission, while officially welcoming the making of environmental complaints, in practice undertakes great efforts to bury such cases without a serious follow-up [12]. Not only did it never produce a legal instrument which gave general guidance on the procedure of complaint handling. It also does not allow the complainant to participate in the examination of a case, comment on a Member State's reaction, act as a witness etc. Only at the very end has a complainant the possibility to comment on the Commission's intention to deal with the complaint, which might be months or years after the introduction of a complaint. The Commission has thus failed to consider complaints as a "sample taken at random" to examine compliance, and cut itself off from information other than official information sent in from the national administrations.

The issue does not end here. The Commission does not make public national implementation reports. It often charges outside consultants to make studies to check, whether the national transposing legislation completely and correctly transposed EU law [13]. However, it is extremely reluctant to make these conformity studies publicly available [14]. The Commission's own implementation reports are too general. They do not name Member States, which do not comply with EU law and they do not identify either the legal provisions which are not respected.

In 2008, the Commission installed a "Pilot System", which was a way to communicate, away from public knowledge, with Member States' administrations on the transposition and application of EU (environmental) law. These method of exchange information and arrange things was severely criticized, and the Commission abandoned the system by 2015.

It then introduced an "Environmental Implementation Review" (EIR), where it intended to report, every two years, on the implementation of EU environmental law by Member States. A general report covering all Member States [15], was accompanied by specific reports for each Member State [16]. However, the EIR suffered from the same defects as earlier Commission attempts: the reports were drawn up without any participation of civil society; their only source of information were Member States' communications; the reports did not dare to state precisely, which problems existed with the application of EU environmental law, and the

12 See in contrast Regulation 773/2004 on competition complaints, OJ 2004, L 123, p. 18, Recitals 5 and 8: "Complaints are an essential source of information for detecting infringements of competition rules. It is important to define clear and effective procedures for handling complaints lodged with the Commission". "Natural or legal persons having chosen to lodge a complaint should be given the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement".

13 This is often necessary, as for example the Member States sent in 930 pieces of national legislation to implement the habitats Directive 92/43, OJ 1992, L 206, p. 7.

14 See as an example CJEU, case C-612/13P, ClientEarth v. Commission, ECLI:EU:C:2015:486. The overall procedure took about five years and the Commission drags its feet to fully comply with the judgment.

15 See Commission, COM(2017)63 and COM (2019)149.

16 See, as regards Portugal, Commission SWD (2017)54 and SWD (2019)129.

Commission did not even announce what it intended to do in cases, where environmental law was disregarded. To give just one example: as regards the directive on urban waste water [17], the Commission brought more than 30 cases before the Court, in order to ensure compliance with EU law. This contrasts with the directive on nitrates in waters [18], where the Commission applied to the Court as regards the absence of legislation, of the designation of zones or of programmes (18 cases), but worked with the granting of — until now more than 25 — derogations, though compliance is poor in large parts of the EU.

Overall, the obligation of Article 17 TEU that the Commission shall "ensure the application" of EU law, remains, in the environmental sector, a largely unfulfilled commitment.

The following lines will concentrate on cases decided by the CJEU against Portugal, as well as on a number of aspects which had been raised by the Commission in different publications, such as implementation reports.

ACCESS TO INFORMATION, PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

The presentation starts with a negative information: although the EU ratified the Aarhus Convention, whose provisions are thus full part of EU law, and although there is specific legislation to grant access to environmental information [19] and allow public participation in environmental decision-making [20], there is not one single case, where the Commissions addressed the CJEU, in order to ensure that these rights are effectively granted at national level. The Commission did not either publish implementation reports on these rights. The Aarhus rights appear to be, in the mind of the Commission, something undesirable, which should be ignored and set aside as far as any possible.

The Portuguese legislation to transpose the directive on access to environmental information [21] and on access to justice will not be discussed. However, whether the Portuguese measures to transpose the directive on public participation into national law, comply with EU law, is not clear. Indeed, Portugal transmitted three pieces of legislation as official transposing legislation to the Commission [22]. However, one of these pieces (Decreto-Lei 69/2000)

17 Directive 91/271, OJ 1991, L 135, p. 40.

18 Directive 91/676, OJ 1991, L 375, p. 1.

19 Directive 2003/4 on public access to environmental information, OJ 2003, L 41, p. 26.

20 Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, OJ 2003, L 56, p. 17.

21 Portugal officially notified Lei 19/2006 of 12 June 2006 to the Commission. However, it appears that this Lei was repealed by Lei 26/2016 of 22-8-2016, which was not notified to the Commission.

22 The transposing legislation consisted of the 4th amendment of Decreto-Lei194/2000, the3rd amendment of Decreto-Lei 69/2000 and Decreto-Lei 232/2000.

was repealed in the meantime [23], and the two others dealt with industrial permits (Decreto--Lei 194/2000) and environmental impact assessments for plans and programmes (Decreto-Lei 232/2007). In none of these acts appears there to be laid down the obligation to ensure public participation for the plans mentioned in the annex to Directive 2003/35 on public participation, namely plans for waste management, batteries and accumulators, the prevention of nitrate pollution, the management of packaging waste and on ambient air quality. It is possible that Portugal laid down the requirements of the directive in other pieces of its national legislation; however, it has not informed the Commission thereof.

ENVIRONMENTAL IMPACT ASSESSMENT

EU legislation requires that plans, programmes and projects, before they are finally approved, are assessed as to their effects on the environment, insofar as such an impact may be significant. Portugal had started in 1990 to adopt legislation which transposed Directive 85/337 on projects [24] into national law; it completed that legislation in 1997, but exempted projects for which the permitting procedure had already begun prior to the adoption of the 1990-legislation, from the requirement to make an environment impact assessment. On the request of the Commission, the CJEU held this exemption to be contrary to EU law, as the directive did not allow any exemption of this kind [25]. Portugal's arguments that legal certainty and the prohibition of giving a retroactive effect to the 1997-legislation required to grant such exemptions, were dismissed by the Court.

In 2008, Portugal was found in breach of its obligation under EU law, because it had not transposed the directive on the environment impact assessment of plans and programmes [26] in time [27]. This directive should have been transposed by July 2004, but Portugal transposed it only in 2007. Its arguments before the Court that work was going on and the legislation was quite complex, were dismissed.

In case C-117/02 [28], the Commission was of the opinion that Portugal had infringed the provisions of the environmental impact assessment directive, because it had authorized a tourist project in an area, which belonged to a natural site of EU interest, without having made an environmental impact assessment. The Court, though, dismissed the application,

23 Repealed by Decreto-Lei 151-B/2013.

24 Directive 85/337 on the effect of certain public and private projects on the environment, OJ1985, L 175, p. 30. In the meantime, this directive was replaced by Directive 2011/92, OJ2012, L26, p. 1.

25 CJEU, case C-150/97, Commission v. Portugal, ECLI:EU:C:1999:15.

26 Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, OJ 2001, L 197, p. 30.

27 CJEU, case C-376/06, Commission v. Portugal, ECLI:EU:C:2007:318.

28 CJEU, case C-117/02,Commission v. Portugal, ECLI:EU:C:2004:266.

because that Commission had not proven that the project in question had in fact a significant impact on the environment. It held that the Commission had the full charge to prove its arguments and could not rely on suppositions.

These different cases on the EU environmental impact legislation have in common that they concern the lack or the incomplete or incorrect transposition of EU environmental law into the Portuguese legal order; an exception to this is the last-mentioned case (C-117/02), which concerns the application of EU nature conservation law in a specific case. As mentioned above, the Commission exceptionally also pursues specific nature conservation(biodiversity) cases, without really giving an explanation for this exception. Presumably, such individual cases are (sometimes) pursued because of the particular relevance of nature conservation (biodiversity protection) in environmental law. The CJEU held that the Commission's discretion to bring or not to bring a case before the CJEU, cannot be controlled by the Court [29]. In my opinion, this creates a set of Commission administrative decisions which are not even be examined by the Court as to whether the limits of discretion were exceeded and whether similar cases were treated by the Commission in a similar way. This understanding of the CJEU contradicts the democratic principle that administrative decisions must be able to be controlled by a court.

NATURE CONSERVATION AND BIODIVERSITY PROTECTION

In case C-72/02 [30], the Commission was of the opinion that Portugal had not properly transposed several provisions of the birds directive [31] — which should have been transposed at the moment of accession in 1986! — and of the habitats directive [32] into its national legal order. Portugal admitted the infringement and the Court thus stated that it had failed to respect EU law. The only remaining problem was, whether Portugal was obliged to transpose also Article 12 of the birds directive into national law. This provision requests Member States to report every three years to the Commission on the implementation of the directive.

The Court held that Article 12 only concerned the relation between national and EU administrations and therefore did not need to be transposed into national law. In my opinion, this judgment is incorrect. There is a fundamental right of freedom to information [33]. The Lisbon Treaties proclaim that transparency and access to information are fundamental

29 CJEU, cases C-236/99, Commission v. Belgium, ECLI:EU:C:2000:374; C-266/03, Commission v. Luxemburg, ECLI:EU:C:2005:341; C-530/07, Commission v. Portugal, ECLI:EU:C:2009:292.

30 CJEU, case C-72/02 Commission v. Portugal, ECLI:EU:C:2003:369.

31 Directive 79/409 on the conservation of wild birds, OJ 1979,L103, p. 1.

32 Directive 92/43 on the conservation of natural habitats and of wild fauna and flora, OJ 1992, L 206, p. 7.

33 See Charter of Fundamental Rights of the European Union, OJ 2000, C 364 p. 1, Article 11: "Everyone has the right to freedom of expression. This right shall include the freedom… to receive and impart information."

for the EU [34]. Regulation 1367/2006 stipulates that EU institutions and bodies shall actively and systematically disseminate information to the public [35]. There is thus a legal obligation of the Commission to regularly inform the public on the implementation of EU environmental law. This cannot be done without the Member States sending national implementation reports to the Commission. It follows from all this that the question of reporting is not just a matter between the Commission and the different Member States.

In case C-191/05 [36], Portugal had amended the borders of a designated bird habitat by a regulatory decision. The CJEU held that Portugal was not allowed to amend those borders without having established that the scientific ornithological criteria justified such an amendment. Portugal admitted that it was in breach of EU environmental law.

As in case C-191/05, the case C-239/04 [37] was initiated by a private complaint, which was taken up by the Commission. The Commission was of the opinion that Portugal had constructed the M2-motorway between Lisbon and the Algarve, which crossed a protected bird habitat in the Castro Verde region and had significant negative impacts on that habitat, without examining whether alternative, less damaging lines for the motorway were available. Portugal did not contest that it had not examined alternative lines. The Court found that Article 6(4) of Directive 92/43 only allowed the impairment of a protected habitat, when no alternative solutions existed. As the Commission had pointed to an alternative line for the motorway, Portugal should have examined this alternative solution.

In 2018, the Commission brought a rather substantive case before the CJEU [38]. It argued that Portugal had not complied with its obligations under the habitats directive. That directive requires Member States to identify natural sites and sites that host protected species, which maybe of Community interest and to inform the Commission thereof. When the Commission considers that a site is of such a Community interest, it puts the site on an EU-wide list ("Natura 2000"). Following this, the Member State is obliged to classify, within six years at the latest, the site as "special area of conservation", establish priorities for the maintenance or restoration of the site and take the necessary conservation measures to give a favourable conservation status to the site and to the protected species which it hosts [39].

The Commission argued that for the seven sites which the Commission had put, in 2004, on the Atlantic biogeographical region as well as for the 54 sites which it had put, in 2006, on the list of the Mediterranean biogeographical region, Portugal had not classified the sites as special areas of conservation and had not taken sufficient follow-up measures. Portugal defended itself

34 See Article 1 TEU, Article 15 TFEU.

35 Regulation 1367/2006 on the application of the Aarhus Convention to Community institutions and bodies, OJ 2006, L 264, p. 1, Artic4(1).

36 CJEU, case C-191/05, Commission v. Portugal, ECLI:EU:C:2006:472.

37 CJEU, case C-239/04, Commission v. Portugal, ECLI:EU:C:2006:665.

38 CJEU, C-290/18, Commission v. Portugal, ECLI:EU:C:2019:669.

39 See for the details of the procedure Directive 92/43 (fn.31), Articles 4 and 6.

by arguing that it had adopted in 2008, by way of a Government resolution, a plan concerning all sites of the network Natura 2000 of the habitats directive, which complied with the requirements of that directive (PSRN2000) and which was binding on the Portuguese public authorities. A classification of the sites as special areas of conservation was a pure formality. The PSRN2000 ensured well the protection of the different sites and species. Apart from that, the elaboration of management plans for the different sites was ongoing, but was complex and difficult.

The CJEU held the Commission's application to be well founded. It found that an explicit classification of areas as special areas of conservation was necessary, as the different measures for the protection of a habitat and of the species in question had to be developed for each designated habitat. The measures enumerated in the PSRN2000 were too general and not specific enough for each habitat and each protected species and therefore did not comply with the requirements of Article 6 of the habitats directive.

The Court repeated its opinion that the classification of a site had to be complete, clear and precise [40]. In earlier judgments, it had already held that such a designation under Article 6 of the habitats directive needed a formal legislative or regulatory act and that administrative measures alone were not sufficient. The Portuguese Government resolution PRSN2000 did not, according to the Court, comply with this basic requirement, apart from the fact that it was not specific enough for the different habitats and protected species.

In practice, this judgment means that Portugal will have to adopt regulatory or legislative conservation measures for each of the 61 habitats that were on the EU lists of sites of Community interest.

The Commission had not raised and thus the Court had not discussed the fact that Portugal had designated, for the Atlantic biogeographical region, only seven [41] sites. In view of the long shoreline which Portugal has with the Atlantic ocean, this number is surprisingly low. In the past, the Court had already held that a Member State which did not designate a site, which objectively qualified to be of Community interest, had to let itself be treated, as if it had designated that site [42].

More generally, the Commission was concerned that of the Portuguese natural habitats which were protected under Directive 92/43, 29 per cent had a favourable conservation status, whereas 61 per cent had an unfavourable conservation status. 16 per cent of the

40 CJEU, case C-290/18 (fn.37, above), section 35: "Em conformidade com jurisprudência constante do Tribunal de Justica, as disposiciones de uma diretiva devem ser aplicadas com caráter obrigatorio incontestável, com a especifidade precisão e clareza necessárias, a fim de ser satisfeita a exigência de seguranca juridica (Acórdão Comissão/Italia, C-159/99 e jurisprudência referida)".

41 According to the most recent list for the Atlantic biogeographical region, Commission Decision 2020/495, OJ 2020, L111, p. 176, there are now eight Portuguese sites: Peneda/Gerês, Litoral Norte, Rio Minho, Rio Lima, Valongo, Serra D'Arga, Côrno do Bico and Banco Gorringe.

42 CJEU, cases C-355/90, Commission v. Spain, ECLI:EU:C:1993:331 (for birds); C-340/10, Commission v. Cyprus, ECLI:EU:C:2012:143 (for other species). Both cases had been initiated by complaints from private citizens.

protected species had a favourable conservation status, but 41 per cent an unfavourable conservation status (2013) [43]. More than twenty years after the adoption of Directive 92/43, this result was disappointing. However, the Commission does not have the habit of bringing such cases before the CJEU. It limited itself to suggest a better management of the habitats in Portugal [44]. Whether really the CJEU judgment in case C-290/18 will improve the situation, remains therefore doubtful.

It is not either likely that the Commission will take any formal steps against Portugal with regard to the incomplete measures to reach a good environmental status of Portuguese marine waters by 2020 — a requirement of Directive 2008/56 [45] — or to inform the Commission of invasive alien species in Madeira and the Azores [46]. The Commission limited itself to complain the situation.

Other aspects of the Portuguese biodiversity are entirely outside the Commission's surveillance, such as the protection of forests — including forest fires — landscape protection, the conservation of insects or the protection of fauna and flora species which are not listed in the habitats directive.

WATER MANAGEMENT

Early legislation

In the area of water management, the CJEU handed out 16 judgments. A first series of five judgments concerned the absence of Portuguese legislation to transpose EU water directives into national law [47]. Portugal defended itself with the argument that the necessary legislation was being prepared, an argument that the Court dismissed, as the EU legislation which had not been transposed or applied, had existed since Portugal's accession to the EU, thus since more

43 Commission SWD (2019), 129, p. 14.

44 *Ibidem*.

45 Directive 2008/56 establishing a framework for Community action on marine water quality in the field of marine environment policy, OJ 2008, L 164, p. 19.

46 Commission SWD(2019) 129, p. 19 and p. 17.

47 CJEU, case C-213/97 (fn.3, above).The case concerned directive 86/280 on limit values and quality objectives for the discharge of certain dangerous substances into waters, OJ 1986, L 181, p. 16; case C-208/97, Commission v. Portugal, ECLI:EU:C:1998:312. The case concerned directive 84/156 on limit values and quality objectives for mercury discharges, OJ 1984, L 74, p. 49; case C-214/97 Commission v. Portugal, ECLI:EU:C:1998:301. The case concerned the lack of a plan of action and a timetable under directive 75/440 on the quality of surface water used for human consumption, OJ 1975, L 194, p. 26; case C-183/97, Commission v. Portugal, ECLI:EU:C:1998:310. The case concerned directive 80/68 on the protection of groundwater, OJ 1980, L 20, p. 43; C-229/97 Commission v. Portugal, ECLI:EU:C:1998:481.The case concerned directive 79/869 on methods of measurement and frequencies of sampling and analyses, OJ 1979, L 281, p. 44.

than twelve years. Portugal also referred to existing decree-laws on water questions, but admitted that these did not fully and properly transpose the EU legislation into national law.

In case C-261/98 [48], the Court found that Portugal had not submitted programmes to reduce the pollution of waters by dangerous substances under Article 7 of Directive76/464 [49]. Portugal defended itself with the argument that it had sent to the Commission a study and several other documents concerning polluting substances. However, the CJEU held that these documents did not contain binding quality objectives and a timetable to reach them, and did thus not constitute action programmes as required by the directive. And in case C-435/99, the Court found that Portugal had not sent implementation reports to the Commission concerning nine water directives, dismissing the defence by Portugal that the reports were in preparation [50].

All EU water legislation mentioned until now was subsequently repealed and replaced.

Bathing water

Case C-272/01 concerned the quality of bathing waters in Portugal [51]. The CJEU held that it appeared from the Portuguese own reports that the quality did not, during 1999, correspond to the requirements of EU legislation [52]. In contrast, it rejected the Commission's argument that Portugal had not identified sufficient inland bathing waters, which were covered by EU law, and had not made the necessary sampling.

Since then, EU legislation on bathing water was changed; it now provides in particular an average of several years to determine, whether the quality of bathing water needs improvement [53]. The annual reports on the quality of bathing waters are now published by the European Environment Agency; they do not allow any more to identify the water quality of a specific bathing water and are published after the bathing season is finished. For the bathing season of 2018, Portugal had identified 608 bathing waters, of which 554 (91,1%) were of excellent quality, 29 (4,8%) of good quality, 9 (1.5%) of sufficient quality and 2(0.3%) inland bathing waters of poor quality [54]. Of course, the Commission did not take any action.

Drinking water

Compliance with the drinking water directive was the subject of case C-251/03 [55]. The Commission argued in that case that the Portuguese reports for the years 1999 and 2000

48 CJEU, case C-261/98, Commission v. Portugal, ECLI:EU:C:2000:398.

49 Directive 76/464 on the protection of waters against pollution, JO 1976, L 129, p. 23.

50 CJEU, case C-435/99, Commission v. Portugal, ECLI:EU:C:2000684.

51 CJEU, case C-272/01, Commission v. Portugal, ECLI:EU:C:2004:439.

52 Directive 76/160 on the quality of bathing water, OJ 1976, L 31, p. 1.

53 Directive 2006/7 on the quality of bathing water, JO 2006, L 64 p. 37.

54 European Environment Agency, European bathing water quality in 2018. EEA Report 3/2019. Copenhagen 2019, p. 13.

55 CJEU, case C-251/03, Commission v. Portugal, ECLI:EI:C:2005:581. The case concerned directive 80/778 on the quality of water for human consumption, OJ 1980, L 229, p. 11.

showed that there was a microbiological contamination of some quantities of drinking water and that also some other pollutants in drinking water had been found. Portugal argued that it had had too little time to react to the Commission's reproach and that improvement measures had been taken or initiated. The Court held that Portugal had had enough time to align itself to the requirements of the drinking water directive (thirteen years) and that it did not contest the contamination of the drinking water. It thus upheld the Commission's application.

Since then, EU legislation on drinking water was amended [56]. The Commission reports for the period 2008 to 2013 [57] did not indicate any case of non-compliance by Portugal and mentioned that Portugal had reached very high compliance rates [58].

Framework legislation

In 2000, the EU adopted a framework directive on water which replaced most of the previous water directives [59]. Member States were obliged to transpose the directive into national law by the end of 2003. As Portugal had not done so, the Commission brought the case before the CJEU. There, Portugal defended itself by arguing that the necessary legislation was in preparation and that the parliamentary procedure in Portugal was complex. The CJEU found that Portugal had not transposed the directive in time [60].

In 2005, Portugal adopted legislation to transpose directive 2000/60 [61], which the Commission considered appropriate [62], and established ten river basin districts. However, it omitted to adopt, as requested by the directive, river basin management plans (RBMP) for the ten districts, consult the public on them and transmit them to the Commission. Consequently, the CJEU found that Portugal had infringed EU legislation in this regard [63].

Subsequently, having received the plans with delay, the Commission examined compliance questions, in particular, whether the water in Portugal reached a good ecological and chemical status (surface water) and a good quantitative and chemical status (groundwater), furthermore, whether the RBPMs were elaborated and updated every six years [64].

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56 Directive 98/83 on the quality of water for human consumption, OJ 1998,L 330, p. 32. A further amendment is on the point of being adopted, see COM (2017) 753.

57 Commission COM (2014) 363 (2008-2010); COM (2016)666 (2011-2013). Further reports have not yet been published.

58 Commission SWD (2017), p. 19.

59 Directive 2000/60 establishing a framework for Community action in the field of water policy, OJ 2000, L 327, p. 1.

60 CJEU, case C-118/05, Commission v. Portugal, ECLI:EU:C:2006:35.

61 Lei da Água 58/2005, Diaro da República 249 série I-A, p. 7280; Ordonamento do Teritório e do Desenvolvimento Regional, Diaro da República 64, série I-A, p. 2331; Decreto-Lei 130/2012, Diaro da República I, no.120, p. 3109. This is the official Portuguese information sent to the Commission.

62 Commission, SEC (2007) 362, p. 12.

63 CJEU, case C-22-11, Commission v. Portugal, ECLI:EU:C:20112:379.

64 See Commission SEC (2007) 362 and SWD (2012) 379.

The most recent report regarding Portugal [65], where the Commission examined nineteen different requirements or non-binding objectives of Directive 2000/60, will be looked at in more detail.

The Commission's examination of the water status was exclusively based on Portugal's information. it differentiated between the river basin districts and further between rivers, lakes, transitional and coastal waters. The overall assessments thus have to be read with caution. The values for high and good ecological quality varied between 20 (Madeira) and 70 per cent (Minho and Lima), the values for poor or bad quality between 3 (Vouga, Mondego and Lis) and 20 per cent (Cavado, Ave and Leca) [66]. The chemical status of surface waters was found to be good in 25 per cent, whereas that status was unknown in74 per cent of waters [67]. The Commission stated that only 53 per cent of groundwater was monitored as regards their quantitative status (no monitoring in Madeira and the Azores) [68]; of those waters that were monitored, 97 per cent were in good status. The chemical status of groundwater was monitored in only 57 per cent of the waters; 90 per cent of the waters monitored were in good chemical status, 9 per cent failed this test [69].

In its assessment of Portugal's first RBMPs, the Commission had made 22 detailed recommendations as to the application of Directive 2000/60 [70]. In the second assessment, the Commission examined in great detail, whether these recommendations had been fulfilled and concluded that five recommendations had been fulfilled, 15 had been fulfilled partly and two — concerning the monitoring of the quantitative status of all groundwater and a review of the licenses and permits for the abstraction of water — had not been fulfilled [71]. The Commission identified diffuse pollution from agriculture as the biggest problem for surface and groundwater [72], specified the strengths and weaknesses of the second RBMPs [73] and made 22 new recommendations to Portugal [74], but did not announce any formal infringement procedure, also because Directive 2000/60 was weakly drafted and allowed Member States considerable flexibility in complying with its provisions [75].

65 Commission, Second River Basin Management Plans — Portugal, SWD (2019) 56. The report has a length of 161 pages.

66 *Ibidem*, p. 58.

67 *Ibidem*, p. 79.

68 *Ibidem* p. 92.

69 *Ibidem*, p. 100 and p. 101.

70 Commission, SWD (2012) 379.

71 Commission, SWD (2019) 56.

72 Commission SWD (2019) 129, p. 23.

73 Commission SWD (2019) 56, p. 10 to p. 18.

74 *Ibidem*, p. 19 to p. 21.

75 For example, Directive 2000/60 provided that the good status of surface and groundwater should be reached by 2015, but allowed Member States to postpone this deadline unilaterally until 2027 (Article 4(7)). Portugal's planning provides in particular for surface water to comply with the directive by 2027, see Commission, COM (2019) 56, p. 60, p. 85 and p. 97 and SWD (2019)129, p. 24.

Urban waste water

The directive on urban waste water treatment of 1991 [76] requested that by 2005 at the latest, all agglomerations with more than 2000 habitants were equipped with a waste water collection system and that the water, before it was discharged, underwent at least a secondary (chemical) treatment. At sensitive places — nature protection areas, drinking water districts — stricter treatment was necessary.

Portugal came in delay with implementing this directive and was found not less than six times by the CJEU to have infringed it [77]. In the first case (C-233/07),which concerned the agglomeration of Estoril, Portugal defended itself with the argument that work was going on, that the treatment system was of great dimension and complex and that it had done some monitoring work. The CJEU, though, dismissed these arguments.

In case C-530/07, which concerned the collection system in 13 agglomerations [78] and the treatment system in 26 agglomerations, among them Lisbon [79], Portugal admitted that not all waste water was collected, but was of the opinion that the non-compliance was not important so that the Commission should not have brought the action. The CJEU repeated its consistent jurisprudence that it was at the discretion of the Commission to bring a case before the Court and found that Portugal had infringed the law. As regards the treatment, Portugal admitted that not all waste water was correctly treated, but indicated that work was ongoing. The CJEU again considered that Portugal had infringed the law.

Case C-220/10 dealt with the waste water treatment in ten agglomerations [80]. Portugal defended its approach by arguing that studies had shown that Madeira was a less sensitive region so that it could discharge part of its waste water into the sea. The Court did not accept the studies as evidence, as they had been realized too late. As regards the treatment in the other agglomerations, Portugal admitted that only parts of the waste water were treated. Consequently, the CJEU held that it had not respected the requirements of Directive 91/271.

Case C-398/14 concerned originally 52 agglomerations in Portugal. Following some documentation from Portugal, the Commission reduced its application to 44

76 Directive 91/271 on urban waste water treatment, OJ 1991, L 135, p. 40.

77 CJEU, cases C-233/07, Commission v. Portugal, ECLI:EU:C:2008:271; C-530/07 (fn.xxx, above); C-526/09, Commission v. Portugal, ECLI:EU:C:2010:734; C-220/10, Commission v. Portugal, ECLI:EU:C:2011:558; C-398/14, Commission v. Portugal, ECLI:EU:C:2016:61; C-557/14, Commission v. Portugal, ECLI:EU:C:2016:471.

78 The agglomerations concerned were Bacia do Rio Uima/Fiães S.Jorge, Costa de Aveiro, Covilhâ, Espinho/Feira, Ponta Delgada, Póvoa de Varzim/Vila do Conde et Santa Cita.

79 The agglomerations concerned were Alverca, Bacia do Rio Uima/Fiães S.Jorge, Carvoeiro, Costa de Aveiro, Costa Oeste, Covilhâ, Lisbon, Matosinhos, Milfontes, Nazaré/Famalicão, Ponta Delgada, Póvoa de Varzim/Vila do Conde, Santa Cita, Vila Franca de Xira et Vila Real de Santo António.

80 The agglomerations concerned were Funchal, Câmara de Lobos, Quinta do Conde, Albufeira/Armacão de Pera, Beja, Chaves, Viseu, Barreiro/Moita, Corroios/Quinta da Bomba et Quinta do Conde et Seixal.

agglomerations [81]. Portugal argued that work was going on or had already been completed, but the CJEU held that it had not submitted evidence for compliance and consequently upheld the Commission's application.

In case C-557/14, the Commission argued that Portugal had not complied with the judgment in case C-530/07 as regards the agglomerations of Vila Real de Santo António and of Matosinhos. Portugal contested the Commission's arguments, but the Court found that at the relevant date (21 April 2014), the requirements of Directive 91/271 were still not complied with. According to Article 260 (2) TFEU, the Court asked Portugal to pay a sum of 8000 euro for each day that it did not fully comply with the earlier judgment, furthermore to pay a lump sum penalty of three million euro; it considered in particular that Portugal itself had indicated that the treatment system in Matosinhos would only be incompliance in 2019, thus almost twenty years late [82].

Generally, the Commission found in 2017 that the collection of waste water in Portugal was practically complete, but that slightly more than 20 per cent of the waste water still needed secondary treatment [83]. It concluded that "further efforts are needed, such as those in the Madeira region" [84]. Furthermore, the Commission estimated in 2017 that the necessary investments to reach full compliance were 183 million euro [85]; it estimated in 2019 that the annual investments to ensure compliance of the collection and treatment systems were 49,5 million euro [86].

Nitrates in water

Directive 91/676 intends to limit water pollution by nitrates from agricultural sources [87], limiting the nitrate concentration to 50 mg per liter in surface and groundwater. Member States had to ensure that the nitrate discharges did not exceed 170 kg per hectare and year.

The directive is insufficiently monitored by the Commission; numerous derogations were granted to Member States. Between 1997 and 2003, the Commission had started formal

81 The agglomerations concerned were Alvalade, Odemira, Pereira do Campo, Vila Verde (420), Macao, Pontével, Castro Daire, Arraiolos, Ferreira do Alentejo, Vidigueira, Alcácer do Sal, Amareleja, Monchique, Montemor-o-Novo, Grândolo, Estremoz, Maceira, Postel, Vianado Alentejo, Cinfães, Ponte de Reguengo, Canas de Senhorim, Repeses, Vila Vicosa, Santa Comba Dão, Tolosa, Loriga, Cercal, Vale de Santarém, Castro Verde, Almodóvar, Amares/Ferreiras, Mogadouro, Melides, Vila Verde (421), Serpa, Vendas Novas, Vila de Prado, Nelos, Vila Nova de Sâo Bento, Santiago do Cacém, Alter do Chão, Tábua and Mangualde. Matosinhos was the subject of a separate case as regards its treatment system (C-526/09).

82 It is not made known, when the work in the two agglomerations was finished and if and how much Portugal actually paid to the EU budget.

83 Commission, COM(2017) 749, p. 9.

84 Commission, COM(2019) 129, p. 24.

85 Commission, SWD (2017) 54, p. 20

86 Commission, SWD (2019) 129, p. 24.

87 Directive 91/676, OJ 1991, L 375, p. 1.

proceedings against Portugal under Article 258 TFEU, because of the limited designation of vulnerable zones; when Portugal designated more zones, the procedure was stopped [88]. Since then, Portugal was always reported to be in compliance with the directive, though for the period 2008 to 2011, the Commission reported that only 43 per cent of farmers respected the directive's requirement of 170 kg/hectare and year [89]. The Commission report for the period 2012 to 2015 informed that 19.5 per cent of groundwater monitoring stations and 7,7 per cent of surface water monitoring stations showed increasing nitrate concentrations [90], and that the number of eutrophic waters had decreased from the period 2008 to 2011 from 35,9 per cent to 23,1 per cent [91].

The floods directive

The directive on the prevention of floods [92] asked Member States to identify areas with a risk of flooding, map these areas and adopt provisions on the prevention of floods and the reduction of the risks. Portugal adopted flood risk management plans for all its river basin districts and provided for the taking of, overall, 299 measures to reduce the flood risk. The Commission examined those plans [93] and found several possibilities to improve them; in particular, it was concerned that of the 299 measures identified, 219 had not yet started to be executed and only one had been completed. The Commission suggested to include climate change risks in the plans, consider also floods from seawater, pluvial water and artificial waters (dams), but did not consider it necessary to take any more formal action.

AIR POLLUTION

The main EU instrument regarding air pollution is Directive 2008/50 which replaced earlier legislation and fixed concentration limit values for a number of pollutants [94], which were not to be exceeded. As the Commission was of the opinion that the limit values for PM 10 were not respected in Lisbon, Braga and Porto, it brought a case before the CJEU. It submitted data for the years 2005 to 2007 and asked the Court to conclude from these figures that the limit values for PM10 were also exceeded during the following years [95].

88 Commission, COM (2002) 407, p. 30; SEC (2007) 339, p. 7; COM (2010) 47, p. 8.

89 Commission, SWD (2013) 405, part 4/4, p. 23.

90 Commission, SWD (2018) 246, part 9/9, p. 183.

91 *Ibidem*, p. 184

92 Directive 2007/60 on the assessment and management of flood risks, OJ 2007, L 288, p. 27.

93 Commission SWD (2019) 77.

94 Directive 2008/50 on ambient air quality and cleaner air for Europe, OJ 2008, L 152, p. 1. This directive replaced Directive 1999/30, OJ 1999, L 165, p. 41. It fixed air quality limit values for SO^2, NOx and NO^2, particulate matters (PM 10 and PM 2.5), lead, benzene, carbon monoxide (CO) and tropospheric ozone.

95 CJEU, case C-34/11, Commission v. Portugal, ECLI:EU:C:2012:712. The values for PM10 were found to have been exceeded in the agglomerations of Braga, Porto Litoral, Lisboa Norte and Lisboa Sul.

The Court found that indeed the limit values for PM 10 had been exceeded in the three agglomerations during the years 2005 to 2007. However, it felt unable to conclude from such past data on the breach of the directives' requirements beyond 2007 and dismissed the Commission's application insofar.

Since then, the Commission changed its strategy. It took the exceeding of limit values for a longer period as evidence for the fact that the air quality plans, which Member States had to draw up in the case of such exceedances under Article 23 of the directive, did not fulfill the further requirement to bring down the air pollution as quickly as possible. The CJEU accepted this new strategy [96].

Though the Commission found that the limit values for NOx had been exceeded in Lisbon, Braga and Porto in 2014 and continued to do so 2017 [97], it did not (yet) apply to the Court; apparently, the Commission wished to see, whether the Portuguese National Strategy for Air, adopted in 2016 [98], would be implemented in practice, before its infringement procedure under Article 258 TFEU, was continued [99]. The Commission indicated, though, that annually, air pollution in Portugal causes the premature death of some 6.060 persons [100] and an economic loss of about four billion euro [101].

Air (and water) emissions from industrial installations are regulated by Portuguese law. Only for about 625 large industrial installations in Portugal, there are binding EU provisions which oblige the permits for these installations to be based on the best available techniques [102]. These techniques are elaborated, under very active participation of the affected industry, by expert working groups; the conclusions of those groups are adopted by the Commission and become binding. However, the Commission does not monitor, whether the individual permits indeed impose the use of the best available technique. As regards Portugal, the Commission indicated that the highest air emissions causing pressure on the environment came from installations for energy power, the intensive rearing of poultry and pigs, mineral production, metal production and waste management [103]. An earlier infringement as regard a waste incinerator in Lisbon was submitted to the CJEU, but was withdrawn, before judgment was given [104].

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96 CJEU, cases C-488/15 Commission v. Bulgaria, ECLI:EU:C:2017:267, C-336/16 Commission v. Poland, ECLI:EU:C:2018:94; C-636/18 Commission v. France, ECLI:EU:C:2019:900. Similar cases against, Italy, Romania, Hungary and Germany are pending.

97 Commission SWD (2017), 54, p. 18; SWD (2019) 129, p. 20.

98 Commission, SWD (2017) 54, p. 18.

99 The CJEU is of the opinion that the discretion of the Commission under Article 258 TFEU to apply or not to apply to the CJEU cannot be controlled by the Court.

100 Commission SWD (2019) 129, p. 20; see also Commission COM (2013)918;COM (2018) 330;COM (2018) 446; COM (2019) 22,annex.

101 Commission SWD (2017) 54, p. 18.

102 Directive 2010/75 on industrial emissions, OJ 2010, L 334, p. 17.

103 Commission, SWD(2019) 129, p. 21.

104 CJEU, case C-266/07, Commission v. Portugal.

NOISE

The Commission estimated that some 120.000 people in Portugal suffer from excessive noise levels [105]. EU noise legislation requires Member States to identify zones with high noise levels from road, railway or air traffic, establish and publish noise maps which indicate the noise levels, and draw up action plans in order to progressively reduce excessive noise levels [106]. The Commission does not effectively monitor enforcement and compliance with the noise directive [107]. In 2017 and 2019, it mentioned that Portugal was seriously in delay with regard to noise mapping and the taking of measures to reduce noise and that in particular noise mapping for three agglomerations — which were not named — and most roads and railways were still lacking [108], but undertook no further action.

WASTE MANAGEMENT

As regards waste management, the main priority of the EU Commission is the establishment and promotion of a circular economy, which means an economy "where the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste is minimised" [109]. However, as the objectives and actions to approach this objective are not of binding nature, the Commission limited itself to comment on different Portuguese measures, such as Portugal's green growth commitment of 2015, the national action plan for a circular economy of 2016, the Portuguese Fundo Ambiental 2016 or the measures to improve the eco-innovation performance. Its advice for circular economy measures was to better monitor the national measures and to implement the national action plan for a circular economy [110].

In view of the taking of measures, the Commission warned Portugal that it risked of missing the binding objective of recycling 50 per cent of its municipal waste by 2020 [111] and that also the later binding obligations — recycling the municipal waste by 55 per cent in

105 Commission, SWD (2019)129, p. 22

106 Directive 2002/49 relating to the assessment and management of environmental noise, OJ 2002, L 189, p. 12.

107 See the Commission's implementation report on Directive 2002/49, COM (2017) 151 and the strong criticism of the enforcement of that directive, SWD (216) 454, p. 11 to p. 13.

108 Commission SWD (2017) 54, p. 18; SWD (2019) 129, p. 22. According to Directive 2002/49, the noise maps should have been drawn up by June 2007, the action plans by July 2008.

109 Commission, Action plan for a circular economy, COM (2015) 614; see also Commission, Action plan for a circular economy, COM (2020) 98.

110 Commission, COM (2017)54, p. 8; COM (2019)129, p. 7.

111 This obligation is laid down in Directive 2008/98 on waste, OJ 2008, L 312, p. 3, Article 11.

2025, 60 per cent in 2030 and 65 per cent in 2035 [112] — risked of being missed [113]. It has to be underlined, though, that until now, no Member State was ever brought before the CJEU, because it had failed to comply with separate collection or recycling targets of EU waste legislation, although such binding targets exist since 1994. For the rest, the Commission had quite a bundle of recommendations, in order to improve waste management [114]; Portugal is not legally obliged to follow them

The Commission brought five waste cases before the CJEU and very largely succeeded in all of them [115]. The first case (C-323/99) concerned the incomplete and incorrect transposition into national law of a directive on waste oil [116]. The CJEU found in particular that the Portuguese legislation did not lay down clearly and precisely enough the requirement that industries using waste oils had to apply the best available techniques not causing excessive costs, that it had not classified waste from such industries as hazardous waste, had not clearly enough provided for periodical inspections of such industries and had not regularly informed the Commission with its experience concerning the application of the directive. In its judgment in case C-92/03 on the same directive, the CJEU found furthermore, that Portugal had not established sufficiently clearly that waste oils should, as a priority, be recycled (regenerated).

Case C-185/02 concerned Portugal's omission to send to the Commission its plans and projects on the disposal PCBs and PCTs [117], case C-48/04 Portugal's omission to transpose directive 2000/76 on the incineration of waste into national legislation [118]. Case C-37/09 finally concerned the unauthorized disposal of waste in three abandoned quarries. Portugal argued that it had in the meantime removed all waste from the first quarry, and the Court held that the Commission had not proven the contrary. As to the second and third quarry, Portugal argued

112 These obligations are laid down in Directive 2018/851, OJ 2018, L 150, p. 109, amending a.o. Article 11 of Directive 2008/98.

113 The Portuguese recycling rates for municipal waste were 19% (2010), 20% (2011), 26% (2012), 26% (2013), 30% (2014), 30% (2015), 31% (2016), 28% (2017), see Commission, COM (2019)129, p. 7.

114 See Commission COM (2019) 129, p. 10: An increase of landfill and incineration charge; introduction of a residual waste tax; higher charges for municipalities which fail to meet recycling targets; improvement of the separate collection of waste; introduction of a system "pay-as-you-throw"; improvement of the extended producer responsibility systems; review of the waste treatment infrastructure.

115 CJEU cases C-393/99 Commission v. Portugal, ECLI:EU:C:2003:216; C-185/02 Commission v. Portugal, ECLI:EU:C:2004:668; C-48/04 Commission v. Portugal, ECLI:EU:C:2004:772; C-92/03 Commission v. Portugal, ECLI:EU:C:2005:58; C-37/09 Commission v. Portugal, ECLI:EU:C:2010:331. A sixth case (C-525/09), concerning the lack of transposing directive 2006/21 on waste from the extracting industry, OJ 2006, L 102, p. 15, was submitted to the Court, but was withdrawn after Portugal had adopted transposing legislation.

116 Directive 75/439 on the disposal of waste oil, OJ 1975, L 194, p. 23. Later, this directive was repealed and replaced by Directive 2008/98 (fn.110,above).

117 Directive 96/59 on the disposal of PCBs and PCTs, OJ 1996, L 243, p. 31.

118 Directive 2000/76 on the incineration of waste, OJ 2000, L 332, p. 91.This directive was later repealed and replaced by Directive 2010/75 (fn.101, above).

that it had covered the waste with soil and plants, had prohibited the access to the quarries, sanctioned their owners and taken a number of other complementary measures.

The Court clarified that EU law did not allow the unauthorized disposal of waste. In order to remedy such an unauthorized disposal, it was not sufficient to cover the waste with soil and plants, as the mere presence of waste in the soil could impair the environment and in particular the groundwater. Illegally disposed waste had therefore to be removed. Thus, the Court found that Portugal had infringed its obligations flowing out of the directives on waste and on groundwater [119].

CLIMATE CHANGE MEASURES

Portugal's greenhouse gas emissions (GHG) increased between 1990 and 2017, the last year for which official data are available. The UN and EU statistics slightly diverge as to the exact quantities of GHG that were emitted, but agree on the general trend.

Quantities of GHG emitted (in million tons CO^2 equivalent, excluding LULUCF)

Emission year UN [120] *EU (Eurostat)* [121] *EEA* [122]

1990 59,1 60,8 59
1995 68,9 70,0 69
2000 82,8 84,3 82
2005 85,6 88,1 86
2010 68,8 71,7 69
2015 67,7 71,1 68
2017 70,5 74,6 71

The latest EU decision stated that Portugal is obliged to reduce its GHG emissions until 2030 by 17 per cent, compared to 2005 [123]. This means in absolute figures that Portugal

119 Directive 2006/12 on waste, OJ 2006, L 114, p. 9. This directive was later repealed and replaced by Directive 2008/98 (fn.xxx, above). Directive 80/68 on groundwater, OJ L 1980, L 20, p. 43. This directive was later repealed and replaced by Directive 2006/118, L 372 p. 19.

120 UN Data, Greenhouse gas inventory data.

121 EU, Eurostat, Greenhouse gas statistics — emission inventory. June 2019

122 European Environmental Agency(EEA),Annual European Union greenhouse gas inventory 1990-2017 and inventory report 2019, EEA/Publ/2019/051. Copenhagen, May 2019, p. IX.

123 According to Decision 2002/358, OJ 2002, L 130, p. 1, Portugal was allowed to increase its GHG emissions by 27 per cent until 2012, compared to 1990. In 2009, this decision was replaced by Decision 406/2009, OJ 2009, L 140, p. 136 which provided that Portugal could increase its emissions by one per cent until 2020, compared to 2005. Finally, Regulation 2018/842, OJ 2018, L 156, p. 26, provided that Portugal should reduce its emissions by 17 per cent until 2030, compared to 2005. Translated into absolute figures, this means that by

should not emit more than 72,16 million tons GHG (EU Eurostat figures), or 71,38 million tons (EEA figures), still almost 10 per cent more than in 1990. Portugal is thus not close to the EU objective of reaching a reduction of the EU GHG emissions by 20 per cent in 2020, compared to 1990, and to reach a reduction of 40 per cent by 2030 [124]. Portugal has not either yet indicated, how it intends to reach its the commitment, which it apparently made internationally to be climate neutral — thus to have zero GHG emissions — by 2050 [125].

The Commission did not make any suggestions as to Portugal's climate change policy or GHG emissions [126].

CONCLUSIONS

This survey on the Portuguese environment before the Court of Justice of the EU and under the Commission's scrutiny gives a mixed picture. On the one hand, there are pieces of EU legislation which Portugal did not transpose into national law and had to be reminded of its obligations by the Court of Justice. Several of these EU directives, in particular in the water sector, existed at the moment of Portugal's accession to the EU in 1986, when Portugal practically had no national environmental legislation of its own.

However, Portugal was also in delay of transposing EU environmental legislation at a later time, such as the water framework directive of 2000, the directive on environmental noise of 2002 of the legislation on the environmental impact assessment for plans and programmes. A delayed transposition of EU environmental directives seems to be rather the rule than the exception.

On the other hand, there are EU directives which are not correctly applied by Portugal. The air pollution Directive 2008/50 stands out in his regard, as it causes annual losses of life, health injuries and economic losses, which are very considerable. It remains to be seen, whether Portugal succeeds in improving the air quality in particular in its agglomerations, independently of the transitory influence which the covid-19 pandemic has in this regard. In view of the number of premature deaths — ten times as many as for road accidents — and the environmental damage, it appears too indulgent that the Commission further delays its infringement procedure against Portugal on compliance with the directive.

2030, Portugal shall reduce its emissions of 2017 of 74,6 mio tons to 72,67 mio tons, thus by four per cent (EU Eurostat figures). When the EEA figures are taken, Portugal shall emit not more than 71,38 million tons GHG, thus almost the same quantity as in 2017.

124 The new Commission Von Der Leyen announced that it would propose to reach a 50 to 55 per cent reduction by 2030, compared to 1990, see Commission, COM(2019) 640.

125 See Commission SWD (2019) 129, p. 11.

126 Commission, SWD (2019) 129, p. 12.

Also, compliance with the habitats Directive 92/43 appears to be a priority task for the Portuguese authorities. That Portugal had not taken the necessary measures to ensure an adequate treatment of the 61 habitats mentioned in case C-290/18, eleven and eight years after it should have taken such measures and though the directive stated that such measures had to be taken "as soon as possible" [127], is a major omission and cannot be set aside by a reference to a general plan; it is not enough that everybody generally agrees on the need to protect biodiversity, but forgets about it, when powerful lobby pressures from agriculture, transport, urban agglomerations or other vested interest representations claim priority in specific cases.

In the water and the waste sector, the obligations flowing of EU law are so vague — or are interpreted by the Commission in a vague and general way — that they are often not really apt to be enforced by actions before the CJEU. This applies in particular to the water framework directive — which has a general EU compliance rate of less than 50 per cent, fifteen years after its adoption —, to the groundwater directive, the floods directive and even the bathing water directive, furthermore to the waste directive or the packaging waste directive. On all these directives, the Commission does not take legal action under Article 258 TFEU as regards their practical, day-to-day application, but relies on soft monitoring and rather smooth — and largely ineffective — recommendations.

The directive on urban waste water constitutes an exception to this general remark. Here, the Commission tries to enforce with some success the building of infrastructure measures — collection and treatment systems — in all Member States. It is thus no accident that the only environmental case against Portugal, which ended with a financial sanction, concerned that directive and it cannot be excluded that other cases on the basis of Article 260(2) TFEU will follow in future.

Almost all of the cases decided by the Court of justice were legally quite clear, and in most cases, the Court found that Portugal had breached EU law. This is also due to the fact that the Commission tries to bring only such cases before the Court, where it can be almost sure of winning.

The Commission's monitoring of Portugal's environmental law is soft. As mentioned already, the Commission concentrated on cases of lack of or incomplete/incorrect transposition of EU environmental directives, but largely ignored the lack of application of existing provisions in specific cases. This is also due to the fact that the Commission largely cut itself off the information on specific cases which might be coming from civil society, as it treats environmental complaints with very low eagerness of exploration; Member States normally do not report on specific cases and media reports are in environmental matters not a reliable source of information for the Commission. This strategy certainly increases the distance

127 Directive 92/43 (fn.31, above), Article 4(4).

to the citizens, who have little say in EU (environmental) matters, but are nonetheless, regularly called to vote in European elections.

Overall, the Commission and the Court of Justice exercise some sort of surveillance over the Portuguese environment, but this surveillance is not strong. The Commission does not fully play the role which was attributed to it under Article 17 TEU and its efforts — the pilot initiative, warning letters to Member States or the environmental implementation review-exercise — are half-hearted and insufficient. Zero tolerance in environmental law matters is perhaps not the objective at which the Commission should aim. However, an excess of tolerance wipes out the difference between an international environmental organization and the EU which is a *Union*; it leads to more and more legal provisions that are, in practice, not applied, which undermines the credibility of the law-making institutions. Sometimes, the papers, which were elaborated under the environmental implementation review exercise read themselves as journalistic articles [128], but not as a summary of an administrative surveillance.

The truth is probably that as long as the Commission does not change its policy as regards ensuring the application of the Portuguese environmental law, other ways may have to be considered. The United Kingdom, when leaving the EU, undertook such a new way: at present, the British Parliament discusses a bill to establish an "Office for Environmental Protection". This Office will have the task to monitor the application of UK environmental law by municipalities, private and public companies, agencies, and any other public body, including the Government. it is not in an administrative hierarchy, which means that it is not dependent on instructions from the Government and that it is not involved in party politics. It will be able to pronounce fines and other sanctions against wrong-doers.

Would it not be a way to consider the establishment of a similar body in Portugal? The Agência Portuguesa do Ambiente might be charged with such a task and be equipped with the necessary means and administrative independence. The Portuguese environment would immensely profit from such a step, as the environmental interests, largely voiceless until now though they are general and not vested interests, would obtain a chance of being heard in public. It must not be forgotten that the full and daily application of the provisions which were decided by Government and Parliament, is the biggest legal problem which environmental policy faces, in Portugal and elsewhere.

Palavras chave: Direito europeu do ambiente; Comissão europeia; Cumprimento do Direito Europeu; Transposição de diretivas; Direito português do ambiente

128 See Commission COM (2019) 149 and SWD (2019) 111-139.