OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 28 October 1999 *

1. By this action the Commission is seeking from the Court of Justice a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Article 4 of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water [1] (hereinafter 'the Directive'), and the third paragraph of Article 189 of the EC Treaty (now Article 249 EC).

I. Directive 76/160

2. The first recital in the preamble to the Directive states that its aim is to protect the environment and public health by reducing the pollution of bathing water and protecting such water against further deterioration.

3. Article 1 of the Directive provides that it 'concerns the quality of bathing water, with the exception of water intended for therapeutic purposes and water used in swimming pools'. For the purposes of the Directive 'bathing water' means all running or still fresh waters or parts thereof and sea water, in which bathing is explicitly authorised by the competent authorities of each Member State or is not prohibited and is traditionally practised by a large number of bathers. According to the same provision, 'bathing area' means any place where bathing water is found, and 'bathing season' means the period during which a large number of bathers can be expected, in the light of local custom, and any local rules which may exist concerning bathing and weather conditions.

4. Article 3 of the Directive imposes on the Member States the obligation to set, for all the bathing areas or for each individual bathing area, the values applicable to bathing water for the physical, chemical and microbiological parameters given in the Annex to the Directive, which may not be less stringent than those given in the Annex.

5. Under Article 4 of the Directive, the Member States were required to take, within 10 years following the notification of the Directive, all necessary measures to

* Original language: Spanish.

1 — OJ 1976 L 31, p. 1.

ensure that the quality of bathing water conformed to the limit values set in accordance with Article 3. In the case of Belgium, that period expired in December 1985.

6. Article 5(1) of the Directive provides:

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

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

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

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

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

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

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

[...]'

7. Article 8 provides the following derogations from the Directive:

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

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

[...]

Where a Member State waives the provisions of this Directive, it shall forthwith notify the Commission thereof, stating its reasons and the periods anticipated.'

8. Under the new wording of Article 13 of the Directive, [2] Member States are required to submit an annual report to the Commission on their bathing water and its most significant characteristics.

II. Facts

9. After studying the report on the quality of bathing water in Belgium for the years 1983 to 1986, the Commission sent the Belgian authorities an initial letter dated 8 October 1987 pointing out several infringements of the Directive, in particular the deviation from the limit values, the exclusion of certain bathing areas and the inadequate frequency of sampling operations. On 11 February 1988 the Belgian authorities, through their Permanent Representative at the European Communities, replied with information about the various matters raised by the Commission.

10. In a letter dated 21 June 1988, the Commission informed Belgium that it had received a complaint relating to the fact that many bathing areas on the rivers in the Walloon Region — in which, according to the complainant, people were bathing and the water did not conform to the parameters fixed in the Directive — were not being taken into account for the purposes of the Directive. Belgium's Permanent Representative replied to this letter on 6 October 1988 explaining the delay in implementing several directives, amongst them the directive concerning the quality of bathing water, because of the practical problems created by the regionalisation of the administrative authorities.

11. On 25 September 1989, the Commission sent Belgium a letter of formal notice relating to the incorrect implementation of the Directive. [3]

12. On 4 January 1990 the Belgian Government replied to the letter of formal notice; it denied that the Directive had been implemented incorrectly and also pointed out that various measures had been adopted to improve the quality of bathing water in the country.

13. In a letter to the Belgian Government dated 14 November 1995 the Commission

2 — Originally Article 13 of the Directive imposed the obligation to submit a report to the Commission on bathing water 'at regular intervals'. However, the article was amended by Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain Directives relating to the environment (OJ 1991 L 377, p. 48), which made submission of the report an annual obligation.

3 — The grounds of complaint were as follows:
(a) the Directive had not been correctly transposed into Belgian law;
(b) an inadequate number of freshwater bathing areas were monitored especially in the Walloon Region, and
(c) in the water which was monitored, the limit values fixed in the Directive were exceeded.

said that it was prepared to discontinue the procedure for failure to fulfil obligations if the Belgian authorities sent it comprehensive and detailed information about the water purification programmes for the bathing areas in which the limit values fixed in the Directive had been exceeded. The Belgian authorities sent information about Flanders on 31 January 1996 and about the Walloon Region on 13 March the same year.

14. On 27 December 1996 the Commission addressed a reasoned opinion to Belgium pursuant to Article 169 of the EC Treaty (now Article 226 EC) stating that it had failed to fulfil its obligations under the Directive. Firstly, the Commission pointed out that many freshwater bathing areas were not within the parameters set by the Directive. Secondly, it considered that the information submitted about the water purification programmes for the freshwater bathing areas, both for Flanders and for the Walloon Region, were inadequate. Thirdly, it rejected the argument that, during the summer, the water in the Walloon Region was not of sufficient depth for bathing. Finally, the Commission stated that, except in an isolated case mentioned in the reports on the quality of bathing water, the competent authorities had not made use of the possibility to prohibit bathing in the water which did not conform to the parameters fixed by the Directive.

15. After receiving the reply to the letter of formal notice on 12 February 1997 for the Brussels Region, on 6 March 1997 for Flanders and on 1 July 1997 for the Walloon Region, and considering that the response to its charges was unsatisfactory, the Commission decided to bring this action for failure to fulfil obligations.

III. Grounds of complaint

16. The Commission contends that Belgium has failed to fulfil its obligations under the Directive (a) by reducing its scope of application, (b) by not adopting the measures necessary to ensure that the quality of the bathing water conforms to the limit values fixed by the Directive, and (c) by not achieving the results required by the provision. I shall examine each of these grounds of complaints below.

(a) *Belgium has reduced the scope of application of the Directive*

17. The first ground of complaint refers to the bathing areas in the Walloon Region. The Commission maintains that the Belgian authorities have reduced the scope of application of the Directive by excluding from its annual reports many freshwater bathing areas which had previously been included in the reports (hereinafter 'the

disputed areas'), without giving valid reasons for doing so.

18. For their part, the Belgian authorities claim that the only freshwater 'bathing areas' in the Walloon Region, for the purposes of the Directive, are the ten areas included in the 1996 report.[4] In these bathing is explicitly authorised and the water is generally of good bacteriological quality. Whenever the samples taken from these areas show a deviation from the values established in the Directive, bathing is prohibited, so the area concerned is excluded, temporarily or permanently, from the scope of application of the provision.

With regard to the disputed areas, the Belgian authorities point out that, for some time, the quality of the country's bathing water was monitored and the results sent to the Commission between 1992 and 1996. They point out, however, that in their report for 1991, they told the Commission that bacteriological monitoring had been carried out not only in the bathing areas covered by the Directive but also in 28 areas in the Walloon Region which did not have bathing infrastructures and where there were very few or no bathers. The Belgian authorities also said that subsequent monitoring confirmed that there was very little or no bathing in those areas which, therefore, could not be considered 'bathing areas' within the meaning of the Directive, because neither was bathing explicitly authorised nor, when it was not prohibited, was it traditionally practised by a large number of bathers; this was why they stopped being included in the annual report sent to the Commission.

19. In examining this ground of complaint, it is necessary to determine whether the disputed areas should be considered bathing areas for the purposes of the Directive and, if so, whether the Belgian authorities were entitled to decide to exclude them from the scope of application of the Directive.

20. As far as the first question is concerned, in their reply to the reasoned opinion the Belgian authorities explained that monitoring had been carried out in those areas because the health inspectors (prior to the federalisation of Belgium in 1980 and 1988), the decentralised administrative bodies or the municipal councils had classified them as possible bathing areas. According to the Belgian authorities, many municipal councils probably conferred the classification of bathing area without considering the quality of the water or the actual number of bathers, in order to promote the local economy.

21. In my opinion, the Belgian authorities cannot claim that the disputed areas are not bathing areas for the purposes of the Directive when, for years, they have been monitoring their waters in the manner

4 — Five of them were classified as bathing areas by Decree of the Walloon Regional Government on 25 October 1990 (Reniport Beach in Lasne, Lake Robertville in Waimes, Lake Butgenbach, the Rabais Valley and Lake Claire Fontaine in Chapelle-lez-Herlaimont), and the other five have been recommended to receive this official classification (River Semois in Herbeumont, the pool at the Saint-Léger Sports Centre, the pool at the Libramont Sports Complex, Lake Cherapont and Lake Ry jaune).

prescribed in the Directive and sending the results to the Commission for publication in its annual reports on the quality of bathing water in the Member States. The fact that the Directive may have been applied to those areas at the instigation of the health inspectors, decentralised administrative bodies or municipal councils only serves to confirm this view because these are precisely the persons or bodies with direct knowledge of the features of each area. Apart from that, I should stress that the classification 'potential bathing area' has no legal foundation in the Directive.

22. In its action, the Commission draws attention to the fact that, in a guide to camping sites published in 1998 by the Walloon Region, bathing water is indicated in at least 16 of the disputed areas. The Belgian authorities answer that — as is pointed out in the guide — responsibility for that information lies exclusively with the owners of the camping sites, not with the Walloon Region. They maintain that such details are mentioned in the guide only because the owners of the camping sites are interested in making their sites more attractive, which does not mean that bathing is possible in those areas or that it is practised by a large number of bathers.

23. In my view, the reply given by the Belgian authorities is wholly unsatisfactory. The aim of the Directive requires the national authorities to intervene in cases in which tourists are attracted to a specific area because they are told that it is possible to bathe there, particularly if, as in this case, the health inspectors, decentralised administrative bodies or municipal councils state that it is a bathing area.

24. I think, therefore, that the disputed areas should be considered bathing areas for the purposes of the Directive.

25. It is then necessary to determine whether the Belgian authorities were entitled to exclude these areas from the scope of application of the Directive, when they realised that they were not used by a large number of bathers.

26. In this regard, I think it is appropriate to recall the judgment of 28 February 1991, [5] in which the Court had to rule on the question whether the Member States were authorised to reduce the extent of special protection areas for the conservation of wild birds. [6] After emphasising that the Directive does not expressly provide for the reduction of the extent of a protected area, the Court stated: 'Although the Member States do have a certain discretion with regard to the choice of the territories which are most suitable for classification as special protection areas pursuant to Arti-

5 — Case C-57/89 *Commission* v *Germany* [1991] ECR I-883.

6 — The case related to the implementation of Council Directive 79/409/EEC of 2 April 1979, concerning the conservation of wild birds (OJ 1979 L 103, p. 1).

cle 4(1) of the Directive, they do not have the same discretion under Article 4(4) of the Directive in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environments for the species listed in Annex I to the Directive. If that were not so, the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) of the Directive with regard to special protection areas.' [7]

27. Nevertheless, I consider that there is a fundamental difference between the Directive on the conservation of wild birds and the Directive concerning the quality of bathing water. In the former, the Member States have to define its territorial scope of application by formally designating specific areas as special protection areas.The Directive does not apply to a specific area unless it is so designated.

On the other hand,, as Advocate General Lenz pointed out, [8] the directive concerning the quality of bathing water 'does not state that the identification of bathing water might be capable of establishing the applicability of the Directive'. That is to say, the Directive applies to all the areas which fall within the definition in Article 1, and whether or not the Member State explicitly designates them as such is therefore irrelevant.

28. In Case C-92/96, [9] relating to the directive concerning the quality of bathing water, the Spanish Government maintained in its defence that many bathing areas had been abandoned by users as a result of a change in social habits, as bathers preferred to use municipal or private swimming-pools, and that they were therefore no longer bathing areas for the purposes of the Directive.

In the Opinion he delivered in that case, Advocate General Lenz pointed out that a reduction in the number of bathers is often due specifically to a reduction in the quality of the water. In such a case, he said, if this were allowed to lead to a situation in which a Member State no longer had to ensure that the water conformed to the prescribed limit values, the Directive would lose its meaning and aim. However, he added that 'it is [...] quite possible for changes [...] to occur in relation to bathing water. For example, if bathing water ceases to be used by bathers for certain reasons, which do not include pollution, a Member State should have the right to stop treating such

7 — *Ibidem*, paragraph 20.

8 — Opinion delivered in the case in which judgment was given on 14 July 1993, C-56/90 *Commission* v *United Kingdom* [1993] ECR I-4109, point 34.

9 — *Commission* v *Spain* [1998] ECR I-505.

water as "bathing water" within the meaning of the Directive. However, I consider this to be a matter for examination in each particular case and, if necessary, for proof to be furnished by the Member State in question. An assertion in more or less general terms, such as that made by the Spanish Government in this case, is not sufficient for that purpose'. [10]

29. In its judgment the Court of Justice, without expressly ruling whether or not it was possible for Member States to exclude specific areas from the scope of application of the Directive, rejected the contention of the Spanish Government and pointed out that a change in social habits was not one of the derogations envisaged by the Directive.

30. I share the view of Advocate General Lenz. Once the Directive is applicable to an area as the consequence not of an express declaration by the Member States but of the fulfilment of the criteria laid down in Article 1, which are that bathing is explicitly authorised or that bathing is not prohibited and is traditionally practised by a large number of bathers, a change in the objective circumstances in an area may justify ceasing to implement the Directive, on two conditions: that the Member State shows that the objective circumstances have changed and that the reason for that change is not a reduction in the quality of the water.

10 — Opinion delivered in the case which was the subject of the judgment in *Commission* v *Spain* cited in footnote 9, point 40.

31. In the present case the Belgian authorities are seeking to justify excluding the disputed areas by claiming that no bathing is practised in them or bathing is not traditionally practised in them, for the following reasons: the water is too shallow, there are no bathing infrastructures, people paddle kayaks in them and weather conditions are bad.

32. Before I consider these reasons in detail, I think it is important to emphasise that the Belgian authorities do not claim that they *all* apply to *all* the disputed areas. However, they do not indicate — as I think they should have done, so that the Commission could consider whether the decision to exclude the areas was valid — the reasons which apply to each of the areas.

33. With regard to the shallowness of the water, the Belgian authorities maintain that the fact that point 11 of the Annex to the Directive establishes as an imperative value that the water must be transparent to a depth of at least one metre gives reason to believe that only those bathing areas in which the water is more than one metre deep fall within the scope of application of the Directive. In my view, there is no basis for this contention. It is obvious that what the Directive requires in each bathing area is that, where the water is deep, it is transparent to a depth of at least on metre and that, where the water is shallower than one metre, it should all be transparent, that it too say, it should be possible to see the bottom. Furthermore, as the Commission quite rightly points out, it is precisely water which is shallower than one metre which, for obvious reasons, attracts specific sectors

of the population, such as the elderly or children.

34. With regard to the second contention, which is that there is a lack of bathing infrastructures, the Belgian authorities merely state it in their defence, without giving any details. On the other hand, an explanation may be found in the reply to the reasoned opinion, in which they point out that, in most of the areas, the banks are not in a suitable condition, which limits the number of people who can gain access to them. They add that the lack of facilities such as drink stands, changing huts or toilets, make these areas less attractive to bathers.

First and foremost I should like to stress that when the Belgian authorities point out, in their reply to the reasoned opinion, that there are no bathing infrastructures in most of those areas, they implicitly acknowledge that there are such infrastructures in some areas. In accordance with the case-law of the Court of Justice, those areas must, in principle, be considered bathing areas for the purposes of the Directive, because the existence of such infrastructures constitutes evidence that the bathing area is frequented by a large number of bathers whose health must be protected. [11] Apart from that, I believe, as the Commission points out, that the lack of infrastructures does not exclude a bathing area or prevent it being considered as such if it is frequented by bathers.

11 — Judgment in *Commission* v *United Kingdom*, cited in footnote 8, paragraph 34.

35. With regard to the paddling of kayaks, and without further details from the Belgian authorities, I think that, unlike other aquatic activities, such as motorboating, it can hardly constitute a reason for excluding bathing in a specific area. For that to be the case, it would have to be practised irresponsibly, constantly and by a large number of people.

36. Finally, with regard to the adverse weather conditions, the Belgian authorities said, in their reply to the reasoned opinion, that summers in Belgium are usually very rainy, which drastically reduces the number of days conducive to bathing. This claim is also groundless, for the following reasons:

I must say at the outset that the Directive does not lay down as a requirement for its applicability that bathing should be possible on a certain number of days.

I would remind the Court at this point that Article 1 of the Directive defines the term 'bathing season' as 'the period during which a large number of bathers can be expected, in the light of local custom, and any local rules which may exist concerning bathing and weather conditions'. It may be deduced from this definition that Member States may take weather conditions into account in order to establish the timetable of the bathing season, as indeed they do, but not in order to decide that the Directive does not apply to a bathing area.

It is true that Article 8 of the Directive provides that, in the case of exceptional weather or geographical conditions, it may be acceptable for bathing water not to conform to specific physical and chemical parameters. [12] However, Article 8 also lays down the requirement that the Member State is forthwith to notify the Commission thereof, stating its reasons and the periods anticipated. It cannot be ascertained from the documents before the Court that the Belgian authorities satisfied this requirement. Moreover, this derogation, which must be strictly interpreted, [13] only allows temporary deviation from the values prescribed for specific parameters, and does not permit bathing areas to be excluded from the scope of application of the Directive.

I shall give two further reasons why I think the argument put forward by the Belgian authorities is unsatisfactory. The first is that they do not explain why bad weather conditions affect the disputed areas in a different way from the ten recognised bathing areas in the Walloon Region. The second is that other countries in the European Union have, or endure, a climate similar to the one in Belgium and yet have a large number of bathing areas. [14]

37. In their defence to the application, the Belgian authorities refer to certain elements contained in the proposal for the Directive, [15] which were not included in the final text, to show that the disputed areas fall outside its scope of application. [16]

38. Those elements are irrelevant to this matter. With regard, in particular, to the statement in the Proposal for the Directive that 'special attention should be paid to sites where the concentration of bathers exceeds a mean value of 10 000 persons per linear kilometre of beach', I wish to point out the following: In the first place, this Court has already stated that the fact that the number of bathers is below a certain threshold does not permit a bathing area to be excluded from the scope of the Directive. [17] In the second place, the fact that an area does not require special attention does not mean that must be excluded from the scope of application of the Directive. And finally, as the Commission points out, if that minimum number of bathers were necessary, the Directive would probably not apply to any bathing area in Belgium.

12 — To be precise, pH, colour and transparency.

13 — Judgment in *Commission* v *Spain*, cited in footnote 9, paragraph 31.

14 — For example, in the figures for 1997, and counting only fresh water bathing areas (excluding, therefore, sea water bathing areas), Denmark has 112, Ireland 9, the Netherlands 500 and the Grand Duchy of Luxembourg 20.

15 — COM(74) 191 final of 3 February 1975.

16 — These elements are:
'— The Directive concerns only authorised or tolerated bathing places. Bathing at unauthorised places is at the bather's own risk.
— Special attention should be paid to sites where the concentration of bathers exceeds a mean value of 10 000 persons per linear kilometre of beach.
— The hazards to health will be proportional to the time of exposure to the water and they vary considerably according to temperature of the air, and consequently of the water. The Directive therefore prescribes for sea water — which is the preferred bathing medium — less stringent conditions for those areas where the low prevailing water temperature (less than 20 °C) limits the time of bathing compared with other regions where bathing may continue throughout the day.
— Prolonged immersion of the whole body is the principal activity that determines the required physical and chemical characteristics of bathing water.'

17 — Judgment in *Commission* v *United Kingdom*, cited in footnote 8, paragraph 34.

Apart from that, as the Defendant State acknowledges, these elements were not included in the final text of the Directive.

39. For these reasons I believe that the Belgian authorities have not adequately justified their decision to exclude the disputed areas in the Walloon Region from the scope of application of the Directive and that the Commission's first ground of complaint must be upheld.

(b) *Belgium has not adopted the measures necessary to ensure that the quality of the bathing water conforms to the limit values fixed by the Directive*

40. The Commission's second ground of complaint comprises two pleas which need to be considered separately.

41. In the first place, the Commission contends that the programmes of investment in water purification, both in Flanders and the Walloon Region, are inadequate. To be precise, the Commission maintains that the Belgian authorities have merely mentioned the setting up of water-treatment infrastructures in general, without giving specific details about the impact of those infrastructures on the improvement in the quality of the bathing water. So far as concerns Flanders, it points out that the water purification programme does not even cover all the bathing areas. As to the Walloon Region, according to the Commission the programme contains no details as to the dates for the start and completion of the work on the infrastructures provided for or as to the exact location of those works.

42. Under Article 189 of the EC Treaty, the Directive imposes on the Member State to which it is addressed the obligation to achieve the required result but, nevertheless, leaves it to the national authorities to choose the ways and means of doing so. The obligation imposed on the Member States by the Directive concerning the quality of bathing water consists of ensuring that the water complies with the limit values fixed in the Directive. In order to achieve that objective, the Member States must adopt measures which may vary according to the circumstances, bathing areas and source of the pollution. These are initiatives which are not specifically regulated and in which the Member States must be allowed to exercise a certain amount of discretion, because of the wide variety of disturbances which may affect bathing water, which is a different situation from the one which appertains in other sectors of Community environmental law. Therefore, any opinion which is formed about the measures adopted by each Member State will, in my view, depend on whether or not those measures have made it possible to achieve the results required by the Directive, which is the subject of the third ground of complaint that I shall consider later.

43. Secondly, the Commission contends that the measures contained in Belgian law for prohibiting bathing in those areas

in which deviations from the limit values established in the Directive are discovered are inadequate. In this regard, it points out that the responsibility for deciding to prohibit bathing lies with the municipal councils, but there is no provision for the issue of a proper report and no guarantee that bathing is prohibited. It adds that the Belgian authorities themselves cannot be certain that the municipal councils take action when the health authorities recommend that bathing should be prohibited, because, in their reply to the reasoned opinion, they merely state that it *appears* that such recommendations are always followed.

44. In their defence the Belgian authorities explain the procedure which is followed, both in Flanders and the Walloon Region. The health authorities notify the mayor of the municipal council, which is responsible for protecting public health and safety, that the limit values have been exceeded. After consulting all the relevant services, the mayor may order the (temporary) suspension of bathing. They add that, to date, the recommendation that bathing should be prohibited has always been followed.

45. In short, the Commission alleges that Belgian national law does not impose on the competent authorities the obligation to prohibit bathing in those areas in which deviations from the limit values established in the Directive have been recorded.

46. In reply to a question put by the Court, the Commission acknowledges that the obligation is not expressly stated in the Directive. However, it maintains that it is to be inferred from Article 1(2)(a) in conjunction with Article 4(1) and interpreting them in the light of the Directive's aim as stated in the first recital of the preamble that the Member States must take all necessary steps to ensure that, within the prescribed periods, bathing is permitted only in water whose quality conforms to the set limit values. Otherwise, the health of bathers would be at risk and the Directive's aim — to ensure that the concept of 'bathing water', that is to say, water in which bathing is allowed, is identified as being water which conforms to the parameters established by the Directive — would not be achieved.

47. There is no basis for this complaint. Although from the point of view of protecting health it is expedient for bathing to be prohibited each time there is deviation from the fixed limit values, the fact is that the Community legislature imposed no such obligation on the Member States in the Directive.

48. In my view, this analysis is confirmed by the proposal for a directive concerning the quality of bathing water which has been submitted by the Commission and which, if approved by the Council, will replace the

directive currently in force.[18] The 15th recital in the preamble to the proposal for a directive states:

'Whereas bathing should not necessarily be prohibited on the ground that water is not in compliance with the limit values laid down in this Directive; whereas, however, in order to protect the health of bathers, it is necessary for Member States to prohibit bathing in any bathing area every time the pollution represents a danger to public health; whereas the said limit values should be taken into account'.

Article 7 of the proposal for a directive provides as follows:

'1. Where pollution constitutes a threat to public health Member States shall prohibit bathing at individual bathing areas. Such a threat shall be deemed to exist in a case of significant deviation from the values specified in column I in Table 1 of Annex I, taking local conditions into account.

2. Unless the prohibition is permanent the water shall still be considered to be bathing water for the purposes of this Directive.

3. Member States which permanently prohibit bathing at individual bathing areas shall forthwith inform the Commission thereof, indicating the reasons why the bathing water cannot be brought into conformity with this Directive's requirements.'

49. We can see that the proposal for a directive adopted by the Commission introduces a new obligation for the Member States which is not present in the Directive currently in force: the obligation to prohibit bathing in polluted areas and to inform the public of the prohibition through the media. Moreover, this new obligation is not imposed categorically, but must be fulfilled only when pollution constitutes a threat to public health, taking local conditions into account. Therefore, we cannot infer that this obligation is already imposed in the Directive whose infringement is the subject of these proceedings.

50. In short, it appears that the Commission is seeking to obtain from the Court a declaration that the Member States are under an obligation which cannot be inferred from the Directive currently in force. This plea must therefore be rejected.

18 — See proposal for a Directive COM/94/36, published in OJ C 112 1994, p. 3, and the amended Proposal for a Directive COM/97/585, which includes some of the amendments of the European Parliament, published in OJ C 6 1998, p. 9.

(c) *Belgium has not achieved the results required by the Directive*

51. In its third ground of complaint, the Commission claims that the results required by the Directive have not been achieved. It cites, in particular, Article 5 which states that bathing water is to be deemed to conform to the relevant parameters if samples of that water, taken at the same sampling point and at the intervals specified in the Annex, show that it conforms to the parametric values for the quality of the water concerned in the percentage of cases specified in paragraph 1 of the Article. [19]

According to the Commission, the report on the quality of bathing water during the 1995 season for the whole of Belgium shows that the proportion of freshwater bathing areas which conformed to the limit values set by the Directive was 41.4%. The corresponding report for the 1996 season indicates that, even if the disputed sites in the Walloon Region are excluded, the proportion is only 85.5%. [20]

52. The Belgian authorities do not dispute the percentages indicated by the Commission. However, they put forward two arguments to justify themselves.

53. In the first place, they maintain that whenever the sampling operations reveal deviations from the limit values, bathing in that area is prohibited after administrative consultation.The area is therefore excluded, temporarily or permanently, from the scope of application of the Directive, so it is therefore not possible to say that this provision has not been observed.

54. Two points need to be made in relation to this. Firstly, I think it is questionable to claim that, if deviations from the limit values fixed by the Directive are recorded in a bathing area, it is enough for a Member State to prohibit bathing in that area for it to be considered that the provision is properly implemented. [21] Secondly, from the procedure followed in Belgium for prohibiting bathing, as described by the Belgian authorities, [22] it emerges that there is no guarantee that

19 — 95, 90 or 80%, depending on the circumstances, with the additional details established in this article of the Directive.

20 — The report for the 1996 season was published in May 1997, after the reasoned opinion, which is dated 27 December 1996, was given. However, the Court has stated that, in actions for failure to fulfil obligations, the Commission may rely on acts which have already been condemned in the reasoned opinions and which have continued subsequently or on acts which, although they have occurred after the reasoned opinions have been given, are of the same kind as those to which the opinions refer and constitute the same conduct (judgment in Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraph 20; see also the Opinion delivered by Advocate General Jacobs in the case which gave rise to the judgment in Case C-198/97 *Commission* v *Germany* [1999] ECR I-3257, point 14.

21 — I recall here the words of Advocate General Lenz: '[...] It should be borne in mind that the directive is intended to protect not only health, but also the environment. If a Member State were permitted simply to prohibit bathing where water becomes increasingly polluted and to cease to treat that water as 'bathing water', only one of those objectives at best would be attained' (Opinion delivered in *Commission* v *Spain*, the judgment in which is cited in footnote 9, point 38).

22 — See point 44 of this Opinion.

bathing is actually prohibited in those circumstances.

55. In any event, this claim by the Belgian authorities is irrelevant in resolving this matter. In fact, it is clear from the reports submitted to the Commission that the Belgian authorities did not issue notification of any bathing prohibition for the 1995 season, and of only one in the Walloon Region for the 1996 season.

56. In the second place, the Belgian authorities contend that it is unrealistic to expect to achieve 100% conformity, in view of the health risks which escape monitoring: illegal dumping, the use of semiliquid fertilisers and the pollution caused by the bathers themselves.

57. First and foremost, I think it is necessary to point out that, with regard to the pollution caused by the bathers themselves, the introduction to the overall report from the Walloon Region on the quality of bathing water for the period 1982 to 1996, which the Commission attaches to its application, states that the samples are taken on working days, not at weekends when the areas are at their busiest. It adds that the pollution caused by the bathers is therefore not taken into account.

58. In any event, this argument of the Belgian authorities cannot be accepted either. As the Court has stated, 'the Directive requires the Member States to take all necessary measures to ensure that bathing waters conform to the limit values set therein, within a period which is longer than that laid down for transposition of the Directive, in order to enable the Member States to satisfy such a requirement [...]. The Directive therefore requires the Member States to ensure that certain results are achieved and, apart from the derogations provided for, does not allow them to rely on particular circumstances to justify a failure to fulfil that obligation [...]'. [23] So, 'even if [...] limit values were exceeded only once in only one season, [...], that too constitutes an infringement of the Directive'. [24] Although the Court has not dismissed the idea that the absolute impossibility of fulfilling the obligations arising from the Directive could justify a failure to comply with it, [25] in this case the Belgian authorities have not established such impossibility.

59. I think, therefore, that this complaint submitted by the Commission should be upheld.

60. Moreover, the first plea of the Commission's second ground of complaint, regarding the inadequacy of the measures taken by Belgium to ensure that the quality

23 — Judgment in *Commission* v *Germany*, cited in footnote 20, paragraph 35.

24 — *Ibidem*, paragraph 34.

25 — *Ibidem*, paragraph 41.

of its bathing water conformed to the limit values fixed in the Directive, must also be upheld. The fact that there may have been deviations from said limit values in several bathing areas provides grounds for inferring that the Belgian authorities have not adopted all the necessary measures to ensure compliance with the content of this Community rule.

IV. Costs

61. Given that the Commissions' grounds of complaint must be upheld on the merits, the unsuccessful party should be ordered to pay the costs, under Article 69(2) of the Rules of Procedure.

V. Conclusion

62. In the light of the foregoing considerations, I propose that the Court of Justice should uphold the application and:

(1) declare that, by not adopting the necessary measures to ensure that the quality of the bathing water conforms to the limit values fixed under Article 3 of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, within a period of ten years from notification of the said Directive, the Kingdom of Belgium has failed to fulfil its obligations under Article 4 of the Directive and Article 189(3) of the EC Treaty;

(2) order the Kingdom of Belgium to pay the costs.