OPINION OF ADVOCATE GENERAL ELMER

delivered on 14 March 1996 *

Introduction

1. In this case the Pretura Circondariale (District Magistrate's Court), Vicenza, has referred to the Court of Justice for a preliminary ruling three questions on the interpretation of Council Directives 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community [1] (hereinafter 'the aquatic environment directive') and 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges [2] (hereinafter 'the cadmium directive').

The relevant Community provisions

2. The aquatic environment directive makes a distinction between two categories of dangerous substances, set out in lists annexed to the directive. List I contains substances which are especially dangerous to the environment because of their toxicity, persistence and bioaccumulation, including cadmium, which occurs as No 6 on the list. Pollution caused by discharge of these substances must be eliminated.

3. With that purpose in view the aquatic environment directive introduces a system requiring prior authorization from the competent authority of the Member State concerned for the discharge of substances included in the list. According to Article 3 of the aquatic environment directive, authorizations for the discharge of substances in List I are to lay down emission standards with regard to the discharge and provisions as to the period within which the discharge may be effected. In the case of existing discharges, the authorization must in addition prescribe a period within which the conditions laid down in the authorization must be complied with.

4. Article 6 of the aquatic environment directive provides that the Council is to lay down limit values for the emission standards for the various dangerous substances included in List I together with quality objectives for the aquatic environment affected by discharges of the substances within the list. The Council is also to lay

* Original language: Danish.

1 — OJ 1976 L 129, p. 23.

2 — OJ 1983 L 291, p. 1.

down limits for the periods within which the conditions laid down in authorizations for existing discharges are to be complied with.

5. In pursuance of Article 6 of the aquatic environment directive the Council issued the cadmium directive which contains limit values and quality objectives for discharges of cadmium. The limit values and time-limits for compliance therewith are laid down in Annex I to the cadmium directive, which fixes various limit values for the various industrial sectors. However, it follows from footnotes 1 and 7 to the annex that limit values for industrial sectors not mentioned in the table are if necessary to be fixed by the Council at a later stage. Until then the Member States are to fix emission standards for cadmium in accordance with the aquatic environment directive. Such standards must not however be less stringent than the most nearly comparable limit value in the annex.

6. According to Article 6 of the cadmium directive Member States are to adopt the measures necessary to comply with the directive within two years following its notification, that is to say at the latest by 24 October 1985.

The national legislation

7. The Italian Government, in pursuance of Law No 428 of 29 December 1990 on provisions with regard to compliance with obligations resulting from Italy's membership of the European Communities (Law on Community Provisions 1990), issued Legislative Decree No 133 of 27 January 1992 on industrial discharge of dangerous substances into the aquatic environment (hereinafter 'the Legislative Decree'), the purpose of which is, *inter alia*, to implement the aquatic environment and the cadmium directives. Article 1 deals with all discharges of dangerous substances belonging to the families and groups of substances listed in Annex A to the Legislative Decree, including cadmium. Annex B to the Legislative Decree contains limit values for emission standards for certain types of undertaking.

8. Under Articles 6 and 7 of the Legislative Decree authorization for discharge of dangerous substances must be obtained from the provincial authorities. The rules distinguish between new and existing plant:

As far as new plant is concerned, the authorities grant authorization for discharge in accordance with the limit values laid down in Annex B. As regards substances for which no limit values are laid down in Annex B, the authorities grant authorization to discharge in accordance with limit values laid down in a special law.

As regards existing plant, the authorities grant authorization to discharge in the case of undertakings for which limit values are laid down in Annex B. For undertakings not covered by Annex B, the system requiring prior authorization to discharge is applied only once ministerial decrees on limit values have been issued under Article 2(3)(b) of the Legislative Decree. As regards this case such ministerial decrees had not yet been issued at the material time.

9. Article 18 of the Legislative Decree contains rules on penalties in the event of infringements of the provisions of the Legislative Decree.

The case before the national court

10. The Public Prosecutor charged Luciano Arcaro with infringement of Articles 5, 7 and 18 of the Legislative Decree for discharging cadmium into the River Bacchiglione without authorization. According to the information given, Mr Arcaro is the proprietor of existing plant not included amongst the undertakings for which limit values for discharges have been laid down in Annex B to the Legislative Decree.

11. Mr Arcaro has contended in the proceedings that his undertaking is an existing plant to which the system of the Legislative Decree requiring prior authorization to discharge does not apply until ministerial decrees giving limit values for this type of undertaking have been issued under Article 2(3)(b) of the Legislative Decree. Such decrees had not been issued at the time the charges were brought.

12. The case is pending before the Pretura Circondariale di Vicenza, which stayed the proceedings by order of 22 April 1995 in order to refer questions to the Court of Justice for a preliminary ruling. It appears from paragraph 8 of the order for reference that the national court sees reason to doubt whether the Italian rules comply with the Community directives. It points out in that connection that the provisions in question exclude the majority of existing plants from the system introduced by the Legislative Decree and that all the Community directives which the Legislative Decree is intended to implement appear on the contrary to require, clearly and unequivocally, a prior, express authorization. The national court refers by way of example to Article 1(2)(d) of the aquatic environment directive and to the cadmium directive.

The questions referred to the Court

13. In those circumstances the national court has referred the following questions to the Court of Justice:

(1) Does Point 8 of this order for reference put forward a correct interpretation of the Community directives which the Legislative Decree is intended to implement?

(2) If the first question is answered in the affirmative, is it possible for direct effect to be given to the Community provisions, in the light of a correct interpretation of Community law, and at the same time for the national provisions which are incompatible therewith to be left unapplied even though the citizen's legal position may as a result be impaired?

(3) If the second question is answered in the negative, what other method of procedure may be adopted under a correct interpretation of Community law to achieve the elimination from national legislation of provisions which are incompatible with those of Community law, where the direct application of the latter would result in an impairment of the citizen's legal position?

The first question

14. The first question is very widely drafted, as the national court refers to conformity between 'the provisions of the Legislative Decree and all the Community directives which the Legislative Decree purports to implement' and mentions only 'by way of example' certain provisions of the aquatic environment and the cadmium directives. Since, however, it appears from the order for reference as a whole that it is the interpretation of those two directives which is relevant in this case, I think the Court of Justice should restrict itself to answering the questions raised as far as those two directives are concerned.

15. In addition it may be seen from the Court's consistent case-law that in giving a preliminary ruling the Court cannot decide whether a national measure is consistent with Community law. The Court may, however, provide the national court with an interpretation of all relevant points of Community law so as to enable that court itself to decide the question of compatibility in the case before it. [3] The first question must accordingly be redrafted.

3 — See most recently Case C-55/94 *Gebhard* [1995] ECR I-4165.

16. With the first question the national court is really asking the Court of Justice to decide whether the relevant provisions of the aquatic environment and cadmium directives must be interpreted as meaning that discharge of cadmium, regardless of whether it is by a new or existing plant, may be effected only where the competent authority in the Member State concerned has granted a prior authorization.

17. The Commission thinks that that question must be answered in the affirmative. On 25 July 1993 the Commission sent a preliminary letter to the Italian Government stating that in its view the aquatic environment and cadmium directives could not be regarded as having been correctly transposed into the Italian legal system by the Legislative Decree. In meetings with the Italian authorities the Commission amplified its views. Not having received an answer from the Italian authorities to the points of criticism discussed at the said meetings, in December 1995, the Commission decided to send the Italian Government a further preliminary letter.

18. The Italian Government has not made any observations in the matter.

19. I must emphasize that it is clear from the sixth recital in the preamble to the aquatic environment directive that:

'... in order to ensure effective protection of the aquatic environment of the Community, it is necessary to establish a first list, called List I ...; any discharge of these substances should be subject to prior authorization which specifies emission standards.'

20. Article 3(1) of the aquatic environment directive provides that all discharges which are liable to contain any of the substances within List I require prior authorization by the competent authority of the Member State concerned.

21. The cadmium directive contains in Article 2(f) and (g) definitions of the expressions 'existing plant' and 'new plant'. That distinction, however, has a significance only for Article 3(4) of that directive, which provides that Member States may grant a discharge authorization for new plants only if those plants apply standards corresponding to the best technical means available.

As far as the aquatic environment directive is concerned, the distinction between existing and new plant has a significance only for Articles 3(3) and 6(4) of that directive. Those provisions specify only the time-limits which the authorities may fix for compliance with the conditions laid down in authorizations for discharge from existing plant.

22. The distinction between new and existing plant thus has a significance only for the content of the authorization but not for the actual requirement for authorization. The system introduced by the aquatic environment directive requiring prior authorization for discharge of dangerous substances is thus compulsory for all discharges of those substances, irrespective of whether the discharge is from new or existing plant.

23. I therefore think that the first question must be answered to the effect that the aquatic environment and the cadmium directives must be interpreted as meaning that discharge of cadmium, whether from new or existing plant, may be effected only if the competent authority in the Member State concerned has granted authorization for it.

The second question

24. By the second question the national court is really asking whether the provisions of the aquatic environment and the cadmium directives to the effect that discharge may be effected only after prior authorization have direct effect, even though the legal position of individuals may be adversely affected as a result.

25. In this connection the Commission has stated that the relevant provisions of the directive do not have direct effect and that if they have not been transposed into a Member State's domestic legal system they may not be applied to the detriment of persons who have effected discharges without authorization.

26. If there is to be any question of the direct effect of provisions of a directive which have not been implemented, the consistent case-law of the Court requires the relevant provisions, as far as their content is concerned, to be unconditional and sufficiently precise. [4] We must therefore consider whether the provisions at issue comply with that requirement.

4 — For example Case 8/81 *Becker* [1982] ECR 53.

27. The aquatic environment and the cadmium directives involve the designation in each Member State of a competent authority to issue discharge authorizations. The competent authority is to lay down, in conjunction with the grant of authorization, emission standards with regard to discharge of the relevant substances into the waters into which the discharge is to be effected, regard being had to the limit values laid down by the Council or the Member State concerned (Articles 3(2) and 5 of the aquatic environment directive). As regards discharges from existing plant, the competent authority is to lay down a time-limit, within the maximum periods laid down by the Council, by which the conditions stated in the authorization are to be complied with (Articles 3(3) and 6(4) of the aquatic environment directive).

28. According to Article 3(3) of the cadmium directive the authorizations referred to in the aquatic environment directive are to contain provisions at least as stringent as those in Annex I to the cadmium directive except in cases where a Member State can prove to the Commission by means of a monitoring procedure set up by the Council that the quality objectives established by the Council are being met and continuously maintained. On the other hand the competent authority may lay down in an authorization more stringent emission standards than those established by the Council if that is necessary in order to meet the quality objectives laid down.

29. The competent authority is thus allowed substantial discretion in issuing discharge authorizations. The said conditions of the aquatic environment and cadmium directives are therefore in my view not unconditional or sufficiently precise to be capable of being recognized as having direct effect.

30. In addition, as the Court has consistently declared, [5] a directive cannot of itself impose obligations on an individual. A directive which has not been implemented in a Member State's internal legislative system cannot, according to that case-law, of itself impose obligations on individuals towards either other individuals or the Member State which has not transposed the directive into its domestic law. Thus the Court has declared, as regards the question of the imposition of penalties for infringement of provisions of directives, [6] that a directive 'cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive'.

5 — See most recently Case C-91/92 *Faccini Dori* [1994] ECR I-3325, at paragraph 20.

6 — Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, at paragraph 14.

31. This case gives no cause to reconsider that case-law. As I have already emphasized the relevant provisions of the aquatic environment and cadmium directives are not unconditional or sufficiently precise to be capable of being recognized as having direct effect. If only for that reason the question must therefore be answered to the effect that the provisions of the aquatic environment and cadmium directives which provide that any person responsible for discharges of cadmium must apply for and obtain an authorization for the purpose cannot, of themselves, and independently of a Member State's national legislation for implementing such provisions, be a basis for determining or aggravating criminal liability for contravention of the said provisions.

The third question

32. With the third question the national court is actually asking how national provisions which conflict with Community provisions may be eliminated from national legislation.

33. The Commission has suggested that the Court's answer to this question should be that: 'It is for the national court to interpret the national legislation applicable in the case as far as possible in the light of the wording and purpose of the directive, though having regard to the principle that when the provisions of the directive have not been implemented in the national legal system the interpretation cannot have the effect of determining or aggravating the criminal liability of the person against whom proceedings are taken.'

34. It seems to me that in this case the national court is actually well aware what the answer to its second question must be, namely that the provisions of the aquatic environment and cadmium directives cannot of themselves, and independently of a national law adopted for their implementation, be a basis for determining or aggravating criminal liability for contravention of those provisions. The question must in those circumstances be understood as a request for a suggestion as to what the court can do in order to make national law conform to Community law.

35. It is naturally not very satisfactory for a national court, possibly after it has referred to the Court of Justice questions for an interpretation of relevant rules of Community law, to have to conclude that national legislation is not in conformity with Community law and that the practical consequence of the judgment it must pronounce is that the physical environment might be polluted by dangerous substances because national legislation does not respect the restrictions on pollution which the rules of Community law

aim to bring into force. It is therefore entirely comprehensible if in such a situation a national court asks what it can do to help make the Member State's legislation conform to Community law.

36. The task of courts is to determine existing law and to give judgment in accordance therewith. The adoption of national legislation, including legislation for the implementation of a directive, is on the other hand a matter for the political authorities of the Member States. It is possible that in the individual Member States there are various rules and various traditions regarding whether and to what extent the courts can draw the attention of the press and the political bodies to the state of the law as determined in the judgments they give. Community law, however, contains no rules on that question and thus involves no restrictions on the use of such measures as may be available to the national courts under national law and the traditions of the individual Member States.

37. The only means offered by Community law to national courts for the avoidance of conflict between national and Community law where a directive which has not been implemented in due time does not have direct effect is the rule of interpretation mentioned by the Commission in its observations to the Court.

38. The Court has declared [7] that

'when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. As the Court held ... in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty'.

39. In that case-law the Court has made it clear that the aforesaid rule of interpretation is to be applied 'so far as possible' in order to interpret provisions of national law in accordance with Community law. That rule of interpretation cannot however be applied so as to undertake an actual redrafting of the provisions of national law. That would be tantamount to introducing the direct effect of provisions of a directive imposing obligations on individuals by the back door and contrary to Article 189 of the Treaty.

40. In other words, if the wording of the national rule allows of several interpreta-

7 — See *inter alia* Case C-334/92 *Wagner Miret* [1993] ECR I-6911, at paragraph 20, and the *Faccini Dori* case (cited in footnote 5), at paragraph 26.

tions, the national court must apply, from amongst the various interpretations, the one which will bring the provision of national law into harmony with Community law. If on the other hand the wording of the law leaves no room for interpretation because for example the law clearly says A, the rule of interpretation cannot be used contrary to the wording of the law so as to say B, even though B (but not A) is in accordance with Community law.

41. The Commission seems to have based the formulation of its proposal for the Court's answer to this question on a more far reaching application of the rule of interpretation which previously found some support in the Court's judgment in *Marleasing* and particularly in the Danish version, where the words 'so far as possible' are not present. [8] The Commission proposes in fact that it should be stated in connection with the rule of interpretation that the national courts must have 'regard to the principle that when the provisions of the directive have not been implemented in the national legal system, the interpretation cannot have the effect of determining or aggravating the criminal liability of the person against whom proceedings are taken'. That addition would in my view be necessary if the rule of interpretation really implied that the national legal rule should, by means of 'interpretation', be brought into line with the directive which was not implemented at the appropriate time even if the national rule raised no doubts of interpretation. Such an 'interpretation' *contra legem* would indeed completely alter the content of the penal provision and the addition proposed by the Commission would then be necessary for complying with the principles of *nullum crimen sine lege* and *nulla poena sine lege*.

42. As already pointed out, however, the rule of interpretation does not make for the possibility of interpreting the rule of national law *contra legem* but only of harmonizing rules where the national provision leaves room for interpretation. In those circumstances the addition proposed by the Commission is unnecessary.

43. That proposed addition is however not only unnecessary but also inappropriate since it would involve interference in the Member State's criminal laws. It must be immaterial whether the result of an interpretation concerning a penal provision is obtained on the basis of a Community obligation or on the basis of other interpretative factors. It is naturally conceivable that the accused has been mistaken about how the relevant rule is to be understood. But that is not an unknown phenomenon as regards criminal legislation in the Member States, and according to the system established by the Treaty it is a matter for national criminal legislation to determine what importance in criminal law is to be attributed to such mistakes of law. As Community law now stands, it can only be assumed to impose a requirement that the legislation of the Member States shall not make a distinction, as regards the importance to be attached in criminal law to mistakes of law, between

8 — Case C-106/89 *Marleasing* [1990] ECR I-4135.

infringements of purely national legislative provisions and infringements of legislative provisions for the implementation of Community rules. [9]

44. In those circumstances I propose that the Court should answer the third question to the effect that every national court, in the interpretation and application of national law, must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. In applying provisions of national law, whether they were adopted before or after the directive, the national court must interpret them as far as possible in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

Conclusion

45. Having regard to the foregoing I propose that the Court should answer the questions referred to it as follows:

(1) Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges must be interpreted as meaning that discharge of cadmium, whether from new or existing plant, may be effected only if the competent authority in the Member State concerned has granted authorization for it.

(2) The provisions of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges, which provide that any person responsible for discharges of cadmium must apply for and obtain an authorization for the purpose cannot, of themselves and independently of a Member State's national legislation for implementing such provisions, be a basis for determining or aggravating criminal liability for contravention of the said provisions.

9 — See in this connection for example Case 68/88 *Commission* v *Greece* [1989] ECR 2965, Case C-326/88 *Hansen* [1990] ECR I-2911 and Case C-36/94 *Siesse* [1995] ECR I-3573.

(3) Every national court, in the interpretation and application of national law, must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. In applying provisions of national law, whether they were adopted before or after the directive, the national court must interpret them as far as possible in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.