OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 7 April 1987 *

Mr President,
Members of the Court,

1. This action against a Member State for failure to fulfil its obligations concerns the implementation in Netherlands law of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances [1] (hereinafter referred to as 'the directive'). The Member States were required to 'bring into force the laws, regulations and administrative provisions necessary to comply' with the directive by 19 December 1981 at the latest. [2]

2. The Government of the Netherlands does not deny that a number of the provisions of the directive have not yet been implemented or have been implemented inadequately. Its main counter-argument is that although there were no formal provisions implementing the directive in Netherlands law, a number of measures giving effect to it in substance had already been adopted. As the Commission stated at the hearing, the Wet Bodembescherming (Law on soil protection) entered into force on 1 January 1987, but its implementing decrees are still in preparation. The defendant government acknowledges this point and hopes that those decrees can be brought into force in the course of this year.

3. The justification put forward by the Kingdom of the Netherlands concerns, in essence, the difficulties encountered as a result of a number of cases of water pollution. In order to deal with the emergency, it argues, priority had to be given to the drafting of temporary provisions, which delayed the adoption of permanent legislation.

4. In that connection the Commission has quite rightly referred to the Court's case-law to the effect that

'a Member State cannot rely on provisions, practices or situations in its internal legal order to justify its failure to comply with its obligations under Community law'. [3]

5. As regards the argument that a number of measures have been adopted which, although not formal implementing measures, give effect to the substance of the directive — in particular the establishment on 15 September 1983 of a multiannual guidance programme for soil protection for the period from 1984 to 1988 (the 'IMP-Bodem'), which, it is argued, implements a large part of the directive — it should be pointed out that

'each Member State must implement directives in a manner which fully meets the requirement of legal certainty and must consequently transpose their terms into national law as binding provisions'. [4]

* Translated from the French.

1 — Official Journal 1980, L 20, p. 43.

2 — Article 21 (1) of the directive.

3 — See, most recently, the judgment of 12 February 1987 in Case 69/86 *Commission* v *Italian Republic* [1987] ECR 773.

4 — Judgment of 2 December 1986 in Case 239/85 *Commission* v *Kingdom of Belgium* [1986] ECR 3645, at p. 3657, paragraph 7.

As the Commission argues, that cannot be said of a planning document which simply lays down guidelines.

6. In order to resolve this dispute a distinction must be drawn, amongst the relevant provisions of the directive, between those where the failure of implementation is admitted (Section I below) and those where it is wholly or partly denied (Section II).

7. *I*—The *first indent of Article 4 (1)* concerns the absolute prohibition of all direct discharge of substances appearing in List I in the annex to the directive. It is admitted that its implementation is inadequate.

8. *Article 4 (2)* concerns possible derogations from the abovementioned prohibition when the groundwater is permanently unsuitable for other uses. The defendant State does not deny that it has failed to implement it but takes the view that there is no breach of its obligations in this respect inasmuch as 'there is no such groundwater in the Netherlands'. Since that situation is not immune to change, the argument cannot be accepted.

9. With regard to *Article 5 (1)*, read in conjunction with the *second indent of Article 4 (1)*, it is not denied that the qualified prohibition on 'the disposal or tipping for the purpose of disposal of . . . substances [in List I]' has not been fully implemented in Netherlands law.

10. As far as *Articles 7 to 12 (1)* are concerned, the Netherlands Government concedes that those provisions, which relate to the prior investigations required by Articles 4 and 5 (in the case of Article 7) and to the conditions subject to which authorization under those articles may be issued (in the case of Articles 8 to 12 (1)), are not yet properly incorporated into Netherlands law, although they are 'largely complied with in substance'.

11. *Article 15* requires Member States to keep an inventory of the authorizations referred to in Articles 4 and 5. The defendant government acknowledges, in the same terms as it did for Article 7 *et seq.*, that the implementation of this article is inadequate.

12. *Article 16 (3)* imposes an obligation of secrecy on Member State civil servants. Although 'complied with in substance', that obligation was not given effect within the requisite period. The Netherlands Government admits as much, but states that Article 69 of the Wet Bodembescherming made good that omission. Whilst confirming that point, the Commission maintains its criticism on account of the delay in implementation and the absence of any official notification of the new provision.

13. Lastly, with regard to *Article 17*, it is acknowledged that Netherlands legislation contains no provision regarding the obligation on the part of a Member State intending to authorize discharges into 'transfrontier' groundwater to inform the other Member States concerned.

14. *II*—The first contentious issue concerns the failure to implement *Article 4 (3)*, which allows Member States, after prior investigation, to authorize discharges due to reinjection into the same aquifer of water used for geothermal purposes, water pumped out of mines and quarries or water pumped out for civil engineering works. The Netherlands Government contends that the mining legislation already in force affords adequate implementation of that

provision. The explanations given at the Court's request, following the hearing, contain no firm evidence that Article 4 (3) has been formally implemented. In particular, it is not specified whether the obligations associated with the system of mining concessions — the texts of which were not produced — entail the prior investigation referred to by the directive.

15. With reference to the requirements of the *third indent of Article 4 (1)* and *Article 5 (2)*, the Commission states that the information on 'appropriate measures' to prevent any indirect discharge of substances in Lists I and II was never supplied to it. The defendant government states that it intends to adopt suitable measures, in particular 'on the basis of the Wet Bodembescherming'. However, it has failed to give any details, either on the measures in question or on their notification to the Commission. On this count as well, therefore, its failure to fulfil its obligations is substantiated.

16. *Article 6* applies to artificial recharges of groundwater and provides for special authorization, to be issued by the Member States on a case-by-case basis, provided that there is no risk of pollution. The defendant government takes the view that Article 14 of the Grondwaterwet (Law on groundwater), which entered into force on 1 March 1984 and prohibits any infiltration of extraneous water into groundwater without the express authorization of the provincial councils, is an adequate implementation of Article 6 of the directive, since the competent authorities are properly informed of their obligations under that article. I agree with the Commission that Article 14 of the Grondwaterwet gives those authorities greater latitude than is envisaged by the directive, and hence that Article 6 is inadequately transposed. Whilst it is probable that, in practice, checks will be carried out to ensure that there is no risk of pollution, the measure required by Article 6 must be transposed into national law in mandatory terms.[5] Since that is not the case, the Commission's criticism in this respect is also well founded.

17. The same does not appear to be true in respect of *Articles 12 (2)* and *13*. These articles are concerned with the monitoring by the competent national authorities of compliance with the conditions laid down in an authorization and with the possible withdrawal of the authorization if the conditions are not observed. The information given to the Court at the hearing provides no grounds for questioning the written reply given by the Commission itself to the question put by the Court: 'the Wet Chemische Afvalstoffen (Law on chemical waste) (Articles 35 (4) and 12 and 13) and the Afvalstoffenwet (Law on waste materials) (Article 46 *et seq.*) contain the requisite provisions on the subject' and that 'comparable provisions are to be found in the Grondwaterwet as far as the authorization of artificial recharges (Article 24 *et seq.*) is concerned'.

18. *Article 18* remains to be considered. It is worded as follows:

'The application of the measures taken pursuant to this directive may on no account lead, either directly or indirectly, to pollution of the water referred to in Article 1.'

Both parties agree that Article 18 serves to preserve the status quo, but they interpret it differently. According to the Netherlands Government, the pollution which Article 18 seeks to prevent can only be that which might arise from the misapplication of measures adopted pursuant to the directive.

5 — See judgment in Case 239/85, cited above, at paragraph 5.

The Commission construes it more broadly, taking the view that it seeks to prevent any aggravation of existing pollution, whatever may be the dangerous substance to which it is attributable. Consequently, the Commission maintains that the article must be specifically implemented.

19. In interpreting Article 18 reference should be made to the definitions in Article 1. Whilst it is clearly stated that 'the purpose of this directive is to prevent the pollution of groundwater by substances belonging to the families and groups of substances in Lists I or II' (Article 1 (1)) and whilst 'direct discharge' and 'indirect discharge' are defined as 'the introduction into groundwater of substances in Lists I or II' (Article 1 (2) (b) and (c)), 'pollution' is defined as 'the discharge by man, directly or indirectly, of substances or energy into groundwater, the results of which are such as to endanger human health or water supplies, harm living resources and the aquatic ecosystem or interfere with other legitimate uses of water'.

20. It follows from the absence of any reference to Lists I and II, and from the express reference to the discharge of energy in addition to the discharge of substances, that the concept of pollution cannot be restrictively interpreted so as to refer only to the harmful effects of discharging the substances set out in Lists I and II. Article 18 requires Member States to prevent any pollution of the 'water which is below the surface of the ground in the saturation zone and in direct contact with the ground or sub-soil' (Article 1 (2) (a)) due to the discharge of harmful substances or energy which might arise from the application of measures adopted pursuant to the directive. The directive thus entails a constraint on the choice of methods, which takes the form of an obligation which must be expressly included — and hence implemented — in national legislation.

21. Consequently, I conclude that the Court should:

Declare that the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty by failing to implement within the prescribed period Articles 4 to 12 (1), 15, 16 (3), 17 and 18 of the Council Directive of 17 December 1979;

Order the defendant State to pay the costs.