OPINION OF ADVOCATE GENERAL LENZ

delivered on 21 January 1992 *

Mr President,
Members of the Court,

A — Introduction

1. The present Treaty infringement proceedings against the United Kingdom (hereinafter 'the defendant') relate, according to the Commission's application, to the incomplete implementation in national law of Council Directive 80/778/EEC relating to the quality of water intended for human consumption [1] and the exceeding, in certain areas of the United Kingdom, of the maximum concentrations of nitrates and lead in water permitted by the directive.

2. At the stage when the application was brought the complaint concerning the absence of binding provisions for implementation of the directive related first to the fact that the provisions of the Water Act 1989 were inapplicable in Scotland and Northern Ireland. Secondly no national provisions had been adopted with regard to water used for the food industry.

3. As the Commission acknowledges, the relevant provisions entered into force in Scotland during the course of the procedure before the Court. Moreover, by the date of the hearing on 27 November 1991 the required provisions concerning water used for the food industry had also been adopted. As regards the purely formal implementation of the directive in national law, there remains only the complaint concerning the lack of provisions applicable to Northern Ireland.

4. The Commission nonetheless adheres to all the claims in its application on the ground that there was a significant delay in formal implementation of the directive.

5. The defendant first of all raises an objection of inadmissibility on the ground that the Commission in its application unlawfully broadened the scope of the dispute as defined by the pre-litigation procedure. It observes that in its letter of formal notice the Commission claimed that the United Kingdom had failed to adopt binding provisions concerning the quality of water from private supplies. According to the defendant, the complaint made expressly in the application that the United Kingdom had failed to enact implementing provisions for water used in the food industry goes beyond the scope of the dispute as defined by the pre-litigation procedure and is therefore inadmissible.

6. In its rejoinder the defendant, in the light of events which occurred after the submission of its defence, contends that the applica-

* Original language: German.

1 — Council Directive of 15 July 1980, OJ L 229 of 30 August 1980, p. 11.

tion is entirely inadmissible in so far as the Commission claims that the directive was not implemented by binding legal provisions. The defendant observes that, whereas the letter of formal notice only complains of the lack of binding provisions for water from private supplies, the complaint is extended to supplies in general in the reasoned opinion and in the application. According to the defendant, the judgment in Case C-42/89, [2] which was delivered after the defence was submitted in these proceedings, shows that the letter of formal notice is based on a mistake of law; in that case the Court held that the directive was not applicable to water from private sources.

7. On the question of the admissibility of the application the Commission takes the view that it narrowed the scope of the dispute by comparison with the pre-litigation procedure.

8. The Commission claims that the Court should:

(1) declare that

— by failing to adopt within the period prescribed the laws, regulations and administrative provisions necessary to comply with Directive 80/778/EEC relating to the quality of water intended for human consumption, and

— by failing to ensure that within the period prescribed the quality of such water complied with the directive with respect to nitrates and lead,

the United Kingdom has failed to fulfil its obligations under the Treaty;

(2) order the United Kingdom to pay the costs.

9. The United Kingdom contends that the Court should:

(1) with respect to the allegation that the United Kingdom has failed to implement the directive by binding provisions, reject the application as being inadmissible to the extent that it alleges a failure to implement the directive with respect to water used for food production;

or in the alternative,

reject the application as being unfounded to the extent that it alleges a failure to implement the directive with respect to water used for production as regards the second part of Article 3 concerning the 'values for other parameters':

(2) in the light of circumstances arising after the lodging of the defence, reject the application as being inadmissible in its entirety in respect of the Commis-

2 — *Commission* v *Belgium* [1990] ECR I-2821, paragraph 23.

sion's allegations relating to the alleged failure of the United Kingdom to implement the directive by binding measures;

(3) with respect to the allegations of the Commission regarding the measures taken by the United Kingdom to secure compliance with the nitrate and lead parameters, reject the application;

(4) order the Commission to pay the costs.

10. Reference is made to the Report for the Hearing for the legal background to the case and the arguments of the parties. I shall mention only those matters that are necessary for my reasoning.

B — Opinion

I. *Admissibility*

11. I turn first to the defendant's objection that the application enlarges the scope of the dispute by comparison with the pre-litigation procedure, with the result that part of the application is inadmissible. It is necessary to distinguish between two separate objections. First, there is the objection made in the defence as to the claim concerning the lack of binding provisions for water used in the food industry. The second objection, made in the rejoinder, concerns the complaint regarding non-implementation of the directive by domestic provisions in general.

12. The defendant contends that the first complaint was put forward for the first time in the application and therefore goes beyond the scope of the dispute as defined by the pre-litigation procedure; in relation to the second point it argues that both the reasoned opinion and the application had a different substantive content from the letter of formal notice of 11 August 1987, which for its part was based on a mistake of law.

13. In order to appraise the validity of these arguments, it is necessary first to examine the extent to which the scope of the dispute as defined in the application is determined by the various stages of the pre-litigation procedure. It is apparent from the relevant case-law that the Court to some extent distinguishes between the letter of formal notice and the reasoned opinion and lays down different requirements regarding the degree of precision.

14. In its judgment in Case 274/83, [3] for example, the Court stated that it followed from the purpose assigned to the pre-litigation stage of the Treaty infringement procedure that the letter of formal notice was intended to define the subject-matter of the dispute and to indicate to the Member State the factors enabling it to prepare its defence. [4]

15. The Court added that the reasoned opinion had to contain a coherent and detailed statement of the reasons which led the Commission to conclude that the Member State in question had failed to fulfil one of its obligations under the Treaty; however, the Court

3 — *Commission* v *Italy* [1985] ECR 1077.

4 — See paragraph 19 of the judgment.

could not impose such strict requirements as regards the initial letter, which of necessity contained only an initial brief summary of the complaints. There was therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it had already made more generally in its initial letter. [5]

16. As I understand the judgments in Cases 74/82 and 274/83, the Commission is entitled in the reasoned opinion to put forward further and new grounds for the Treaty infringement alleged in the letter of formal notice. That also means that the arguments put forward in the letter of formal notice are not exhaustive.

17. In apparent contradiction to those decisions are the judgments in which the Court focuses solely on the letter of formal notice or the reasoned opinion. [6] In these cases the emphasis is on the requirement that the Member State concerned should have sufficient opportunity to comment on the complaints and obtain sufficient information to prepare its defence. In both Case 211/81 and Case 229/87 the objections of inadmissibility were dismissed on the ground that the Member State concerned was in a position to comment on the complaints made.

18. The Court came to a different decision in Case 51/83. It should however, be noted that in that case the factual complaints made against the Member State by the Commission in the reasoned opinion were quite different from those made in the letter of formal notice. The Commission could not therefore be regarded as describing in greater detail or providing further support for a previously alleged infringement.

19. The same applies to Case 31/69, in which events which occurred after the letter of formal notice had been served were excluded from the scope of the dispute.

20. It cannot be inferred from those decisions that the letter of formal notice definitively determines the subject-matter of the Treaty infringement procedure.

21. In addition to those judgments, which focus on the letter of formal notice, there is a series of judgments in which the emphasis is placed on the reasoned opinion and its relationship to the application. [7] These judgments are relevant to the appraisal of the defendant's objection that the complaint concerning non-implementation of the directive in respect of water used in the food industry was raised for the first time in the application. In Case C-166/82 the Court held that the Commission's reasoned opinion and the application must be founded on the same grounds and submissions. Other judgments [8] state simply that the application may

5 — See Paragraph 21 of the judgment and see also the judgment in Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraph 20.

6 — Judgment in Case 31/69 *Commission* v *Italy* [1970] ECR 25; judgment in Case 211/81 *Commission* v *Denmark* [1982] ECR 4547; judgment in Case 51/83 *Commission* v *Italy* [1984] ECR 2793; judgment in Case 229/87 *Commission* v *Greece* [1988] ECR 6347.

7 — See judgment in Case 166/82 *Commission* v *Italy* [1984] ECR 459; judgment in Case C-217/88 *Commission* v *Germany* [1990] ECR I-2879; and judgment in Case C-347/88 [1990] ECR I-4747.

8 — Cases C-217/88 and C-347/88.

only be based on submissions which were put forward in the reasoned opinion.

22. Finally, in a series of judgments the Court considers the pre-litigation procedure as a whole. [9] The scope of the action cannot be widened after the pre-litigation procedure has ended. [10] The letter addressed by the Commission to a Member State formally inviting it to submit its observations and the reasoned opinion delivered by the Commission constitute an essential guarantee provided by the Treaty; compliance with that guarantee is an essential formal requirement of the procedure for establishing a Treaty infringement by a Member State. [11]

23. For the purpose of determining in a particular case what complaints are included in the scope of the dispute as defined by the pre-litigation procedure, it is necessary to form a synthesis combining a purely formal approach focusing on what facts and conclusions are expressly mentioned with an analysis which is based on the meaning and purpose of the pre-litigation procedure and looks at whether the defendant Member State had the opportunity to comment on specific complaints or was unable to do so owing to the time at which the events took place or to an element of surprise in the Commission's arguments. The approach which lays emphasis on the procedural guarantees provided by the pre-litigation phase can modify the results produced by a purely formal examination.

9 — See judgment in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203; judgment in Case 166/82 *Commission* v *Italy* [1984] ECR 459; judgment in Case 325/82 *Commission* v *Germany* [1984] ECR 777; judgment in Case 309/84 *Commission* v *Italy* [1986] ECR 605; judgment in Case 298/86 *Commission* v *Belgium* [1988] ECR 4343.

10 — See Case 309/84, paragraph 14.

11 — See for example Case 325/82, at paragraph 8.

24. Against that theoretical background I now turn to the defendant's objection that the Commission introduced for the first time in its application the complaint that no binding provisions concerning water used in the food industry had been enacted and that this complaint should be excluded from the scope of the dispute.

25. The defendant argues that the question of water used in the food industry is covered by the second indent of Article 2 and Article 3 of the directive, whereas the complaints made in the letter of formal notice and in the reasoned opinion related only to the first indent of Article 2.

26. On this question it should first of all be noted that neither the letter of formal notice nor the reasoned opinion appears to refer expressly to the first indent of Article 2 or to restrict itself to that provision. Both documents refer generally to Directive 80/778 and provide examples and put forward arguments to demonstrate the alleged inadequate implementation. The letter of formal notice of 11 August 1987, for example, states as follows:

'The Commission is of the opinion that the measures taken in the United Kingdom in order to implement Directive 80/778, namely those under the Water Act 1973, which provides that drinking water has to be "wholesome", and the relevant circulars, are not sufficient for the following reasons: According to the information given by the United

Kingdom authorities, there are more than 80 000 private water supplies in the United Kingdom. ... Private water suppliers are neither addressed by circulars nor are they under any obligation to follow the instructions laid down by them.'

27. The letter first of all states that the Commission is of the opinion that Directive 80/778 has not been adequately implemented. That claim is supported by the example of private suppliers, to whom the national provisions in force are inapplicable. It cannot be inferred, however, that the complaint is restricted to that group of potential addressees of the domestic implementing provisions. That is apparent from the following passage of the letter, which is again formulated in general terms:

'The reliance on possible legal proceedings in which a United Kingdom Court may or may not interpret the relevant provisions of the Water Act 1973 so as to give effect to Directive 80/778 as regards the particular case before the Court creates a system of legal insecurity and therefore cannot be regarded as an adequate implementation of the directive. Sine neither the Water Act 1973 nor the circular in question correctly transpose the directive, it follows that the UK has to take additional legally binding measures in order to transpose correctly the directive.'

28. In the reasoned opinion of 14 April 1989 the statements regarding the inadequate implementation of the directive are formulated even more generally. The opinion states that

'In its letter of formal notice the Commission pointed out that the provision in the Water Act 1973 (which provides that drinking water has to wholesome) and various circulars issued by the Department of the Environment are not sufficient. They do not transpose the specific requirements of the directive into national law. Nor do the different circulars impose legal requirements, particularly in respect of private suppliers, of which there are a large number in the United Kingdom.'

29. The only reference to private suppliers in the entire passage is the phrase 'particularly in respect of private suppliers'.

30. Both formal letters sent during the pre-litigation procedure seem to contain a general complaint concerning inadequate implementation of Directive 80/778. Neither explicitly nor implicitly is the scope of the dispute restricted to the first indent of Article 2 of the directive. Even if the lack of binding quality rules for water used in the food industry was expressly referred to for the first time in the application, that does not mean that that issue falls outside the scope of the dispute as defined by the pre-litigation procedure. In so far as the Commission complains of the inadequate implementation of

the directive as a whole, its complaint includes the second indent of Article 2 and Article 3, particularly since nowhere in the pre-litigation correspondence are specific articles of the directive singled out as being inadequately implemented.

31. The Commission's contention in the application concerning 'water used in the food production industry' is not a new submission for the purposes of the Court's case-law [12] when it specifies in more detail the complaint concerning the lack of binding implementing provisions previously put forward in abstract terms.

32. The defendant also had the opportunity to comment on the Commission's general complaint concerning inadequate implementation of the directive. Its rights of defence were therefore not improperly restricted.

33. For those reasons the submission concerning water used in the food industry must be regarded as admissible.

34. On the matter of admissibility there remains the further claim that the scope of the dispute was unlawfully extended to public supplies.

35. The defendant argues that the letter of formal notice related solely to legislation concerning private supplies. According to the defendant, the scope of the dispute was extended to provisions imposing obligations on public suppliers only by the reasoned opinion.

36. As is apparent from my examination of this point in connection with water used in the food industry, the terms of the letter of formal notice do not appear to be limited in this way. The reasoned opinion contains no new submission with regard to the lack of binding implementing provisions. With respect to the limits placed on the scope of the action by the letter of formal notice the Court has emphasised that the main concern is to safeguard the rights of defence of the Member State concerned. Even if the letter of formal notice may have been misleading with respect to the addressees of the binding provisions to be adopted, the reasoned opinion, which merely defines more closely the complaint already made, was more clearly formulated so that the defendant also had ample opportunity to comment at this point.

37. The defendant's claim that the letter of formal notice is based on a mistake of law does not in any way alter that conclusion. It is true that in its judgment in Case C-42/89 the Court held that the directive did not impose obligations in respect of water from private sources, because it applied to water suppliers of a certain size specified by the directive.

12 — See Cases C-217/88 and C-347/88, cited above.

38. First, it is apparent from the foregoing discussion that the letter of formal notice is not to be interpreted as being limited to private suppliers. Secondly, the judgment was not delivered until after the defence had been lodged in this case, which for purely factual reasons suggests that it did not induce the Commission to modify its submissions during the pre-litigation procedure.

39. The defendant's objections of inadmissibility must therefore be dismissed.

40. On the question of admissibility it nonetheless remains to be considered to what extent there subsists an interest capable of legal protection when it is common ground that by the date of the hearing the defendant had enacted nearly all the legal provisions for implementation of the directive. The only remaining point concerns the legislation applicable to Northern Ireland.

41. According to a consistent line of decisions of the Court, where a Treaty infringement is eliminated after expiry of the period laid down by the Commission pursuant to the second paragraph of Article 169 there remains a legal interest in the continuation of the proceedings. That interest may consist in providing a basis for the liability of a Member State for its Treaty infringement with respect to another Member State, the Community or individuals. [13]

42. The action is therefore admissible in its entirety.

II. *Substance*

1. Failure to enact binding provisions to implement Directive 80/778

43. Directive 80/778 imposes obligations with various objectives. It imposes first of all the normal obligation under a directive to implement the directive by domestic provisions. That obligation is expressly laid down in Article 18 of the directive, which provides:

'A Member State shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive and its annexes within two years following its notification.'

In the case of legal obligations intended to bring about physical changes in the environment the adoption of legal provisions is not in itself sufficient to achieve the objectives sought.

13 — See most recently Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 28 (which contains further references); as regards claims for damages by individuals against a Member State in respect of non-implementation of a directive, the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* v *Italy* [1991] ECR I-5357.

44. The defendant makes numerous references to this point in its arguments. The Community legislature took account of this by imposing on Member States under Article 7(6) of the directive the duty to take all necessary steps 'to ensure that water intended for human consumption at least meets the requirements specified in Annex I' whilst allowing them under Article 19 of the directive a period of five years to ensure that the quality of water intended for human consumption complied with the directive.

45. The relevant period for the complaints concerning the failure to adopt binding legal provisions to implement the directive is therefore the two-year period laid down by Article 18 of the directive. For the purposes of the factual discrepancy between the quality requirements of the directive and the sampled water, reference must be made to the five-year period laid down by Article 19 of the directive.

46. The directive was adopted on 15 July 1980 and notified to the United Kingdom on 18 July 1980. The period for formal implementation of the directive therefore expired on 18 July 1982. The present Treaty infringement procedure commenced formally about five years later. The letter of formal notice was dated 11 August 1987. Two further years elapsed before the application was made to the Court.

47. If the pre-litigation correspondence is interpreted in the manner set out in my discussion of the admissibility of the application, the letter of formal notice and the reasoned opinion are to be understood as complaining of the non-implementation of the directive by binding legal provisions in general. In its application to the Court the Commission took account of the steps taken in the meantime to adopt the relevant provisions. The Water Supply (water quality) Regulations 1989 entered into force in England and Wales partly on 1 September 1989 and partly on 1 January 1990. Consequently, the Commission limited its claims to the absence of binding provisions applicable to Scotland and Northern Ireland. In addition it objected to the fact that the legislation that had been adopted applied only to water used for domestic purposes and not to water used in the food industry. The Commission's claim that it restricted the scope of the application by comparison with the pre-litigation procedure is therefore correct.

48. By comparison with the general complaint of non-implementation the application is first of all more limited in its material scope. The Commission considered that the provisions concerning water used for domestic purposes had been correctly enacted and that its complaint had been dealt with on that point. The inapplicability of the rules to water used in the food industry is only one of the matters to be resolved. The reason why this matter was not dealt with in the water legislation that was enacted may be

that the legislative provisions necessary for the food industry are addressed to a different category of persons and in part involve less strict quality requirements (second indent of Article 2 and Article 3 of the directive).

49. Neither those considerations nor the fact mentioned by the defendant that water supplied to the food industry represents only 1% of total water supplies justify the failure to implement the directive in this respect. Even the defendant's argument that water used for domestic purposes and water used in the food industry often come from the same sources does not lead to a different view since the defendant itself states that it is nonetheless possible for water supplied specifically for the food industry not to be subject to quality requirements conforming to the directive.

50. That a lacuna in the legislation existed is demonstrated by the subsequent enactment of the Food Safety Act 1990 which, as the Commission acknowledges, remedied the lacuna. Since the implementation period provided for by Article 18 of the directive expired on 18 July 1982 and the period laid down in the reasoned opinion on 14 June 1989, the Food Safety Act 1990 was undoubtedly enacted too late. It is clear that there was a Treaty infringement on this point.

51. In its application the Commission accepted that, apart from the restriction concerning water used in the food industry, the Water Supply Regulations 1989 correctly implemented the directive in England and Wales. By restricting its complaint to Scotland and Northern Ireland the Commission limited the geographical scope of its original complaint. The enactment of the relevant provisions for Scotland during the Court proceedings was clearly too late. It is therefore also clear that there was a Treaty infringement on account of inadequate or delayed implementation of the directive in Scotland and Northern Ireland.

2. Failure to comply with the nitrate parameter in certain regions of England

52. The Commission complains that in 28 water supply zones in England the maximum admissible concentration of nitrate (50 mg/l according to parameter 20 of Annex I C of the directive) is exceeded. It claims that the United Kingdom has therefore infringed its obligations under the directive.

53. The findings of fact are not contested by the defendant. The parties merely disagree about the legal consequences of those findings. The Commission considers that the maximum admissible concentrations laid down by the directive are absolute limits, so that if the limits are exceeded there is automatically an infringement of the directive; the defendant, on the other hand, takes the view that the directive merely imposes the obligation to take all practicable steps. According to the defendant, there is no Treaty infringement where the Member State cannot keep within the parameters laid down

by the directive despite taking all possible steps to do so. A Member State cannot, in its view, be held responsible for the conduct of third parties or the state of the physical environment which is outside of its control. The dispute between the parties raises the question whether Article 7, in conjunction with Article 19, of the directive imposes an obligation to achieve a result or merely an obligation to take certain action which may be satisfied even where the desired result is not achieved.

54. In the alternative the defendant argues in its defence that it may claim an extension of the implementation period under Article 20 of the directive. Article 20 allows the five-year period laid down in Article 19 for complying with the limits and guide levels contained in Annex I to be extended upon receipt of a special request.

55. Since the defendant did not submit any express request, it suggests to the Court that it is possible to re-classify a communication to the Commission concerning the unilateral grant of derogations from the directive under Article 9. Since that communication was itself not made until October 1985, that is to say after expiry of the five-year period laid down by Article 19 of the directive, the defendant seeks to rely on a legitimate expectation allowing recourse to Article 20 that is said to have arisen during the pre-litigation phase. The defendant argues that for two years the Commission raised no objection to the use of Article 9 to grant derogations; the defendant could therefore assume that it was entitled to grant the derogations and saw no need to make a formal application under Article 20 of the directive.

56. The first issue to be resolved in connection with the question of the high nitrate concentration is the legal nature of the obligations. I have already stated that the directive imposes different kinds of legal obligations. In this case the obligation is to achieve certain physical results, that is to say a specifically defined quality standard for water intended for human consumption. That obligation stems from Article 7, in conjunction with Article 19; for compliance with that obligation Member States were given in principle three years more than for the implementation of the directive. That fact alone points to the conclusion that the aim of the directive is to achieve a result defined by the directive.

57. Moreover, the preamble states as follows:

'Whereas, in view of the importance for public health of water for human consumption,

it is necessary to lay down quality standards with which such water *must* comply.' [14]

'Whereas the values fixed for certain parameters *must* be equal to or lower than a maximum admissible concentration.' [15]

58. The first indent of Article 7(3) of the directive provides that:

'The values to be fixed by the Member States *must* be less than or the same as values shown in the "maximum admissible concentration".' [16]

59. The above wording points to an unconditional obligation.

60. That the directive itself makes provision for derogations in Articles 9, 10 and 20 leads, in the defendant's view, to the conclusion that the obligations in the directive to achieve certain results cannot be absolute. The defendant considers that in interpreting the provisions of the directive the Court should recognize, as it does for example in the case of Article 30 of the EEC Treaty, that there are inherent limits on the scope of the legal obligations.

61. In my view it may be said in reply to that submission that the very existence of derogating rules suggests that no further exceptions may be made beyond those expressly provided for. According to the consistent case-law of the Court and a general principle of law, exceptions are generally to be interpreted strictly. As regards the exceptions in Directive 80/778, the Court held in Case 228/87: [17]

'Derogations from the directive are permitted only under the conditions provided for in Articles 9, 10 and 20 thereof. These provisions must be interpreted strictly.'

62. To that may be added the fact that Annex 1 itself modifies to some extent the absolute character of the maximum admissible concentrations laid down in that Annex in so far as the 'comments' qualify individual parameters. Article 7(5) of the directive indicates the importance of the comments in interpreting the values. This is not inconsistent with the unconditional nature of the maximum values since those values are expressly limited by the comments as part of the directive.

63. As regards the argument concerning inherent limitations, it must be pointed out that Articles 30, 36 and 59 of the EEC Treaty to which the defendant refers are provisions with constitutional status for the Community. In no way does it follow that principles applied for the purpose of interpreting those rules must also be used for interpreting secondary law. Since the Community legislature takes account of the different nature of legal provisions by providing for express exceptions, recourse to the criterion of inherent limitations in order to justify further exceptions is questionable.

14 — My emphasis (OJ 1980 L 229, p. 11).

15 — Ibid. (my emphasis).

16 — Ibid. (my emphasis).

17 — *Criminal proceedings against X* [1988] ECR 5099, at paragraph 10.

64. In support of its view the defendant argues that, if the obligation to achieve certain results laid down by the directive were to be regarded as absolute, any case in which the maximum admissible concentration was exceeded by chance or *force majeure* would constitute an infringement of the directive. That that is not so is shown by Article 10 of the directive, which permits the maximum admissible concentrations to be exceeded for a limited period and under certain conditions in the event of emergencies. Article 9 of the directive makes provision for further unilateral derogations in the event of 'exceptional meteorological conditions'. Moreover, it is not inconsistent with the nature of directives that a Member State should assume responsibility for circumstances over which it has no direct control.

65. If therefore the defendant was in principle obliged to ensure that the nitrate values were observed throughout its territory, there remains the question whether it may rely on one of the exceptions in the directive.

66. In this connection the exception provided for by Article 20 of the directive falls to be considered. Under that provision Member States may 'submit a special request to the Commission for a longer period for complying with Annex 1'. It is common ground that the defendant submitted no express request.

67. The defendant argues that all substantive conditions for granting the derogation are fulfilled, so that it must nonetheless be able to rely on the provisions. In response to that argument it must be pointed out that the submission of the request is an essential procedural requirement which must be met in order to take advantage of the exception. The written request must set out the 'difficulties experienced' together with 'an action program with an appropriate timetable to be undertaken for the improvement of the quality of water intended for human consumption' (Article 20, second paragraph, of the directive). Only a request made in that form allows the Commission to carry out the required examination (Article 20(3)). Compliance with such formal requirements may be expected of a Member State, since the responsible authorities are informed about compliance with the necessary formalities.

68. It is, however, questionable whether the notification of the derogations granted unilaterally under Article 9 of the directive can be construed as a request under Article 20 of the directive. The defendant assumed that Article 9 of the directive constituted the relevant legal basis for the grant of derogations from the nitrate values. Indeed it had grounds for doing so since at the time neither the Commission nor the authorities of other Member States could agree whether Article 9 could be used in the event of nitrate values being exceeded. Following notification of the derogations granted for certain areas in the United Kingdom the Commission took two years to come to a view on the matter and to communicate it to the defendant.

69. Before the actual question of reclassification of the communication arises, it must be borne in mind that the communication under Article 9 was submitted to the Commission in October 1985. According to the Court's case-law, however, it would have been necessary for a request under Article 20 to have been submitted within the period laid down by Article 19 of the directive, that is to say before 19 July 1985. After expiry of that period derogations were possible only in the event of emergencies and under the conditions laid down by Article 10 of the directive. [18] Strict compliance with the formal requirements is therefore also necessary in this connection.

70. The position might be different only if the Commission had created a legitimate expectation that it was waiving compliance with the formal requirements and time limits. The defendant's argument that the Commission consented to the use of Article 9 is to be understood in that sense.

71. Against that it may be argued that the United Kingdom had recourse to Article 9 and communicated the grant of derogations under Article 9 after the time limit of 18 July 1985. Moreover, there was uncertainty surrounding the correctness of that course of action. When the Commission finally informed the defendant of its view that derogations could not be granted under Article 9 in cases where the nitrate values were exceeded, the defendant revoked the derogations without objection.

72. There might possibly have been scope for pleading a legitimate expectation if the discussions between the parties concerning the applicability of Article 9 had taken place *before* 19 June 1985. Under the circumstances the defendant's argument must be rejected. It must be concluded that there was a Treaty infringement on account of the nitrate values under parameter 20 of the directive being exceeded in 28 water supply zones.

3. Failure to comply with the lead parameter in certain regions of Scotland

73. The Commission contends that in certain water supply zones in Scotland the maximum concentration for lead is not complied with. The defendant, on the other hand, takes the view that the water in the 17 zones in question does comply with the lead requirements.

74. As regards the facts underlying the dispute, it appears from Annex 32 to the defence that of 204 flushed samples 9 (4%) had a lead content of 50 to 100 µg/l and 4 (2%) exceeded the 100 µg/l limit. At the time of the application four out of 151 samples lay within the range 50-100 µg/l and

18 — Case C-42/89, above at paragraph 23; see also the Opinion in that case, paragraph 22 et seq.

two above 100 µg/l. Further details concerning the result of the samples taken are given in the Report for the Hearing.

75. The question whether in such circumstances the requirements of the directive were met depends on the interpretation to be given to the 'comments' concerning the parameter for lead in Annex 1 to the directive. The parties disagree about the interpretation of those comments, which read as follows:

'Where lead pipes are present, the lead content should not exceed 50 µg/l in a sample taken after flushing. If the sample is taken either directly or after flushing and the lead content either frequently or to an appreciable extent exceeds 100 µg/l, suitable measures must be taken to reduce the exposure to lead on the part of the consumer.' [19]

76. The Commission takes the view that notwithstanding that comment the limit for lead is to be understood as an absolute limit of 50 µg/l. It interprets parameter 51 for lead and the accompanying comment as follows: In the case of samples taken from flowing water or flushed water the absolute limit of 50 µg/l must be observed. For direct samples, that is to say for samples which are taken immediately after water has been standing in lead pipes or tanks, the 100 µg/l limit applies; where that limit is exceeded suitable measures must be taken to reduce the exposure to lead on the part of the consumer.

77. The defendant, on the other hand, argues that the comment modifies the 50 µg/l maximum admissible concentration.

78. In keeping with the view expressed earlier that exceptions from the directive must flow from the directive itself, it is entirely conceivable that the comments may in individual cases give another meaning to the otherwise absolute limits. It therefore depends on the wording of the comment. The first sentence of the comment does not establish an absolute limit. It states that in the case of lead pipes the lead content *should* [20] not exceed 50 µg/l in a sample taken after flushing. The second sentence is even clearer. In the case of both alternatives, namely *direct* sampling or sampling *after* flushing, where the lead content either *frequently* or *to an appreciable extent* exceeds *100 µg/l* an obligation to act is imposed, namely to take suitable measures to reduce the exposure to lead on the part of the consumer. Neither the first

19 — Translator's note: In the original German text of the Opinion this footnote reproduces the English text of the comments.

20 — My emphasis.

sentence of the comment nor the second sentence nor the comment as a whole suggests an obligation to achieve a result.

79. The Commission's interpretation is contrary to the clear wording of the comment, since the obligation to take suitable measures where the lead content either frequently or to an appreciable extent exceeds 100 µg/l applies not only to direct samples but also ('or') to samples taken after flushing. In the case of lead pipes, the 50 µg/l limit is therefore to be understood as a mere guide level, whereas an obligation to take action arises where the 100 µg/l is exceeded (but only where it is exceeded frequently or to an appreciable extent). Because these values expressly apply only in the case of lead pipes, the value of 50 µg/l in the 'maximum admissible concentration' column remains valid as an absolute limit but applies only in the case of pipes other than lead pipes.

80. On that understanding of the directive the defendant would only have infringed the directive if the samples had exceeded the lead content limit of 100 µg/l frequently or to an appreciable extent *and* the defendant had not adopted measures 'to reduce the exposure to lead on the part of the consumer'.

81. In my view it is extremely doubtful whether it can be said that the 100 µg/l limit is exceeded frequently where it is exceeded in 2% of cases. From the arguments concerning the applicability of Article 20 in connection with the lead parameters it may be inferred — regardless of whether Article 20 may actually be relied upon — that the defendant has taken and continues to take measures to reduce exposure to lead. It does not appear therefore that the defendant has infringed parameter 51 of the directive.

82. It is therefore unnecessary to consider the question of the burden of proof and the various issues arising from Article 20. I therefore do so merely in the alternative.

83. The Commission takes the view that the defendant has not shown that it complied with the parameter in question. To do so it would be necessary to show the number of flushed samples taken per household in which lead pipes are present and the proportion of those samples which failed to comply with the 100 µg/l limit. In addition it would be necessary to indicate to what extent the limit was exceeded in each case. Only on the basis of such information could it be claimed that, where lead pipes are present, the lead content does not exceed the 100 µg/l limit frequently or to an appreciable extent.

84. The Commission's claims are based on a misunderstanding of the applicant's burden of proof in Treaty infringement proceedings. It is for the Commission to allege and prove that the parameters were not complied with

when it institutes proceedings in respect of a Treaty infringement. As regards the claim regarding samples per household, reference may simply be made to Article 12(2) and Annex II to the directive, which lay down clearly the place and frequency of the samples. There can be no question of taking samples in each household.

85. Finally I would like to make a comment concerning the applicability of Article 20. In view of my remarks concerning the importance of the formal requirements and time limits, it is sufficient to point to the lateness of the request submitted in August 1985. The result of my examination of the complaint concerning failure to comply with the lead parameter is not affected by the comments set out in the alternative. No Treaty infringement can therefore be established.

Costs

86. In the light of my proposed solution the Commission would essentially succeed in its costs claim. In view of the substantial delay in implementation of the directive I therefore propose that, notwithstanding the fact that the interpretation of the lead parameter is favourable to the defendant, the defendant be ordered to pay all the costs.

C — Conclusion

87. In view of the foregoing I therefore propose that the Court decide as follows:

(1) The United Kingdom has failed to fulfil its obligations under the EEC Treaty by:

(a) failing to bring into force within the prescribed period all the laws, regulations and administrative provisions necessary to comply with Council Directive 80/778/EEC relating to the quality of water intended for human consumption, and

(b) failing to ensure that within the prescribed period the quality of water was brought into conformity with the directive with respect to the nitrate requirement.

(2) The remainder of the application is dismissed.

(3) The defendant is ordered to pay the costs of the proceedings.