OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 8 May 1991 *

My Lords,

1. In this case, the Court is asked to declare that the Federal Republic of Germany has failed fully to implement and comply with two directives: Council Directive 75/440/EEC of 16 June 1975 (Official Journal 1975 L 194, p. 26), concerning the quality required of surface water intended for the abstraction of drinking water; and Council Directive 79/869/EEC of 9 October 1979 (Official Journal 1979 L 271, p. 44), concerning the methods of measurement and frequencies of sampling and analysis of such water. I shall refer to these as the 'quality directive' and the 'sampling directive' respectively, and collectively as 'the directives'. Time for the implementation of the directives expired on 18 June 1977 and 11 October 1981 respectively.

2. The principal aims of the quality directive are the reduction in pollution of surface water intended for use as drinking water and its protection against subsequent deterioration, and the protection of public health by surveillance of water quality and of purification treatment. The directive harmonizes the standards to be set and maintained for such water, and provides for the drawing up, by the Member States, of national programmes of water improvement. The sampling directive then defines more closely the methods and frequencies of sampling and analysis by which water quality is to be monitored.

3. The Commission brought its action under four heads: (1) breach of an obligation to classify water into the three categories defined by the quality directive; (2) breach of the obligations to set and maintain quality levels for the water so classified; (3) failure to draw up a plan of action for water improvement and communicate it, and any improvements achieved, to the Commission; (4) failure to provide the Commission with information required under Article 8(1) of the sampling directive. It will be convenient to take these four points in turn.

(a) *Failure to classify water*

4. Article 2 of the quality directive, first sentence, provides that:

* Original language: English.

'For the purposes of this Directive surface water shall be divided according to limiting values into three categories, A1, A2 and A3, which correspond to the appropriate standard methods of treatment given in Annex I.'

Annex I accordingly defines three categories of treatment for transforming water of each category into drinking water. Corresponding to category A1, for instance, are methods of 'simple physical treatment and disinfection', whereas category A2 methods include 'normal physical treatment, chemical treatment and disinfection', and those of category A3 include 'intensive' and 'extended' methods of treatment and disinfection. The second sentence of Article 2 then provides that:

'These groups correspond to three different qualities of surface water, the respective physical, chemical and microbiological characteristics of which are set out in the table given in Annex II.'

In relation to each of these groups or categories, Annex II specifies, for each of the various characteristics or 'parameters', the ranges of values to which water should conform. In terms of these values, therefore, Annex II defines three different qualities of water, ranging from A1 (the most pure), to A3 (the most polluted). By Article 4(3), water which falls short of the minimum standards for A3 should only be used for the abstraction of drinking water in exceptional circumstances.

5. It is I think clear from the wording of Annex II and Article 4(3) that these quality levels relate to the characteristics of water intended for the abstraction of drinking water, not of water which has already been abstracted and given purification treatment. The English version of Article 1 is misleading in this respect, and the French version perhaps ambiguous. The German version of Article 1 is, on the other hand, free from ambiguity, and is in my opinion correct.

6. This categorization of water is fundamental to both directives. Unless it has been taken into account, a Member State cannot fix the parameter values applicable at each sampling point, pursuant to Article 3 of the quality directive, or draw up a plan of action for water improvement, pursuant to Article 4(2). Nor would it be in a position to comply with Article 6 and Annex II of the sampling directive (which lay down, with reference to the three categories, the minimum annual frequencies of sampling and analysis). On the other hand, it is by no means obvious that Article 2, taken by itself, gives rise to a separate obligation to classify the surface waters of a Member State.

7. The Commission claims that the categorization referred to in Article 2 has not been carried out in a complete and binding manner. It does not regard as sufficient a declaration such as that made by the German Government, in its response to the

Commission's reasoned opinion of 20 June 1988, that 'all waters in Baden-Württemberg which are used to supply drinking water fall under category A1'. What the Commission requires is for a classification to be carried out concretely for each 'sampling point' (point at which water is abstracted), and this has been done, according to the Commission, only for Bavaria, Rhineland-Palatinate and Schleswig-Holstein.

8. The German Government replies that, in any case, what is required is a classification of *water*, not of each individual *sampling point*. All water abstracted for drinking water has, it says, been classified into one of the categories A1, A2 and A3 by the competent regional authorities. The investigations which, at the time of the Commission's application, were still continuing in some cases (notably North Rhine-Westphalia) were to determine the source of pollution, and not the quality of the water. Those investigations have meanwhile been concluded.

9. In my view, the Commission's first head of claim is misconceived, in so far as it assumes that Article 2 creates an independent obligation to classify water, distinct from the other obligations imposed by the directives. It is however difficult to see how Article 2 could create any such separate duty. Thus, it is significant that under this first head, the Commission refers to a duty to classify water *at each sampling point*. As the German Government points out, however, it is Article 3(1) which imposes an obligation 'for all sampling points, or for each individual sampling point': sampling points are not mentioned in Article 2. Of course, if Article 2 did create a distinct duty to classify water, the Commission would no doubt be right in contending that such an obligation could not always relate to whole stretches of water, as opposed to individual sampling points, since it is clear that water can be of different quality at different points. There is for instance no reason to suppose that water taken from two points of a single river must necessarily be of the same category, since an additional source of pollution might lie between the two. In my view, this merely goes to show that Article 2 does not itself impose any obligation to classify water.

10. What Article 2 does, in effect, is to define the three categories of water, A1, A2 and A3, in terms of appropriate methods of purification treatment. In other words, Article 2 itself accomplishes the classification, by defining water in terms of the standard methods of treatment described in Annex I: it does not require Member States to embark upon an independent process of classification. If Article 2 implies any obligation, therefore, it is that of not subjecting a given category of drinking water to the wrong method of treatment, i.e. a method appropriate only to water meeting more stringent standards of purity.

11. Until the hearing, the Commission did not make any allegation that water had been given treatment which was inappropriate in this sense. The complaint made in

the Commission's letter of formal notice, and repeated in its reasoned opinion and in its application, was that Germany had failed to classify its waters and communicate the results of that classification to the Commission. At the hearing, the Commission did raise the question of what treatment was applied to water for which A2 values were specified for some parameters, but A1 values for others.

12. It follows from Article 3 that a value specified in Annex II for water of category A2 cannot be set for water classified as A1 (see below, paragraph 15). A Member State which did this would be in clear breach of its obligation under Article 3. Suppose, on the other hand, that water given A1 purification treatment is classified by the Member State as category A2 (so that it claimed the right to set A2 values pursuant to Article 3). This would not, it seems to me, be permitted by the directive: but the error would consist in treating water meeting only A2 quality levels by means of an insufficient method of purification (namely one appropriate only to A1 category water); and it should be noted that the directive's second recital refers to the need to exercise surveillance 'over surface water intended for the abstraction of drinking water *and over the purification treatment of such water*' (my emphasis). The error would not consist in wrongly classifying the water, since if it meets only A2 standards it is correctly classified as A2. If, on the other hand, it does meet A1 standards, and values are set accordingly pursuant to Article 3, its categorization as A2 would be an empty gesture, and would it seems to me have no legal consequences.

13. Thus, in its letter of formal notice the Commission would have been entitled to raise the question of whether water in Germany had in all cases been given an appropriate method of treatment, pursuant to an obligation, derived from Article 2 of the directive, to treat water by a method corresponding to its level of quality. In the event, however, it raised a different issue, and one which is difficult to distinguish from its second head of complaint. At the hearing, the Commission confirmed that, in its view, Article 2 imposed a separate duty to classify water by means of a formal decision with independent legal effect, although it agreed that the obligations imposed by Article 2 and Article 3 were closely connected.

14. In my opinion, it is by no means clear what formal act, distinct from the act of setting applicable values pursuant to Article 3(1), would be required to fulfil such a duty of classification. In selecting a method of purification, the Member State will in effect have categorized the water being treated. Thus, whatever formal declaration it may make, if water is subjected to A1 treatment, the quality levels to be complied with are those specified for water of category A1. If any formal act of categorization is required, it is best regarded as a preliminary step in the setting of values pursuant to Article 3. As far as Article 2 itself is concerned, it does not seem to me that the Commission has established the breach of any distinct obligation imposed by that article.

(b) *Failure to set and maintain values*

15. Article 3(1) of the quality directive provides that:

'Member States shall set, for all sampling points, or for each individual sampling point, the values applicable to surface water for all the parameters given in Annex II.

(. . .)'

These values must be set within the ranges specified by Annex II. A column of 'I' values specifies the minimum standard a Member State is required to set for a given water category (e.g. not more than 0.05mg/l of arsenic for category A1). A column of 'G' values specifies standards Member States are to strive to attain (in the same example, not more than 0.01mg/l of arsenic).

16. From Article 5(4) of the directive, it appears that a 'sampling point' is any place at which surface water is abstracted before being sent for purification treatment. The English version of the directive uses the term to refer both to the points for which values are set, pursuant to Article 3(1), and to the points at which samples are taken for the purpose of verifying that water conforms to those values (Article 5(1)). The French version, like the German, uses two different terms: 'point de prélèvement' for 'sampling point' in Article 3(1), and 'lieu d'extraction' for 'sampling point' in Article 5 (in German: 'Entnahmestelle' and 'Schöpfstelle' respectively). Article 5(4) shows however that these expressions have the same meaning — as indeed they must if the sampling operations described in Article 5 are to serve their purpose.

17. Article 4(1) then provides that:

'Member States shall take all necessary measures to ensure that surface water conforms to the values laid down pursuant to Article 3. Each Member State shall apply this Directive without distinction to national waters and waters crossing its frontiers.'

18. According to the Commission, it does not appear from the information supplied by the German Government that values have been set for every sampling point in accordance with Article 3 of the quality directive. At best, this has been belatedly done for the *Land* of Schleswig-Holstein (not before December 1988). The German Government replied that the necessary measures have been taken in different ways by different *Länder*, but always within the framework of the 'Wasserhaushaltsgesetz' (WHG), the law on the management of water resources. It pointed out that by Paragraph 7 of the WHG (read with Paragraph 2), the use of water for a particular purpose is permitted only pursuant to a licence ('Erlaubnis'). Licences for the abstraction of water for public use as drinking water are, it appears, issued by the

competent local authorities of the various *Länder*. Because, it was claimed, such licences have in every case been made conditional upon the water meeting minimum standards set by those authorities in accordance with Annex II of the quality directive, it was said that Articles 3 and 4(1) of the directive have successfully been implemented.

19. The German Government's argument appears therefore to run as follows. The WHG gives the competent administrative authorities a discretionary power to grant, refuse or revoke licences for the use of water, and, Paragraphs 4 and 5, to impose conditions and requirements on such use. It is claimed that arrangements are in place which ensure that any licences issued are subject to the appropriate requirements and conditions. In some cases at least, those arrangements consist in binding instructions issued to the local licensing authorities by (for instance) the appropriate ministry of the *Land* concerned. Now suppose a licence contains conditions relating to minimum standards specified in accordance with Annex II of the quality directive: then, if the water falls below the standards specified, a licensee who continues to use the water is in breach of licence conditions. He will then be in breach of Paragraph 2 of the WHG, or at least will be liable to have the licence withdrawn. The licences are accordingly the means by which the appropriate values are set and maintained, and the directives are implemented in Germany by virtue of the combined effect of the legislative framework of the WHG, on the one hand, and the imposition of licence conditions, on the other.

20. This argument raises two questions, one of principle and one of fact. The first is: to what extent is it possible for a Member State to rely on administrative measures of this nature in implementing a directive? The second question is whether, assuming such a mode of implementation is permissible in principle, all the appropriate measures have in fact been taken. It should be noted that two kinds of administrative measure are at issue here: conditions imposed on water undertakings by the licensing authorities, and instructions issued to the licensing authorities themselves by a central authority of the *Land* concerned.

21. According to the Commission, administrative instructions, not being rules of law, cannot be regarded as effectively transposing the rules of a directive into a Member State's domestic legal system. Such measures lack, in particular, the necessary element of legal effect on third parties, i.e. persons other than the authorities and water undertakings concerned. The Commission argues that even where the instructions took the form of published ministerial circulars binding on the addressee, they would not suffice. The Commission's objection seems to be that it is not clear whether a third party could challenge, either the behaviour of a licensing authority acting contrary to ministerial instructions, or that of a water undertaking breaching licence conditions.

But, the Commission says, the directives must be understood as requiring the creation of rights for private citizens, as well as obligations for public authorities.

22. According to the German Government, the administrative measures relied upon for implementation of Article 3 take one of two forms, depending upon the *Land* concerned. In some cases — for instance in Bavaria — ministerial announcements have been published which notify the requirements of the directive to the licensing authorities concerned. In other cases, it seems that the only measures relied upon are individual decisions addressed to water undertakings by the licensing authorities. It is argued that, in either of these cases, the measures taken meet the requirements of legal certainty and clarity. Since neither directive concerns the relation between the State and the citizen, it is said to be sufficient if the licensing authorities are bound by their instructions, and if the water undertakings are in turn bound by the conditions attaching to the licences, without there being any need to create rights or obligations in third parties.

23. In what follows, I will first discuss the question of what is required in principle in order to implement a directive, and then examine the measures which have been taken by the German Government.

24. It must first be observed that there is no inflexible rule that legislation is always required to implement a directive. As the Court said in Case 29/84 *Commission* v *Germany* [1985] ECR 1661:

'It follows from that provision [the third paragraph of Article 189 of the Treaty] that the implementation of a directive does not necessarily require legislative action in each Member State. In particular the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts.' (paragraph 23 of the judgment; see also Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraphs 6-8).

In Case 29/84 *Germany*, the directive concerned required Member States to recognize nursing qualifications obtained in other Member States, and it was therefore clear that the directive intended rights to be created for individuals, namely the nurses who wished to have their qualifications

recognized so that they could work in Germany. It followed that the German Government was not permitted to rely upon an established and consistent administrative practice of recognizing diplomas, for that did not create a situation which was 'sufficiently precise, clear and transparent as to enable nationals of other Member States to discover their rights and to rely on them' (paragraph 28 of the judgment).

25. Other cases in which administrative measures were found to be insufficient have involved directives harmonizing technical standards, or conditions of authorization, for the benefit of traders: see Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, Case 145/82 *Commission* v *Italy* [1983] ECR 711. In the latter case, the existing national provisions which were required to be harmonized took the form of statutory provisions. It followed that administrative measures were not enough, even when they took the form of ministerial circulars which were binding on the administration, and had been notified to the economic interests concerned: see the remarks of Advocate General Reischl in Case 145/82 at pp. 722-3.

26. As the Court has frequently emphasized, the choice of form and methods given to Member States by the third paragraph of Article 189 of the Treaty is to be understood in relation to the objective of the directives in question (see Case 102/79 *Belgium*, cited above, paragraph 7 of the judgment). It is however clear that a Member State will never be allowed to rely upon what the Court has often referred to as 'mere administrative practices, which by their nature may be changed according to the whim of the authorities and which lack appropriate publicity' (see e.g. Case 160/82 *Commission* v *Netherlands* [1982] ECR 4637, paragraph 4 of the judgment). The phrase recurs as a constant refrain in non-implementation cases, but it deserves closer analysis. The Court cannot in my view be saying that *any* administrative measure is defective, in that it can be changed too easily by the authorities and is insufficiently public. Such an interpretation would be inconsistent with the Court's frequent pronouncements that there can in principle be cases in which legislation (as opposed to administrative provision) is *not* required: see Case 29/84 *Germany* and Case C-339/87 *Netherlands*, cited above at paragraph 24.

27. In the first place, a distinction should be drawn between administrative *measures* and administrative *practices*. There is a difference between implementing a directive by means of binding rules issued by a national authority, and relying merely on the established practices or habits of officials. Only in the former case can there be said to be measures in place which guarantee continuing compliance. On the other hand, it cannot in my opinion be decisive that administrative measures can easily be changed by the administration, since the same may be true of legislative provisions. In many Member States, certain legislative powers will be delegated to administrative authorities, in some cases without the need for any further approval by the legislature. In such circumstances the line between

delegated legislation and administrative regulation can be difficult to draw. It is clear that there is no objection in principle to implementation by way, for example, of ministerial decision or regulation: see Case C-339/87 *Netherlands*, cited above in paragraph 24, and in particular the remarks of Advocate General Van Gerven at pp. 867-8.

28. One defect which administrative measures may share with mere administrative practices, is that they too may lack appropriate publicity. Thus, the Court has recently condemned 'les mesures internes ou les instructions administratives par nature modifiables et dépourvues d'une publicité adéquate' — see Case C-131/88 *Commission* v *Germany*, judgment of 28 February 1991, paragraph 72 of the judgment. However the question may arise of what degree of publicity will be appropriate or adequate in any particular case.

29. It seems to me, therefore, that three separate requirements can be distinguished. There is, first of all, a requirement that there should be implementing measures which go beyond mere administrative practice by imposing a binding norm upon official action. Next, there is the requirement that whatever measures are taken be made public. Finally, there is the requirement that enforceable rights be created in individuals. It should not however be assumed that all three requirements must be fulfilled in the case of every directive.

The need for binding national provisions

30. When it is said that a Member State cannot rely in its implementation on 'mere administrative practices', this must certainly be taken to include situations where compliance with the directive is left to the discretion of individual officials or authorities. It makes no difference that the authorities in question are directly bound by the directive, and do in fact comply with it in practice: see Case 97/81 *Commission* v *Netherlands* [1982] ECR 1819. In that case, the Netherlands was charged with failure to implement the quality directive. The Court accepted that the Netherlands could delegate the supervision of water quality to regional or local authorities, but this did not release it from 'the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature' (paragraph 12 of the judgment).

31. Although, in Case 97/81, it was said that *national* provisions were required, the Court observed that

'None of the matters put forward by the Netherlands Government justifies the conclusion that provisions of a binding nature have actually been adopted *either by the national authorities or by regional or local authorities* in order to set ... the values applicable ...' (paragraph 13, my emphasis).

Thus, 'national' here means, in the first instance, measures taken by the implementing State, as opposed to Community legislation. It is therefore not necessary for the implementing provisions to be adopted in every case by the Member State's central government, rather than by local or regional authorities competent to adopt such measures (see, similarly, Cases 227 to 230/85 *Commission* v *Belgium* [1988] ECR 1, paragraph 9 of the judgment, and Case C-131/88 *Commission* v *Germany*, cited above in paragraph 28, paragraph 71 of the judgment). On the other hand, it is I think clear in the present case that the implementing measures cannot consist merely in the individual decisions of each licensing authority. Provisions must be adopted which ensure that the relevant decisions are taken in a uniform fashion by the various local authorities, and in accordance with the requirements of the directive. These provisions must therefore be *binding* on the licensing authorities concerned, and must emanate from some higher authority (for instance, the relevant ministerial department in each of the Länder).

The requirement of appropriate publicity

32. In what circumstances will the implementing measures also be required to be made public? It is difficult to obtain guidance on this question from the Court's case-law, because the question of publicity is often subsumed under the question of the creation of enforceable rights. Where a directive requires rights or obligations to be created in individuals, the legal position must obviously be made sufficiently precise and clear to the persons in respect of whom those rights or obligations arise: see Case 29/84 *Germany*, quoted above at paragraph 24. Even in the absence of such a class of persons directly concerned by the directive, however, it can be argued that the public at large should at least have the possibility of verifying that Community legislation has been properly implemented. Thus, even if a Member State's failure to implement would not deprive any particular class of individuals of rights which were required to be made available to them in national law, that failure might nonetheless be something any citizen should at least be entitled to become aware of, so that, for instance, complaint can be made to the proper national authorities (or indeed to the Commission): voir the remarks of Advocate General Van Gerven in paragraph 7 of his Opinion in Case C-131/88 *Commission* v *Germany* (cited above, paragraph 28). A measure which is not made public might also be said to be one which can be changed too easily, in the sense that it can be altered without this being noticed outside the administration.

Creation of enforceable rights

33. As I have said, it is clear from the case-law of the Court that where a directive intends that rights or obligations be created in individuals, the legal position resulting from implementation must be made sufficiently precise and clear to them: this includes the requirement of sufficient publicity discussed above. In addition, however, where such rights arise, the indi-

viduals concerned must in appropriate circumstances be able to rely upon them before the national courts: see Case 29/84 *Germany*, cited above at paragraph 24, and Case C-131/88 *Germany*, cited above at paragraph 28. In the latter case, it was Council Directive 80/68/EEC of 17 December 1979 (Official Journal 1980 L20, p. 43), on the protection of groundwater against pollution, which was found by the Court to intend rights and obligations to be created in individuals (see paragraph 7 of the judgment). It should be noted however that the groundwater directive provides for the creation of a detailed system of authorization and control potentially affecting an unlimited class of persons, namely all those who are engaged in any activity leading directly or indirectly to the discharge of noxious substances into the environment. A similarly large and open class of persons might be said to be concerned by the atmospheric pollution directives (Council Directive 80/779/EEC of 15 July 1980, Official Journal 1980 L 229, p. 30, and Council Directive 82/884/EEC of 3 December 1982, Official Journal 1982 L 378, p. 15) discussed in Advocate General Mischo's Opinion in Cases C-361/88 and C-59/89 *Commission* v *Germany*, delivered on 6 February 1991: see in particular paragraph 18 of the Opinion. It should also be observed that those persons are not 'third parties' with respect to the measures discussed in those cases, for it is their activities which are the direct object of the systems of control which were required to be established.

34. In contrast to the groundwater and atmospheric pollution directives, those at issue in the present proceedings appear to require the creation of rights or obligations in only a limited class of persons, namely the limited number of undertakings which abstract surface water for the purpose of supplying drinking water to the public. The directives imply in particular that these persons are to be put under the obligation of not supplying water where the source falls below standards set in accordance with the directives. It follows that the legal provisions and administrative instructions affecting the issue of water licences should be such that these persons, if they are themselves not organs of the administration, can ascertain their rights and obligations, and, if need be, have them determined in the national courts. It seems to me, however, that the Commission may go too far in suggesting that the national measures must be such as to confer rights on third parties to challenge inadequate compliance or implementation. It is true that the public at large, as well as ecologists and environmental pressure groups, have a general interest in water quality, and indeed in the respect for Community law. It does not however automatically follow that enforceable rights must be made available to them in the national courts.

35. As I have already mentioned, even if no such enforceable rights are to be created it

may be that there should nonetheless be an obligation on the implementing State to make public the measures it has taken, so that the concerned citizen can have recourse to whatever channels of redress are available under national law against administrative inaction. It might be argued that where the quality of the environment is concerned, there are particularly compelling reasons for requiring full publication of implementing measures; and it should be noted that the Council has recently adopted a directive providing for a right of access to information concerning the environment (Council Directive 90/313/EEC of 7 June 1990, Official Journal 1990 L 158, p. 56). As regards the measures relied upon by the German Government, it appears that some but not all have been published in official or ministerial journals.

36. In the event, it will not in my opinion be necessary to decide in the present case whether there is a requirement to create enforceable rights in third parties, or even whether there is a requirement of publicity. An examination of the measures which have been taken will show that even the minimum requirement of 'national provisions of a binding nature' (see above, paragraph 30) has not been met.

The implementing provisions

37. As the German Government points out, Paragraphs 2 and 7 of the WHG contain a general prohibition on the unauthorized use of water. Before implementation of the quality directive fell due, it appears that water quality was controlled in the Federal Republic by the administrative act of issuing licences within the framework of the WHG. If, therefore, the German Government could indeed show that in each of the *Länder,* binding administrative instructions had been issued from a central ministerial authority, to every local authority competent to grant water licences, then that would at least go some way towards establishing proper implementation of the directives. The instructions would have to be measures with binding effects in German administrative law, and would have to require that appropriate amendments be made to all relevant licences. Each of these measures would also have to be communicated to the Commission under Articles 13 and 10 respectively of the quality or sampling directives.

38. In the absence of detailed legislative provisions incorporating the requirements of the directives into national law, this would, it seems to me, be the minimum required to show proper implementation. Indeed, unless it was in possession of such complete documentation, it is difficult to see how the Federal Government could itself be satisfied that proper implementation had taken place in all the *Länder.*

39. In the context of the present proceedings, the defendant produced

various examples of what it considered to be adequate implementation of Article 3 of the quality directive. In the case of *Bavaria*, a decision of the Landratsamt Hof dated 24 July 1981 was produced (Annex B1 to the rejoinder), and it appears from the German Government's response to the Commission's reasoned opinion that similar decisions were taken by the other competent local authorities in Bavaria (Annex 2 to the communication of 26 January 1989). The decision modifies the terms of a licence authorising abstraction of water from the Steinbach and Goldbach, *inter alia* by setting values corresponding to the minimum specified for category A2 water in Annex II of the quality directive. The grounds for the decision refer to the two directives, and to a letter dated 30 December 1977 from the Bavarian Ministry of the Interior instructing the Landratsamt to draw the necessary conclusions from the quality directive. That letter was not produced in evidence. The defendant did produce a published announcement of the same ministry dated 12 July 1977, but this appears to do no more than draw to the attention of local authorities the terms of the quality directive, request them to supply certain information, and promise further instructions (see Annex B3 to the rejoinder).

40. These documents — namely the individual decision of the Landratsamt Hof and the published announcement of the Bavarian ministry — cannot in my view be regarded as sufficient evidence of proper implementation. The former, although binding on the recipient water undertaking, and however adequate in itself, is no more than an isolated administrative decision. Nor, on the other hand, can it be sufficient merely to draw the existence of a directive to the attention of local authorities, or to instruct them in general terms to draw the necessary consequences. In either case, national provisions of a binding character are lacking: see Case 97/81 *Netherlands* (cited above at paragraph 30).

41. In the case of *Rhineland-Palatinate*, the defendant produced a decision dated 15 November 1988 of the Bezirksregierung Trier (Annex B4 to the rejoinder), which is apparently one of a number of similar decisions for that Land (see Annex 5 to the German Government's communication of 26 January 1989). The decision appears to impose subsequent conditions on a licence, pursuant to Paragraph 5(1) of the WHG, setting parameter values appropriate for category A2 water, as well as setting frequencies of sampling pursuant to the sampling directive. Again, this decision is, at best, correct administrative practice. It is true that the Trier decision also refers to administrative measures ('Verwaltungsvorschriften') applying the directives, and taking the form of circulars from the Ministry for Agriculture and the Environment (presumably of Rhineland-Palatinate) dated 20 October 1977 and 23 June 1981. These however have not been produced in evidence, so that their adequacy as implementing measures cannot be assessed, and the defendant did not seek to rely upon any such measures in its rejoinder (where the position in Rhineland-Palatinate was expressly distinguished from that obtaining in Bavaria, where ministerial measures were published in the relevant

official gazette). It seems to me therefore that 'binding national provisions' are once again lacking. It must also be observed that all except one of the decisions for Rhineland-Palatinate appear to have been taken after the expiry of the time-limit set in the Commission's reasoned opinion. The German Government has not pointed to any earlier decisions to the same effect, and it is accordingly difficult to see the decisions as being taken in response to binding ministerial instructions issued in 1977 and 1981.

42. At the hearing, the Commission raised in addition various points of detail arising from the decision of the Bezirksregierung Trier. First, it objected that only one value had been set for each parameter, whereas the directive specifies two: a mandatory value (given by the 'I' column in Annex II), and a guidance value (given by the 'G' column). I do not think however that Article 3 of the directive requires two separate values to be set: the two columns are better seen as specifying the ranges within which a single value is to be set for each parameter (the 'I' value specifying the minimum, the 'G' value the realistic maximum). Next, the Commission pointed out that some of the values specified were appropriate for category A1 water, but others, for instance the value for iron, only for A2. There would of course be no objection to this, assuming the water to be of category A2, and assuming an appropriate method of purification treatment were used. In Annex 5 to the German Government's communication of 26 January 1989, however, the water in question is stated to be of category A1. The Commission also pointed out that in the case of one parameter (manganese), an A3 value had been set. At the hearing, the German Government made no attempt to explain these apparent irregularities. Even at the level of administrative practice, therefore, doubts arise as to the correct implementation of the directive in Rhineland-Palatinate.

43. In the case of *Schleswig-Holstein*, the defendant produced, in response to the Commission's reasoned opinion, two letters dated 14 December 1988 and 5 January 1989, written by the Minister for Nature and the Environment of Schleswig-Holstein, to the local water authorities for Lübeck and Kreis Stormarn respectively (Annex 6 to the German Government's communication of 26 January 1989). These do appear to issue binding instructions to amend in appropriate terms water licences issued by these authorities. Both letters were written after the expiry of the time-limit set in the Commission's reasoned opinion, and would not therefore amount to evidence of full and timely compliance with Article 3 of the quality directive, even if acted upon immediately by the recipient authorities. At the hearing, the German Government confirmed that an appropriate licensing decision had been taken by the Kreis Stormarn water authority at the end of 1989, and said that no drinking water was

in fact abstracted from the source at Lübeck.

44. According to the German Government, no surface water is abstracted for use as drinking water in the case of *Hesse*, *Saarland*, *Berlin*, *Bremen* and *Hamburg*. It does not dispute, on the other hand, that the directives apply to water abstracted in *Baden-Württemberg*, *Lower Saxony*, and *North Rhine-Westphalia*, but it has produced no evidence of any measures taken in those Länder setting values in accordance with Article 3 of the quality directive. As far as Lower Saxony is concerned, the only evidence produced was a document annexed to its response to the Commission's reasoned opinion (Annex 3 to the communication of 26 January 1989). The source or status of that document was not clear, but it appears in any case to relate solely to frequencies of sampling and analysis. In the case of North Rhine-Westphalia, there was an announcement dated 17 October 1989 by the Regierungspräsident of Detmold, declaring the waters of the Aabach Dam to be of category A1 (Annex B2 to the rejoinder). It is true that the German Government also referred in its rejoinder to other measures taken in North Rhine-Westphalia, including published ministerial circulars and subsequent decisions of local Regierungspräsidenten. These were however not produced to the Court, and again it is therefore impossible to assess their adequacy. At the hearing, the German Government stated that implementation had taken place in Baden-Württemberg and Lower Saxony in exactly the same way as it had in Bavaria, but once again no further evidence was produced.

45. I conclude therefore that, on the evidence before the Court, it cannot be said that the implementation of Article 3 of the quality directive has been anything other than belated and incomplete. In my view, therefore, the Commission has succeeded in its second head of claim.

46. If a Member State has failed to set the applicable values pursuant to Article 3, it will of course be unable to ensure that the water conforms to the values set, and will therefore also be in breach of its obligations under Article 4(1). Furthermore, the mechanism by which the German Government claims the values are maintained is essentially the same as that by which it claims the values are set, namely the attachment of appropriate conditions to water licences. If it has failed to show that there are binding provisions ensuring such values are set, it would have equal difficulty in demonstrating that there are provisions which ensure water conforms to those values.

47. In its reply, the Commission suggested moreover that the German Government had conceded that limiting values had been breached, at least in the case of North Rhine-Westphalia (where the defendant had indicated that this was due in part to geological factors). In its rejoinder, the German Government explained that, although waters in North Rhine-Westphalia

had been classified 'by formal decision' as falling under category A1, in the case of three lakes the minimum values for A1 had been breached: as regards coloration, in the case of the Perlenbach and the Dreilägerbach, and as regards nitrate content in the case of the Heilenbecke. In all three cases, however, the method chosen for water treatment had taken this into account, each lake being subjected to an A2 category method.

48. It is not clear whether this constitutes an admission that values in North Rhine-Westphalia have been breached, or is merely evidence that, despite the 'formal decision' to which the German Government referred, the waters of the Perlenbach, the Dreilägerbach and the Heilenbecke are in fact of category A2 (see above, paragraph 14).

49. I do not in any event consider it either necessary or appropriate for the Court to make any separate declaration regarding a breach of Article 4(1). To the extent that the two duties are inseparable, it suffices to find a failure to comply with Article 3. In so far, on the other hand, as they can be distinguished, it should be observed that a breach of Article 4(1) is mentioned neither in the Commission's letter of formal notice of 18 August 1987, nor in its reasoned opinion of 20 June 1988. It is however these documents which define the subject-matter of proceedings under Article 169: see Case 211/81 *Commission* v *Denmark* [1982] ECR 4547, Case 51/83 *Commission* v *Italy* [1984] ECR 2793 and Case C-48/89 *Commission* v *Italy*, judgment of 14 June 1990.

(c) *Failure to draw up a plan of action*

50. The first subparagraph of Article 4(2) of the quality directive requires Member States to take, within the framework of its objectives, the necessary measures to ensure continuing improvement of the environment, and, to this end, to draw up a systematic plan of action. This must include 'a timetable for the improvement of surface water and especially that falling within category A3'. In this respect, 'considerable improvements' are to be achieved over a ten-year period. The second subparagraph of Article 4(2) makes it clear that the plan will have regard to economic and technical constraints. The third subparagraph requires the Commission to carry out a thorough examination of such plans, and if necessary to submit appropriate proposals to the Council.

51. The Commission said that it has received from the German Government no notification of any such plan, despite an express request, and despite the general duty to communicate implementing measures imposed by Article 10. Nor, said the Commission, has it received any details of what improvements have actually been achieved. In response to a written question of the Court, however, this head of claim was withdrawn in respect of the Bodensee (Lake Constance).

52. The German Government responded to this complaint as follows. On the one hand, it considers that an obligation to plan and carry out water improvement exists only in respect of water which is not classified as

category A1. Furthermore, where water fails to meet A1 standards, but the pollution is due to the nature of the soil, no improvement is called for, as long as an appropriate method of purification treatment is applied. If the pollution is due to some other factor beyond the control of the Federal Republic, the improvement of such water can at best be of low priority. So, for instance, there is no present necessity for the improvement of waters in Bavaria; they are classed as A3 only out of precaution, and any deterioration would be the result of pollution originating outside the territory of the Federal Republic. In the case of Schleswig-Holstein, pollution is due to the nature of the soil and could not be corrected by administrative measures. The German Government considers that the same is true of North Rhine-Westphalia, although it seems that there the necessary tests to determine the source of pollution were completed only after this action was brought, and corrective measures have in fact been taken in one instance (the Heilenbecke).

53. As far as pollution due to the nature of the soil is concerned, this is, as the Commission pointed out, a matter expressly regulated by Article 8 of the quality directive, which allows a Member State to 'waive' (i.e. derogate from) the directive in various circumstances, including those in which water undergoes natural enrichment from the soil. The fourth paragraph of Article 8 provides that:

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

The intention of Article 8 is not therefore to exclude *a priori* all 'natural' pollution from the scope of the directive. In some of the cases mentioned in Article 8 (e.g. floods and natural disasters), the derogation will of its nature be temporary. In the case of enrichment from the soil, the derogation might be either temporary or permanent, depending upon the nature of the problem. In either case, however, it is clear that the Commission must be informed — so that it can, for instance, express a view as to the period allowed. No notice under this paragraph appears in fact ever to have been given by the defendant. In my view, therefore, natural enrichment could not be a ground for refusing even to consider whether a particular source of water needed to be improved in the context of a 10-year programme.

54. Similarly, given that the directive applies without distinction to national waters and waters crossing frontiers (see the second sentence of Article 4(1)), its obligations extend also to pollution originating outside the territory of the implementing Member State. Once again, a Member State must be prepared at least to consider what measures could be taken over a 10-year period.

55. It is true that the plan envisaged by Article 4(2) will be one which assigns priorities and takes account of economic and technical constraints. The most polluted

water is to be tackled first, and first priority should no doubt be given to sources of pollution which can be most easily brought under control. What is feasible, and what improvements a Member State could reasonably be expected to achieve over the ten-year period, are questions which could only be satisfactorily resolved where the Member State actually prepared a systematic plan of action which could then be examined by the Commission. There is nothing to suggest that such a systematic plan was ever drawn up, let alone submitted to the Commission's examination. The German Government referred to a plan for the Danube drawn up by the Government of Baden-Württemberg, and covering the period up to the end of 1980. At best, this could have formed the basis of one element of a systematic plan for the Federal Republic. It appears that it was brought to the attention of the Commission only in the context of these proceedings.

56. It does not seem to me, moreover, that the German Government has established that the waters on its territory were already of such a high quality that the 'continuing' and 'considerable' improvements referred to in the first subparagraph of Article 4(2) were impossible to achieve. It is true that in its rejoinder it was able to point to some measures of improvement which have taken place in the cases of the Danube and Lake Constance. The fact remains that, in the absence of a systematic plan, it is not possible to say what improvements could reasonably be expected under Article 4(2), the obligations of which are predicated upon the existence of a plan and a dialogue with the Commission. In my view, the failure to draw up such a plan and submit it to the Commission's examination was in itself a clear breach of the obligations imposed by Article 4(2).

(d) *Failure to provide information on sampling*

57. Article 6(1) of the sampling directive provides that:

'The competent authorities of the Member States shall fix frequencies of sampling and analysis for each parameter for each sampling point.'

Annex II lays down minimum annual frequencies for each parameter, which by Article 7 can be reduced in certain cases. Article 8(1) then provides that:

'For the purposes of applying this Directive, the Member States shall provide the Commission at its request with all relevant information on:

— the methods of analysis used,

— the frequency of analysis.'

Article 8(2) requires the Commission to draw up, at regular intervals, a consolidated report based on the information gathered under Article 8(1).

58. On 23 January 1987, the Commission wrote to the Permanent Representation of the Federal Republic, stating that it was currently examining the application of the directives in the Member States, and asking various questions, including:

What frequencies of sampling and analysis had been fixed for the different sampling points pursuant to Article 6?

Had use been made of the possibility provided in Article 7, of reducing the frequencies of sampling and analysis?

The Commission claimed that this information was not provided in the requisite detail, and that where it was provided, it was deficient in not specifying the population served by each sampling point.

59. It appears in fact that it was only in its communication of 26 January 1989 (belatedly responding to the Commission's reasoned opinion of 20 June 1988) that the German Government made any attempt to reply to these questions. The only concrete information provided was a table annexed as Annex 3 to that communication, apparently specifying the frequencies for all sampling points in Lower Saxony. In other cases, the only indications given were that sampling is done in accordance with Annex II of the sampling directive (Annexes 2, 5 and 6 to the communication). Since the minimum frequencies set out in Annex II depend upon the population served, the latter indications were plainly inadequate (and to this extent at least, the Commission was right to complain about a lack of population figures). Furthermore, the defendant stated in its rejoinder that in the region of Düsseldorf, frequencies had been reduced pursuant to Article 7 of the sampling directive. This information was apparently not offered to the Commission when it was expressly requested under Article 8(1).

60. It is true that the Commission's original request did not ask for population figures, although I think it would have been entitled to do so, since those figures are relevant for the purposes of applying the directive. Similarly, despite the suggestion in the Commission's application that an express request was made for information on *methods* as well as *frequency* of analysis, it appears that only the latter was in fact requested by the Commission. The fact remains that, with the possible exception of Lower Saxony, the defendant has not supplied information which the

Commission, as it was entitled to do, *did* expressly request. The argument which the German Government put forward in its defence must be rejected, according to which Article 8(1) only covers cases where there exists a 'specific need' for information, one which has to be 'objectively justified' by the Commission. The need which the gathering of this information serves is the general one of obtaining all relevant data, for the purpose of drawing up a consolidated report on the application of the directive. Although the German Government indicated in its rejoinder that it is prepared to supply the information, the fact remains that it had failed to do so by the time this action was brought, and must consequently be found to be in breach of its obligations under Article 8(1) of the sampling directive.

Conclusion

61. In my view, therefore, the Commission has succeeded in establishing a breach of the following obligations:

— the duty to set applicable values of water quality, arising from Article 3 of the quality directive;

— the duty to draw up, and submit to the Commission's examination, a programme of water improvement, arising under Article 4(2) of the quality directive;

— the duty to provide the Commission with information it had requested under Article 8(1) of the sampling directive.

62. The Commission has not, in my opinion, established a breach of Article 2 of the quality directive, because that article does not in my view impose a separate obligation of the kind suggested by the Commission. Furthermore, for the reasons given above in paragraph 49, I do not think it appropriate for the Court to make a separate declaration in respect of Article 4(1). The Commission has nevertheless succeeded in substantially all of its application.

63. I am accordingly of the opinion that the Court should:

(1) Declare that the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty, by failing to take the measures required under

   (a) Article 3 and Article 4(2) of Council Directive 75/440/EEC of 16 June 1975, and

   (b) Article 8(1) of Council Directive 79/869/EEC of 9 October 1979;

(2) For the rest, dismiss the application;

(3) Order the Federal Republic to pay the costs.