# OPINION OF ADVOCATE GENERAL JACOBS

delivered on 25 September 1997 *

1. In this case, the Commission is seeking a declaration under Article 169 of the EC Treaty that Italy has failed properly to implement Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters. [1]

2. In particular the Commission alleges that Italy has failed properly to implement Articles 3, 4 and 5 of the Directive.

## The Shellfish Waters Directive

3. The Directive concerns the quality of shellfish waters and applies to those coastal and brackish waters designated by the Member States as needing protection or improvement in order to support shellfish life and growth and thus to contribute to the high quality of shellfish products directly edible by man. [2] According to its preamble, its objectives are to protect waters, including shellfish waters, against pollution and to safeguard certain shellfish populations from various harmful consequences resulting from the discharge of pollutant substances into the sea. [3]

4. It is stated in the preamble to the Directive:

'in order to attain the objectives of the Directive, the Member States will have to designate the waters to which it will apply and will have to set limit values corresponding to certain parameters; ... the waters so designated will have to conform to these values within six years of designation'. [4]

* Original language: English.

1 — OJ 1979 L 281, p. 47.

2 — Article 1.

3 — First and second recitals.

4 — Sixth recital.

5. The provisions of the Directive at issue are as follows:

'*Article 3*

1. Member States shall, for the designated waters, set values for the parameters listed in the Annex, in so far as values are listed in column G or in column I. They shall comply with the comments contained in both columns.

2. Member States shall not set values less stringent than those listed in column I of the Annex and shall endeavour to observe the values in column G, while taking into account the principle set out in Article 8. [5]

...

*Article 4*

1. Member States shall, initially within a two-year period following the notification of this Directive, designate shellfish waters.

2. Member States may subsequently make additional designations.

3. Member States may revise the designation of certain waters owing in particular to factors unforeseen at the time of designation, taking into account the principle set out in Article 8.

*Article 5*

Member States shall establish programmes in order to reduce pollution and to ensure that designated waters conform, within six years following designation in accordance with Article 4, to both the values set by the Member States in accordance with Article 3 and the comments contained in columns G and I of the Annex.'

5 — Article 8 provides that implementation of the measures taken pursuant to the Directive may on no account lead, directly or indirectly, to increased pollution of coastal and brackish waters.

6. Article 13 requires Member States to provide the Commission with information concerning, *inter alia*, waters designated in accordance with Article 4(1) and (2).

7. Article 15 requires Member States to implement the Directive within two years of its notification. The Directive was notified on 5 November 1979 and hence required implementation by 5 November 1981.

8. The Annex sets out parameters for temperature, coloration, suspended solids, salinity and concentration of numerous chemical constituents and other substances. Point 8 refers to organohalogenated substances and point 9 lists certain metals. Some parameters are expressed as a guide (column G), some are mandatory (column I, the initial being presumably a relic of the French text) and others contain figures in both columns.

9. Articles 6 and 7 lay down detailed criteria for determining conformity within the meaning of Article 5. Those criteria concern sampling points and periods (frequency is dealt with in the Annex) and the percentage of samples which, for each parameter, must conform to the values and comments.

10. The Italian authorities forwarded to the Commission in December 1981 the legal measures purporting to implement the abovementioned provisions of the Directive. The Commission however did not consider that those measures satisfied the requirements of the Directive, in particular as regards the parameters. It accordingly requested further information concerning the designation of shellfish waters. Having received no response, the Commission sent Italy a letter in August 1991 giving Italy the opportunity to submit its observations on the alleged infringements.

11. In 1992, Legislative Decree No 131 implementing the Directive was published. Article 4 provides that the regions concerned must designate shellfish waters within 180 days from the Decree's entry into force and that the Minister for the Environment, in conjunction with the Minister for Health and the Minister for Industry, is to set limit values for concentrations of petroleum hydrocarbons, organohalogenated substances and metals within one year of the Decree's entry into force.

12. The Commission accepts that Decree No 131 substantially implements the Directive. However, Article 4 of the Decree refers to later measures to be taken by the regions; no such measures have to date been notified to the Commission as required by Article 13 of the Directive. The Commission accordingly

sent Italy a reasoned opinion in July 1993. Italy sent an allegedly unsatisfactory response in March 1994, whereupon the Commission decided to bring proceedings.

13. The Commission seeks a declaration that Italy has failed to fulfil its obligations under the Treaty:

by failing to designate waters needing protection or improvement in order to support shellfish life and growth in accordance with Article 4 of the Directive and/or to notify such designations to the Commission in accordance with Article 13 of the Directive;

by failing to establish programmes in order to reduce pollution in accordance with Article 5 of the Directive;

and by failing to set values for the parameters listed at points 8 and 9 of the Annex, other than for mercury and lead, in accordance with Article 3 of the Directive.

14. The Commission observes that there has as yet been no designation of shellfish waters, at least for the whole of Italy, or that the designated waters have not yet been notified to it. Clearly without designation the competent authorities cannot establish programmes as required by Article 5 of the Directive; it cannot therefore be ascertained whether the values set in accordance with Article 3 have been observed.

15. The Commission also adds that the Decree shows clearly that the setting of limit values for the parameters referred to in points 8 and 9 of the Annex to the Directive, except for mercury and lead, has been delegated to a later ministerial decree. Since no such decree or other measure to the same effect has been notified to the Commission, it must be concluded that Italy has not fully complied with Article 3 of and points 8 and 9 of the Annex to the Directive.

16. Italy contends that it was not possible to obtain and communicate to the Commission details of the regional measures implementing the Directive within the time-limit of two months set by the reasoned opinion. However, since then such information has been collected with regard to the designation of waters and, in part, the establishment of programmes; measures have been adopted by 12 of the 15 coastal regions and those measures have been notified to the Commission. In addition, the procedure for approving the decree setting the parameters indicated in points 8 and 9 of the Annex should shortly be completed.

17. The Commission in its reply notes Italy's continued failure fully to implement the Directive. Of the 12 regions mentioned by Italy, only 11 (excluding Sicily) appear to have designated shellfish waters as required by Article 4. The Commission considers that notification by only 11 out of the 20 regions, constituting little more than 50% of the national territory, cannot demonstrate proper implementation. Moreover, programmes in order to reduce pollution have, with sporadic exceptions, not been established or notified. In any event, since the number of regions which have designated shellfish waters is incomplete, the establishment of programmes ensuring that designated waters conform to the Directive must *a fortiori* be incomplete. Finally, as the Italian Government itself admits, the parameters mentioned in points 8 and 9 of the Annex have still not been set.

18. Italy makes the point, which has the virtue of common sense, that land-locked regions can hardly be expected to designate shellfish waters, which, at least for the purposes of the Directive, are by nature coastal. It further points out that the Directive does not lay down criteria for the designation of shellfish waters; in its view, Member States accordingly have some discretion and designation of waters by a Member State will constitute proper implementation of the Directive unless it is derisory or manifestly inadequate.

19. In my view there is force in the first of those contentions, and it may be that the measures taken by Italy and by the regions are now sufficient to comply with the Directive on this point. However it is clear that Italy had failed to designate the waters or had failed to notify them to the Commission by the material date, namely within two months from the reasoned opinion, and it follows that the Commission is entitled to the declaration which it seeks under that head.

20. As for the other heads of the Commission's action, Italy accepts that it has not yet complied with the Directive and states that the implementing measures will shortly be notified. The Commission is therefore entitled to succeed under those heads also.

## Conclusion

21. Accordingly in my opinion the Court should:

(1) declare that Italy has failed to fulfil its obligations under the Treaty:

by failing to designate waters needing protection or improvement in order to support shellfish life and growth in accordance with Article 4 of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters and/or to notify such designations to the Commission in accordance with Article 13 of the Directive;

by failing to establish programmes in order to reduce pollution in accordance with Article 5 of the Directive;

and by failing to set values for the parameters listed at points 8 and 9 of the Annex, other than for mercury and lead, in accordance with Article 3 of the Directive;

(2) order Italy to pay the costs.