JUDGMENT OF THE COURT (Fifth Chamber)
22 April 1999 *

In Case C-340/96,

Commission of the European Communities, represented by Richard B. Wainwright, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, Derek Wyatt QC and Mark Hoskins, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

defendant,

* Language of the case: English.

APPLICATION for a declaration that:

— by failing, by the acceptance of undertakings, to enforce compliance by water companies with the requirements of Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11) and

— by failing, thereby, to ensure that the quality of water supplied in several parts of the United Kingdom conforms to the requirements of that Directive in that maximum admissible concentrations for several parameters in the Directive are exceeded,

the United Kingdom has failed to fulfil its obligations under the EC Treaty,

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the First Chamber, acting as President of the Fifth Chamber, J. C. Moitinho de Almeida (Rapporteur), C. Gulmann, D. A. O. Edward and L. Sevón, Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 October 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty in which it seeks a declaration that:

— by failing, by the acceptance of undertakings, to enforce compliance by water companies with the requirements of Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11) (hereinafter 'the Directive') and

— by failing, thereby, to ensure that the quality of water supplied in several parts of the United Kingdom conforms to the requirements of that Directive in that maximum admissible concentrations for several parameters in the Directive are exceeded,

the United Kingdom has failed to fulfil its obligations under the EC Treaty.

The Directive

2 Article 7(1) of the Directive requires Member States to fix values applicable to water intended for human consumption for the parameters shown in Annex I. Article 7(3) provides that, for the parameters given in Tables A, B, C, D, and E of Annex I, the values to be fixed by the Member States must be less than or the same as the values shown in the 'Maximum admissible concentration' column. Member States are also required, under Article 7(6) of the Directive, to take the steps necessary to ensure that water intended for human consumption at least meets the requirements specified in Annex I.

3 Article 18 of the Directive provides that Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive and its annexes within two years following its notification and forthwith to inform the Commission thereof. Member States were also required under Article 19 of the Directive to take the necessary measures to ensure that the quality of water intended for human consumption would comply with the Directive within five years of its notification. So far as the United Kingdom is concerned, those periods expired on 18 July 1982 and 18 July 1985 respectively.

4 Articles 9, 10 and 20 of the Directive provide for derogations from the obligation on Member States to guarantee that the water in question meets the requirements laid down therein. Article 9 authorises derogations to take account of situations arising from the nature and structure of the ground in the area from which the supply in question emanates and of situations arising from exceptional meteorological conditions; Article 10 authorises derogations in the event of emergencies; and Article 20 authorises Member States, in exceptional cases and for geographically defined population groups, to submit a special request to the Commission for a longer period for complying with Annex I.

The national legislation

5 Section 68(1)(a) of the Water Industry Act 1991 (hereinafter 'the Act') requires water undertakers, when supplying water to any premises for domestic or food production purposes, to supply only water which is wholesome at the time of supply. In this connection, the Water Supply (Water Quality) Regulations 1989, which have been the subject of several amendments, set out the water-quality requirements resulting from the Directive.

6 Sections 18 to 24 of the Act set out the detailed arrangements designed to ensure that the water companies comply with the water-purity standards.

7 Thus, section 18 of the Act provides that, where a water company supplies water which does not comply with the purity requirements, the Secretary of State must in principle make an enforcement order, which may be either provisional or final. An enforcement order which is final contains any measure necessary for the purpose of securing compliance with the purity requirements. Under section 18(5) of the Act, an enforcement order requires the company to which it relates to do, or not to do, such act as specified or such activity as described in the order, takes effect at the earliest practicable time, as determined by or under the order, and may be revoked at any time.

8 Before making a final enforcement order or confirming a provisional enforcement order, the Secretary of State is required, under section 20(1) of the Act, to give notice stating that he proposes to make or confirm an order, setting out the effects of the order and, *inter alia*, the condition or requirement for the purpose of securing compliance with which the order is to be made or confirmed, the acts or omissions constituting contravention of that condition or requirement, and the other facts justifying the making or confirmation of the order. Under section 20(2) of the Act, the aforementioned notice must be published in such a manner that it is brought to the attention of persons likely to be affected by it. For that same purpose, the Secretary of State is required under section 20(5) of the Act to publish the enforcement order adopted.

9 Pursuant to section 22(1) of the Act, the obligation to comply with an enforcement order is a duty owed to any person who may be affected by contravention thereof. Section 22(2) provides that any breach of that duty causing loss or damage is actionable at the suit of the person concerned. Furthermore, section 22(4) provides that where a water company fails to comply with an enforcement order, the Secretary of State may seek an injunction requiring it so to comply.

10 In the case where a company is in serious breach of its obligation to comply with an enforcement order, section 24(1) and (2) of the Act empowers the Secretary of State to apply to the courts for a special administration order. Where the breach is serious enough to make it inappropriate for the company to continue to hold its appointment, the court concerned may, under section 23(1) and (2) of the Act, order that its functions be transferred to another company.

11 Under section 19(1) of the Act, the Secretary of State is not required to make an enforcement order in relation to any company if he is, *inter alia*, satisfied that the company in question has given an undertaking to take all such steps as it appears to him for the time being to be appropriate for the company to take for the purpose of securing or facilitating compliance with the relevant rules.

12 The requirement to comply with such an undertaking is independent of the primary obligation to supply wholesome water. Failure by a company to comply with an undertaking itself gives rise to an obligation on the part of the Secretary of State to make an enforcement order under section 19(2) to ensure compliance with the terms of the undertaking.

Pre-litigation procedure

13 Having received numerous complaints alleging failure by the United Kingdom to comply with its obligations under the Directive, the Commission, by letter of 26 September 1991, gave the United Kingdom Government formal notice to submit its observations on the various alleged infringements.

14 Since it considered the reply by the United Kingdom Government to be unsatisfactory, the Commission addressed to it, on 18 June 1993, a reasoned opinion criticising it for failing, by the acceptance of undertakings and the mere issuing of guidelines, to enforce compliance by the water companies with the requirements of the Directive, and failing, thereby, to ensure that the quality of water supplied in several parts of the United Kingdom conforms to the requirements of the Directive in that maximum admissible concentrations for several parameters in the Directive had been exceeded. According to the Commission, the United Kingdom had thereby failed to fulfil its obligations under the Treaty and the Directive, and it accordingly requested the United Kingdom to take the necessary measures to comply with that reasoned opinion within two months.

15 In its reply of 21 September 1993, the United Kingdom acknowledged that breaches of individual standards for certain of the water-quality parameters in the Directive had occurred and were in some cases still occurring. It further accepted that the Directive required it to ensure that all supplies of drinking water in the United Kingdom met the requirements of the Directive at all times. On the other hand, the United Kingdom Government did not in any way accept the Commission's contention that the system of undertakings contained in the Act constituted a failure to enforce the standards of the Directive.

16 After several exchanges of correspondence between the Commission and the United Kingdom concerning, *inter alia*, the water supply zones in which undertakings were still outstanding, and a final meeting between the two parties to the proceedings, the Commission decided to bring the present action.

The substance

17 It should be noted at the outset that the Commission indicated during the hearing before the Court that its action concerned exclusively the United Kingdom's failure to comply with the Directive in England and Wales.

18 In support of its action, the Commission submits that the system of undertakings provided for under the Act does not satisfy the requirements of the Directive. First, the system of undertakings does not make it possible to ensure full application of the Directive. Second, that system does not enable individuals to have recourse to the courts in order to enforce the rights conferred by the Directive as against companies responsible for failing to comply with it.

The general ground of complaint alleging failure to comply effectively with the Directive

19 The Commission first points out that, while it is not criticising the United Kingdom, in the present proceedings, for the fact that the drinking water in several areas of the United Kingdom does not meet the quality requirements laid down by the Directive, a fact, moreover, which the United Kingdom does not dispute, it does take the view that the systematic recourse to the mechanism of undertakings does not constitute a satisfactory way in which to ensure full implementation of the Directive.

20 In this regard, the Commission notes first of all that, by the fact of accepting the undertakings, the United Kingdom's failure to comply with the standards laid down by the Directive frequently extends over several years. Moreover, the undertakings themselves contain clauses making it possible to amend both the target dates and the technical specifications of the works required to secure compliance with the standards of the Directive.

21 Taking as an example the undertakings given by Thames Water, which is the company supplying water for London, the Commission goes on to point out that those undertakings were accepted without any reference to the quality standards to be met. While the third undertaking given by Thames Water refers to the 'advisory value' in a booklet entitled 'Guidance on Safeguarding the Quality of Public Water Supplies', that booklet contains standards that are not in compliance with the requirements of the Directive.

22 Finally, the Commission states that the Act does not adequately specify the conditions to which acceptance of the undertakings is subject. It claims in this regard that, in accordance with its proposal for a new directive on the quality of water intended for human consumption (proposal of 4 January 1995, COM(94) 612, in respect of which the Council adopted a common position on 19 December 1997 (OJ 1998 C 91, p. 1)), a number of derogations from the quality standards are permitted which go beyond those authorised at present. Contrary to the system of undertakings, however, acceptance of those derogations is subject to very stringent conditions.

23 The Commission expressly acknowledged during the hearing that the system of enforcement orders constituted a satisfactory method for implementing the Directive.

24 The United Kingdom Government contends that the Commission has not succeeded in establishing that the failings recorded result from the systematic acceptance of undertakings given by the water companies.

25 It notes in this regard that the monitoring of certain pesticides became technically possible only in the mid-1980s. Thus, it was not possible to confirm non-compliance with the Directive's requirements in regard to herbicides until 1989, and the companies did not at that time have the technical knowledge which would have enabled them to adopt immediately the appropriate methods of treatment. The United Kingdom adds that, in certain cases, compliance with the requirements of the Directive necessitated significant construction work, public consultation and environmental impact assessments. Where relevant, it was also necessary to install alternative systems of domestic water supply.

26 The United Kingdom Government also argues that the water companies are best placed to identify the measures required for compliance with the Directive, and, consequently, that undertakings constitute, for the purpose of attaining the desired result, a more expeditious and efficacious procedure than that of enforcement orders. Moreover, national courts have already recognised the advantages which recourse to undertakings has over recourse to enforcement orders.

27 It must be pointed out that, as the Court has held (see, in particular, Case C-360/87 *Commission* v *Italy* [1991] ECR I-791, paragraph 13), Member States must, in order to secure the full implementation of directives in law and not only in fact, establish a specific legal framework in the area in question. In the case of the mechanism of undertakings which is at issue in the present proceedings this has not been achieved.

28 As may be seen from paragraphs 7 and 8 of the present judgment, while the Act sets out the procedure to be followed for issuing an enforcement order and requires the Secretary of State to specify the measures necessary to ensure that the water in

question is brought into compliance with the Directive's requirements within as short a time as possible, that is not the case with regard to the system of undertakings provided for under section 19 of the Act, since that provision authorises the Secretary of State to accept an undertaking on the sole condition that it contains such measures as it appears to him for the time being to be appropriate for the company to take in order to secure or facilitate compliance with the standards in question.

29 The Act thus does not specify the matters to be covered by the undertakings, in particular the parameters to be observed in respect of derogations, the programme of work to be carried out and the time within which it must be completed, and, where appropriate, the information to be given to the population groups concerned.

30 It follows that the Act does not set out a specific legal framework in the sense contemplated in the case-law cited above.

31 The conclusion that the method of undertakings does not meet the requirements of Community law is not affected by the United Kingdom's argument that the Commission approved the system of undertakings, particularly in a letter dated 16 May 1989. The Court has consistently held that the Commission may not, except where such powers are expressly conferred upon it, give guarantees concerning the compatibility of specific practices with Community law. In no circumstances does it have the power to authorise practices which are contrary to Community law (see, to this effect, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 136).

32 It must therefore be held that, by accepting undertakings from water companies for the purpose of ensuring that water complies with the requirements of the Directive, without the conditions governing the acceptance of such undertakings being specified in the Act, the United Kingdom has failed to fulfil its obligations under the Treaty and under the Directive.

The ground of complaint relating to the lack of a judicial remedy

33 The Commission submits in its application that, although the United Kingdom transposed the Directive into its domestic law by means of provisions which are sufficiently clear and precise to enable individuals to ascertain their rights, the persons entitled to exercise the rights concerned are prevented, so long as an undertaking is in force, from having recourse to the courts if they are supplied with water not complying with the quality standards of the Directive. Such a situation is not in conformity with the requirements resulting from Community law (see, *inter alia*, Case C-131/88 *Commission* v *Germany* [1991] ECR I-825).

34 The United Kingdom challenges the admissibility of this submission on the ground that it was not set out in the letter of formal notice or in the reasoned opinion.

35 According to the Commission, the identity of grounds of complaint and arguments required by the case-law of the Court is satisfied in this case, even though the reasoning regarding the insufficiency of the system of undertakings was further developed in the application. It is clear from the case-law that there is nothing to prevent the Commission from filling out its arguments in the application to the Court, provided that neither the scope of the proceedings nor the legal or factual basis are displaced or enlarged. In this case, the reasoning regarding the assertion by individuals of their rights before the national courts supports the ground of complaint that by accepting undertakings the United Kingdom did not carry out in full its obligations under the Directive, a ground which has been maintained throughout the administrative phase of the proceedings in this case.

36 On this point, it must be remembered that the letter of formal notice from the Commission to the Member State and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, which thus cannot thereafter be extended. The opportunity for the State concerned to be able to submit its

observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure (see, in particular, Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55).

37 Where, in particular, a directive is intended to create rights for individuals, it is indeed the case that Member States must lay down the provisions necessary to ensure that the persons entitled to exercise those rights enjoy judicial protection (see, to this effect, *inter alia*, *Commission* v *Germany*, cited above, paragraph 6).

38 However, during the pre-litigation procedure in the present case, the Commission confined itself to expressing the view that, in so far as it did not require the water companies to comply with the requirements of the Directive, the system of undertakings did not constitute a satisfactory method for dealing with a situation in which the maximum admissible concentrations laid down in the Directive for several parameters had been exceeded. It was only in its application to the Court that the Commission charged the United Kingdom with not providing effective judicial protection for persons entitled to exercise the rights deriving from the Directive.

39 The Commission could not therefore, without enlarging the scope of the present action and, as a result, infringing the rights of defence of the United Kingdom Government, charge that Government with having failed to provide adequate judicial protection for persons entitled to exercise the rights provided for by the Directive.

40 It follows that the ground of complaint now under consideration falls outside the limits of the present proceedings for a declaration of failure to fulfil obligations and must therefore be rejected as inadmissible.

Costs

41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been essentially unsuccessful in its defence, the United Kingdom must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by accepting undertakings from water companies for the purpose of ensuring that water complies with the requirements of Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption, without the conditions governing the acceptance of such undertakings being specified in the Water Industry Act 1991, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the EC Treaty and under that directive;**

2. **Dismisses the remainder of the application;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

Jann Moitinho de Almeida Gulmann

Edward Sevón

Delivered in open court in Luxembourg on 22 April 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber