OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 25 June 1998 *

1. By an action brought under Article 169 of the EC Treaty, the Commission seeks a declaration by the Court that the Kingdom of Spain has failed to fulfil its obligations under the Treaty and Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (hereinafter 'the Directive'). [1]

In particular, the Commission complains that the Kingdom of Spain has failed to adopt and to communicate the programmes for the reduction of pollution by substances within List II annexed to the Directive, as provided for in Article 7 thereof.

The legislative framework

2. In these as in other proceedings, the Commission complains that there has been an infringement of a directive which is one of the earliest instruments adopted by the Community in order to implement an environmental policy, pursuant to the First Programme of Action of the European Communities on the Environment. [2]

The Directive identifies two categories of dangerous substances, drawn up in two lists annexed to the Directive itself, with the purpose of effectively protecting the aquatic environment, which includes inland surface water, territorial waters, internal coastal waters, and ground water. [3]

3. The first category contains substances, appearing in List I, which are particularly dangerous because of their toxic, persistent and bioaccumulable nature. The pollution caused by such substances must be eliminated. To that end, pursuant to Article 6 of the Directive, the Council is to fix limit values which must not be exceeded by the emission standards laid down in each discharge authorisation.

* Original language: Italian.

1 — OJ 1976 L 129, p. 23.

2 — OJ 1973 C 112, p. 1, in which the programme is published as an annex to the Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973.

3 — See Article 1(1) of the Directive.

The second category contains substances, appearing in List II, whose deleterious effect on the aquatic environment can be confined to a given area and depends on the characteristics and location of the waters into which they are discharged. The substances within List II are identified by two means. On the one hand, List II contains individual substances and categories of substances belonging to the families and groups of substances specifically listed therein. On the other hand, the list itself further contains substances belonging to the families and groups of substances in List I for which the limit values referred to in Article 6 of the Directive have not been determined. According to the Commission's claim, which has not been challenged by the defendant State, there are 99 substances capable of belonging to List I but subject to the arrangements for the substances within List II since no limit values have been determined for them.

4. In order to reduce pollution caused by the substances in List II, the Directive, and in particular Article 7 thereof, requires the States to establish 'programmes' incorporating 'quality objectives' for water; those objectives are to be laid down in accordance with any more detailed or sector-specific directives which the Council might adopt. Determination of the quality objectives must take into account the latest economically feasible technical developments. The programmes are to be implemented within the deadlines that they themselves are to set. In particular, implementation is to be by means of emission standards set by the competent State authorities on the basis of the quality objectives laid down in the programmes. Any discharges falling within the scope of the Directive must obtain prior authorisation and emission standards must be set.

5. Article 7(6) of the Directive requires the programmes to be communicated to the Commission, which must arrange for regular comparisons of those programmes in order to ensure sufficient coordination in their implementation. To that end, if it sees fit, the Commission must submit proposals to the Council. [4] The need to harmonise national laws in this field is justified by the fact that any disparity between the national provisions on the discharge of dangerous substances into the aquatic environment 'may create unequal conditions of competition and thus directly affect the functioning of the Common Market'. [5]

Accordingly, the Directive not only constitutes a first step towards better protection of the natural environment in the Community but also contributes to the establishment and functioning of the internal market, so justifying its adoption on two legal bases: Articles 100 and 235 of the Treaty. [6]

4 — See Article 7(7) of the Directive.

5 — See the third recital in the preamble to the Directive.

6 — See to this effect the Opinion of Advocate General Tesauro in Case C-206/96 *Commission* v *Luxembourg* [1998] ECR I-3401, in particular point 13.

6. The Directive did not lay down any time-limit for its transposition into national law. However, by letter of 3 November 1976, the Commission proposed 15 September 1981 to the Member States as the deadline for forwarding programmes for reducing the pollution caused by the substances in List II. No objection was raised to that deadline by any of the Member States. [7] By virtue of Article 395 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, [8] the Kingdom of Spain was required to comply with the Directive by 1 January 1986.

Procedure

7. By letters of 26 September 1989 and 4 April 1990, the Commission, not having received any information from the Spanish authorities as to whether programmes for the reduction of pollution caused by the substances within List II had been adopted, requested information from the defendant State, initially with regard to all the substances in List II and, subsequently, regarding the 99 substances belonging to List I, but which are subject to the arrangements for the substances in List II in the absence of the limit values referred to in Article 6 of the Directive.

8. Since there was no reply from the Spanish Government, the Commission sent an initial letter on 19 December 1990, giving it formal notice that it had failed to fulfil its obligations under Article 7 as regards both the substances enumerated in List II and the abovementioned 99 substances, in respect of which the Commission considered the Spanish Government's failure to be particularly serious.

The Spanish authorities replied to the Commission by letter of 23 July 1990, which never reached the relevant Commission department, and again by letter of 29 January 1991. In short, the Spanish authorities admitted in those letters that the programmes referred to in Article 7 of the Directive were in the course of being drawn up by the Water Authorities and, therefore, had not yet been adopted in respect either of the substances in List II or of the 99 substances mentioned in the letter of formal notice. The Spanish authorities stated that the adoption of programmes for the reduction of marine pollution caused by dangerous substances was a matter for the autonomous communities. However, the letter made reference to numerous studies and plans for improving the environment, drawn up or in the process of being drawn up, concerning various areas of Spain and its coastline.

9. On 30 November 1993, by a further letter of formal notice, the Commission again called

7 — See the judgment in Case C-206/96 *Commission* v *Luxembourg*, cited above, paragraph 7.

8 — Act attached to the Treaty of Accession of the Kingdom of Spain and the Portuguese Republic to the European Communities (OJ 1985 L 302, p. 23).

upon the Spanish Government to submit its observations on the establishment and implementation of the programmes referred to in Article 7 of the Directive, and also attached the list of 99 substances belonging to List I but subject to the arrangements for the substances within List II.

The Spanish Government replied on 3 March 1994, making a number of observations. First of all, the Spanish authorities pointed to the existence of draft guidelines for catchment basins (Northern Spain, the Douro, the Tagus, the Guadiana, the Guadalquivir, the Segura, the Júcar and the Ebro). They also informed the Commission that an inventory of potentially polluting activities had been drawn up on the basis of four broad categories of dangerous substances. It appears from that inventory that the industrial activities which produce dangerous substances do not pollute surface waters. Plant health products used in agriculture give rise to minor levels of pollution, while significant pollution is caused by industrial activities which use dangerous substances in their manufacturing process or which generate them as byproducts. The Spanish authorities pointed to the existence of a project for the continuous monitoring of water quality (the SAICA Project), and to the quality objectives to be defined in accordance with the toxicity, persistence and bioaccumulation of each substance. The Spanish Government acknowledged that the autonomous communities had not yet completed the programmes for which they were responsible with regard to the pollution of sea water.

10. The Commission, considering the replies provided by the Spanish Government to be inadequate, issued a reasoned opinion on 17 November 1994 pursuant to Article 169 of the Treaty in which it complained of the failure to adopt measures to implement the Directive, with reference to the failure to establish the programmes for reducing pollution by the substances in List II.

The two-month period prescribed by the reasoned opinion was extended by a further two months by letter of 18 January 1995 at the request of the defendant State. The Spanish Government eventually replied to the reasoned opinion by letters of 8 September 1995 and 16 October 1995, both of which contained information and reports on the policy of the Spanish central government authorities and autonomous communities in the matter of discharges of polluting substances into water.

The Commission, taking the view that such information did not demonstrate the existence of programmes for the reduction of pollution of waters caused by the substances in List II, brought the present action.

Substance

11. The Commission's action appears to be well founded and should be upheld.

The arguments put forward by the Spanish Government may essentially be reduced to two categories.

Difficulties of an internal nature

12. First, the defendant State claims, with regard to the protection of both surface waters and sea water, that it has had to deal with significant changes in its own administrative structure brought about by the change in the political system since the promulgation of the Constitution of 6 December 1978. Furthermore, the accession to the European Communities required the transposition into the Spanish legal system of a considerable amount of Community legislation even in sectors, such as the environment, in which the new Spanish administration had little experience and which were less developed than those of other Member States. The creation and launching of the autonomous communities, on which Spanish law specifically confers jurisdiction in environmental matters, constituted an additional difficulty standing in the way of the immediate implementation of the Directive.

13. In that connection, it is sufficient to observe that the Court has consistently held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law, [9] and that no significance attaches to the fact that implementation is delegated in whole or in part to authorities other than the central State authorities, such as an autonomous region [10] or a municipality. [11]

It follows that the administrative difficulties encountered by the defendant State do not justify the infringement of which it is accused. By 1 January 1986 Spain should in any event have complied with its obligations under the Directive.

9 — See, among many others, Case C-259/94 *Commission* v *Greece* [1995] ECR I-1947, paragraph 5; Case C-147/94 *Commission* v *Spain* [1995] ECR I-1015, paragraph 5; and Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 18.

10 — See Joined Cases 227/85 to 230/85 *Commission* v *Belgium* [1988] ECR 1, paragraph 9.

11 — See Case 199/85 *Commission* v *Italy* [1987] ECR 1039.

The absence of programmes for the reduction of pollution

14. Secondly, the Spanish Government refers to its own legislation on the protection of waters from pollution and, in particular, argues that, although no instruments formally designated as programmes for reducing pollution exist (or have yet been approved), attainment of the objectives of the Directive was guaranteed to the same extent by the legislation in force combined with the pollution monitoring measures put in place by the Spanish authorities.

15. In this connection, I would observe first of all that, in the present case, what is at issue is the infringement specifically set out in the reasoned opinion and in the application initiating these proceedings, namely the absence of and the failure to forward programmes for the reduction of pollution caused by substances in List II annexed to the Directive, as provided for by Article 7 thereof. Thus, although there is no doubt as to the existence of legislation for the protection of waters nor as to the efforts expended by the Spanish authorities, in both their legislative and administrative capacities, in filling a gap or remedying a shortcoming in the relevant legislation in respect of environmental protection, those are not the points at issue.

16. So far as concerns the Spanish Government's assertion that, despite the absence of formally adopted programmes, attainment of the objective of the Directive was guaranteed to the same extent by the legislation in force combined with current administrative practice, I am of the view that the provisions, of various ranks and types, on which the defendant State relies do not make it possible to establish the existence of programmes for the reduction of pollution, as required by the Directive.

The purpose of Law No 29/85 on the monitoring of waters, which entered into force shortly after the Treaty of Accession, [12] is to lay down a general scheme for national water resources and the use thereof replacing the earlier, superseded rules dating from 1879. Against that general background, Title V of that Law, which deals with protection of surface water quality, provides for a system of prior administrative authorisation for all discharges of polluting substances into the aquatic environment. The decree implementing the abovementioned Law [13] governs in detail the procedure for issuing such authorisations, the most important aspect of which consists in the setting by the competent authority of the emission standard with which every discharge must comply. However, the conditions for authorisation must be defined on the basis of the provisions contained in the plans for the reduction of pollution provided for in respect

12 — The Law is dated 2 August 1985 (BOE No 189 of 8 August 1985), whereas the Treaty of Accession was signed on 12 June 1985.

13 — Royal Decree No 849 of 11 April 1986 (BOE No 103 of 30 April 1986).

of each catchment basin and in the national water plan, as provided for by Spanish legislation. [14]

17. The Spanish Government itself acknowledges that the catchment basin plans have not been adopted, despite the fact that they are decisive for the definition of the programmes for reducing pollution caused by substances within List II which, it should be borne in mind, have various deleterious effects depending on the characteristics and location of the waters into which they are discharged.

The existence of studies on certain catchment basins, setting out the characteristics of the polluting activities in the country and classifying the polluting substances, does not amount to the establishment of programmes for the reduction of pollution. At most, they constitute preparatory material for drawing up programmes which must incorporate quality objectives, set deadlines for their implementation and include specific provisions governing the use of certain substances.

18. Furthermore, the Spanish Government's reference to the Ministerial Order of 12 November 1987, [15] which actually sets quality objectives for certain dangerous substances that, however, belong to List I and not to List II, the one at issue in the present case, is wholly irrelevant in this context.

19. So far as concerns pollution of sea water, the Spanish Government points to the existence of Law No 22/88, [16] which, in laying down general rules governing territorial waters, merely provides (at Articles 56 to 62) for a system of prior authorisation for discharges of dangerous substances into the sea. However, the system of authorisations and the general conditions to which they are subject must be determined by the autonomous communities. It has not been shown that those communities have established the programmes for the reduction of pollution required by the Directive. The reports drawn up by some of the autonomous communities and forwarded to the Commission at the pre-litigation stage of the infringement procedure merely set out the obligations under the Directive itself, such as the forthcoming establishment of specific programmes for the reduction of pollution by the substances falling within List II, [17] or refer to action for the collection of data or inquiries aimed at drawing up appropriate legislation for the transposition of the Directive, [18] but do not contain any actual programmes for the reduction of pollution.

14 — See, in particular, Royal Decree No 927 of 29 July 1988 (BOE No 209 of 31 August 1988).

15 — BOE No 280 of 23 November 1987.

16 — Law No 22 of 28 July 1988 (BOE No 181 of 29 July 1988).

17 — See the report submitted by the Generalitat of Valencia.

18 — See the report submitted by the Basque Government.

20. Finally, although Royal Decree No 484 of 7 April 1995, [19] laying down measures regulating discharges which are unlawful or subject to provisional authorisation, represents, as the defendant State submits in its defence, a means of achieving a reduction in the level of pollution, it does not constitute a programme as such within the meaning of the Directive. [20]

Within the scheme of the Directive, the 'programme' provided for in Article 7 is an instrument the purpose of which is to define procedures for the reduction of pollution, within a structured and potentially complete framework enabling a comparative assessment to be made of the various schemes in force for the protection of waters in the various Member States with the aim of coordinating them if possible.

It follows that neither a series of legislative measures nor a system of prior authorisations for the discharge of dangerous substances which, despite being intended to protect the aquatic environment, do not provide an organised and coordinated framework of measures to be implemented with a view to attaining specific quality objectives, constitutes a programme.

As the Court itself has pointed out, programmes for reducing pollution must be specific. The objective of reducing pollution which may be pursued by other measures, such as general improvement programmes, does not necessarily coincide with that of the Directive at issue. [21]

21. It should be borne in mind that the establishment of programmes is a means which the Directive itself treats as essential to the attainment of the objectives of environmental protection which is its main purpose. The corollary to that essential aspect is the obligation to set deadlines for the implementation of the programme (Article 7(5)) and the obligation to communicate it to the Commission so that the latter may, in addition to ascertaining whether it meets the objective pursued by the Directive, check that it has been coordinated as between the various Member States (Article 7(7)).

19 — BOE No 95 of 21 April 1995.

20 — In any event, moreover, the abovementioned royal decree was adopted after the expiry of the period prescribed by the reasoned opinion, including its extension. The Court has consistently held that failure to fulfil obligations must be determined at the material time and no account can be taken of any subsequent changes (see, most recently, Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 15).

21 — See, with regard to the programmes for the reduction of pollution provided for by Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life (OJ 1978 L 222, p. 1) and Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters (OJ 1979 L 281, p. 47), Case C-298/95 *Commission* v *Germany* [1996] ECR I-6747. That has been the approach recently taken in relation to the Directive at issue in the present case as well (see Joined Cases C-232/95 and C-233/95 *Commission* v *Greece* [1998] ECR I-3343, paragraph 35).

It follows from those provisions as a whole that, even if the aim of reducing pollution were pursued to a sufficient extent by the legislative instruments provided for under Spanish law, the absence of programmes for bringing about that reduction prevents the Commission from checking whether there has been coordinated implementation in the various Member States, thereby jeopardising the attainment of one of the objectives of the Directive which, as stated above, is to eliminate disparities in the conditions of competition which may adversely affect the implementation of the Common Market. [22]

22. Moreover, the requirement for particular accuracy in the transposition of directives was underscored by the Court specifically with regard to a directive on the environment, where the management of the common heritage is entrusted to the individual Member States in their respective territories. [23] That is precisely the case with respect to the objective, provided for in the Directive, of reducing pollution caused by the substances within List II, for which, unlike the substances within List I, the quality objectives are to be determined by each Member State. [24]

Conclusion

23. In the light of the foregoing, I propose that the Court:

— declare that, by failing to establish or communicate programmes for reducing pollution by substances falling within List II, as provided for by Article 7 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, the Kingdom of Spain has failed to fulfil its obligations under Article 7 of that directive and Article 189 of the Treaty;

— order the Kingdom of Spain to pay the costs.

22 — To that effect, see also the Opinion of Advocate General Tesauro in Joined Cases C-232/95 and C-233/95, cited in the previous footnote, in which the defendant Government challenged the grounds of the Commission's action, claiming that national provisions differing in rank and type ensured that the conditions governing water resources met the requirements laid down by the Directive.

23 — See Case 262/85 *Commission* v *Italy* [1987] ECR 3073, in particular paragraph 9.

24 — Except where provided for by specific directives adopted by the Council (Article 7(3)).