OPINION OF ADVOCATE GENERAL MISCHO

delivered on 11 July 2002 [1]

I — Introduction

1. Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community [2] (hereinafter: the Directive) has been the focus of the Court's attention on a number of occasions. [3]

2. On this occasion, the Court is called upon to examine the action brought by the Commission concerning the implementation of the Directive by the French Republic.

3. More specifically, the French authorities are claimed to have failed to adopt pollution reduction programmes including quality objectives for the 99 dangerous substances listed in an annex to the application and to have failed to communicate to the Commission summaries of those programmes and the results of their implementation, contrary to Article 7 of the Directive.

II — Relevant legislation

4. The Directive is intended to eliminate pollution from the aquatic environment caused by certain particularly dangerous substances set out in List I of the annex thereto (hereinafter: List I) and to reduce pollution of the aquatic environment by certain other dangerous substances set out in List II of the annex thereto (hereinafter: List II). To achieve that goal, Member States must, under Article 2 of the Directive, take the appropriate steps.

5. As regards the substances within List I, Member States must, under Articles 3 and 5 of the Directive, subject all discharges into the aquatic environment to prior

1 — Original language: French.

2 — OJ 1976 L 129, p. 23.

3 — See *Commission* v *Greece* (Joined Cases C-232/95 and C-233/95 [1998] ECR I-3343); *Commission* v *Luxembourg* (Case C-206/96 [1998] ECR I-3401); *Commission* v *Italy* (Case C-285/96 [1998] ECR I-5935); *Commission* v *Spain* (Case C-214/96 [1998] ECR I-7661); *Commission* v *Belgium* (Case C-207/97 [1999] ECR I-275); *Commission* v *Germany* (Case C-184/97 [1999] ECR I-7837); *Commission* v *Greece* (Case C-384/97 [2000] ECR I-3823); *Commission* v *Portugal* (Case C-261/98 [2000] ECR I-5905) and *Commission* v *Netherlands* (Case C-152/98 [2001] ECR I-3463).

authorisation by the competent authorities and impose emission standards which must not exceed the limit values. Those values are laid down by the Council on the basis of the substances' effects on the aquatic environment.

6. According to its first indent, List II contains substances belonging to the families and groups of substances in List I for which, however, the emission limit values referred to in Article 6 of the Directive have not as yet been determined by the Council. The Council has laid down limit values for 18 substances and has received proposals concerning an additional 15. This means that 99 substances within List I are currently included in the first indent of List II.

7. Furthermore, according to its second indent, List II contains certain substances whose deleterious effect on the aquatic environment can be confined to a given area and depends on the characteristics and location of the water into which those substances are discharged.

8. The rules applying to the substances within List II are designed, under Article 2 of the Directive, to reduce water pollution by those substances by means of appropriate steps that the Member States must take.

9. Those steps are defined in Article 7 of the Directive as follows:

'1. In order to reduce pollution of the waters referred to in Article 1 by the substances within List II, Member States shall establish programmes in the implementation of which they shall apply in particular the methods referred to in paragraphs 2 and 3.

2. All discharges into the waters referred to in Article 1 which are liable to contain any of the substances within List II shall require prior authorisation by the competent authority in the Member State concerned, in which emission standards shall be laid down. Such standards shall be based on the quality objectives, which shall be fixed as provided for in paragraph 3.

3. The programmes referred to in paragraph 1 shall include quality objectives for water; these shall be laid down in accordance with Council Directives, where they exist.

4. The programmes may also include specific provisions governing the composition and use of substances or groups of substances and products and shall take into account the latest economically feasible technical developments.

5. The programmes shall set deadlines for their implementation.

6. Summaries of the programmes and the results of their implementation shall be communicated to the Commission.

7. The Commission, together with the Member States, shall arrange for regular comparisons of the programmes in order to ensure sufficient coordination in their implementation. If it sees fit, it shall submit relevant proposals to the Council to this end.'

10. Article 13(1) of the Directive, as amended by Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain Directives relating to the environment,[4] provides:

'At intervals of three years the Member States shall send information to the Commission on the implementation of this Directive, in the form of a sectoral report which shall also cover other pertinent Community Directives. This report shall be drawn up on the basis of a questionnaire or outline drafted by the Commission in accordance with the procedure laid down in Article 6 of Directive 91/692/EEC. The questionnaire or outline shall be sent to the Member States six months before the start of the period covered by the report. The report shall be sent to the Commission within nine months of the end of the three-year period covered by it.

The first report shall cover the period from 1993 to 1995 inclusive.

...'

III — Analysis

11. In its application, the Commission observes that Member States are required, in accordance with Article 7(1) of the Directive in conjunction with Article 1 thereof, to establish programmes which include quality objectives and are intended to reduce water pollution within a specified period. All discharges into the waters concerned require prior authorisation by the competent authority; such authorisation lays down emission standards which are based on the quality objectives fixed in the relevant programmes.

4 — OJ 1991 L 377, p. 48.

12. The Commission takes the view that quality objectives are, therefore, both an integral part of the programmes provided for under that article in that their absence from them would render such programmes incomplete, and the quality indicator in the light of which the decision whether to issue authorisation to discharge is made. Therefore, in the absence of programmes and quality objectives, authorisation cannot have been granted in accordance with Article 7(2) of the Directive.

13. The Commission observes that the French Republic has failed to implement a programme/programmes to reduce pollution by dangerous substances in accordance with Article 7 of the Directive. It points out that, notwithstanding the failure to adopt programmes in a manner consistent with the Directive, that observation does not necessarily preclude that Member State from having met the requirement to have quality objectives for the waters affected, objectives which, under Article 7(2), have to be fixed in order to be able to lay down emission standards. The Commission maintains, however, that that is not the case here.

14. Thus, the Commission's criticism is structured around two main points: first, it argues that the measures communicated by the French Government which are supposedly intended to implement Article 7 of the Directive do not amount to programmes to reduce pollution caused by all relevant substances in List II for the purposes of that article; secondly, it criticises the French authorities for having failed to implement quality objectives for the waters into which those substances are discharged.

15. It should be pointed out that Article 7(3) of the Directive specifies that the programmes referred to in Article 7(1) include quality objectives for water. It inevitably follows, and the Commission itself mentions this for that matter, that where there is a continued failure on the part of a Member State to lay down such objectives, it must have failed to fulfil its obligation to establish programmes. Whether or not, in such circumstances, it has also failed to fulfil that obligation on another ground, for example, on account of a failure to provide comprehensive, coordinated and coherent arrangements, is therefore of secondary importance in my view because, in the absence of quality objectives, the failure to fulfil the obligation to establish programmes would in any event be found to exist.

16. I will therefore begin by considering the Commission's complaint relating to those objectives, the second complaint raised in the application.

The complaint concerning the failure to implement quality objectives for the waters into which the substances in List II are discharged

17. As I have noted above, the applicant points out that quality objectives are the quality indicator in the light of which the

decision whether to issue authorisation to discharge is made; authorisation cannot have been issued in accordance with Article 7(2) of the Directive in the absence of such objectives. According to the Commission, those objectives have to be laid down on the basis of consideration for the aquatic environment affected and by basin, taking into account all discharges affecting a certain area of water, irrespective of their nature or their origin.

18. It followed that authorisation could not be granted for a new discharge of a given substance, regardless of the emission standards applicable, where an aquatic environment affected by such discharges contained that substance in a quantity greater than that which is apparent from the relevant quality objectives.

19. The Commission adds that, in the same way, emission standards, which are required to be laid down in authorisations, may not be established in general or abstract terms; they must be established on a case-by-case basis with reference to the condition of the relevant aquatic environment affected so as to facilitate compliance with the quality objectives.

20. The requirement to lay down such objectives for each body of water and for every substance was likewise apparent from the Court's case-law and in particular from its abovementioned judgment in *Commission* v *Germany*. [5]

21. The measures communicated by the French Government did not cover all the relevant bodies of water and in any event were not caught by such a definition of quality objectives.

22. The defendant disputes the Commission's analysis, taking the contrary view that it has taken the steps required by the Directive.

23. The French Government explains in particular that it is Loi n° 64-1245, du 16 décembre 1964, relative au régime et à la repartition des eaux et à la lutte contre leur pollution (Law No 64-1245 of 16 December 1964 concerning the regime and distribution of water, and water pollution control) [6] which defines quality objectives.

24. It adds that the Circulaire du 17 mars 1978 relative à la politique des objectifs de qualité des cours d'eau, sections de cours d'eau, canaux, lacs ou étangs (Circular of 17 March 1978 concerning the quality objectives policy for watercourses, sections of watercourses, canals, lakes or ponds) set out the two levels appropriate for establishing those objectives. Under the ordinary law approach, first, departmental quality objective charts had to be drawn up in each département, those charts bringing together the quality objectives that, secondly, the département concerned was required to lay down for each watercourse in turn.

5 — Paragraphs 33 to 36 thereof.

6 — JORF, 18 December 1964, p. 11258.

25. The French Government describes how those charts are an essential tool in implementing Loi n° 76-663, du 19 juillet 1976, relative aux installations classées pour la protection de l'environnement (Law No 76-663 of 19 July 1976 on facilities classified for the purpose of environmental protection). [7] Under that law, orders may be issued which authorise the operation of some 65 000 industrial facilities and include provisions on discharges which are laid down by reference to the quality objectives drawn up for each watercourse.

26. According to the French Government, quality objectives are established in accordance with a scale of criteria for assessing general water quality which was set up by the Institut de recherches hydrologiques (French Hydrological Research Institute) in 1971. By reference to that scale, five separate water quality levels could be established, the attainment of which in each case being subject to observance of a large number of parameters. The French Government points out in this regard that although not all of those parameters fall within the scope of measures to control dangerous substances, one of them does, however, specifically concern the level of concentration in water of dangerous substances deriving from industrial waste. Nevertheless, steps were not taken to measure the level of concentration in all the waters concerned of each of the 99 substances contained in List II.

27. Particular objectives also existed in the case of waters forming the subject-matter of particular Community directives, for example in the case of shellfish waters, waters needing protection or improvement in order to support fish life, surface water intended for the abstraction of drinking water and bathing water.

28. By Circulaire n° 90-55 du 18 mai 1990, relative aux rejets toxiques dans les eaux (Circular No 90-55 of 18 May 1990 concerning toxic substances discharged into the water; hereinafter: Circular of 18 May 1990), the French Ministry of the Environment had introduced, at regional level, an inventory of industrial waste which specifically covered the 132 substances contained in List II and was to be compiled from the results of investigations into industrial processing by classified facilities and of tests on the substances discharged. The French Government points out that that inventory was compiled at regional level and made it possible to review the orders granting authorisation for such facilities where considered necessary.

29. With a view to strengthening the legal basis of the national rules in force, the French Republic had adopted Loi n° 92-3, du 3 janvier 1992, sur l'eau (Law No 92-3 of 3 January 1992 on water) [8] and the Arrêté du 1er mars 1993, relative aux prélèvements et à la consommation d'eau ainsi qu'aux rejets de toute nature des installations classées pour la protection de l'environnement soumises à autorisation (Order of 1 March 1993 on water withdrawal and consumption, and discharges of any kind by facilities classified for the purpose of environmental protection and subject to authorisation). [9] Under those provisions, quality objectives were to be

7 — JORF, 20 July 1976, p. 4320.

8 — JORF, 4 January 1992, p. 2946.
9 — JORF, 28 March 1993, p. 5283.

fixed, taking each watercourse in turn, and those objectives were to be taken into account by applying the rules on classified facilities, and in addition limit values were to be adopted in respect of those substances set out in Lists I and II of the Directive for which adoption of such values was necessary. The French Government makes it clear that limit values more stringent than those applied nationally may be adopted at prefectorial level if, taking the water quality objectives as the basis for his analysis, the Préfet (prefect of the relevant département) considers such a measure to be necessary, and that the Order of 1 March 1993 supplements the sectoral measures in that it lays down a series of requirements which must be met by those industries chiefly involved in discharging the substances in question.

30. The French Government does not dispute the fact that it must base its system of authorisation on quality objectives drawn up individually for each watercourse. In this context it points out that it indeed has drawn up such objectives, watercourse by watercourse, and that one of the parameters of those objectives concerns the scale of the industrial waste discharged.

31. It does, by contrast, take the view that there is no requirement for those objectives to be presented as they apply to each substance and that the interpretation of the term 'objective' advocated by the Commission is unworkable, too complex and calls for an unreasonable degree of cost. After all, the number of substances affected and the combinations of those substances that would have to be studied was almost infinite. Furthermore, an approach of that kind, taking each substance in turn, overlooked the combined effects (whether positive or negative) of pollutants.

32. In the French Government's view, by considering the objectives as a whole, the approach it has adopted, the Directive is, on the contrary, applied properly.

33. In this regard it submits that under the French system specifically those discharges of dangerous substances covered by the lists contained in the Directive can be measured and water quality objectives for each separate watercourse can be applied on the basis of several parameters, one of which, it claims, relates to those substances alone.

34. It was clear from the scale of criteria forming the basis of assessment of the quality objectives, which was communicated to the Commission in an annex to the defence, that one of those criteria, the biotic index, specifically and exclusively relates to dangerous substances. According to the French Government, an aggregate index is also, therefore, a value expressed as a figure, consequently making it possible to assess with precision the authorisations to be granted without fixing objectives for discharges on a substance-by-substance basis.

35. The defendant, unlike the Commission, considers that its interpretation of the Directive is not contradicted by any judgment of the Court. It explains that the Court has never interpreted Article 7 of the Directive, which is unclear on this matter, as requiring objectives to be laid down, substance by substance, for each watercourse.

36. According to the French Government, although the Court referred in its judgment in *Commission* v *Germany*, cited above, to the importance of laying down quality objectives as part of the approach of adopting programmes, it refers only to objectives 'for all the substances' and at no stage specifies that those objectives must relate to each substance individually. Thus, the matter in actual fact turned on whether the 99 substances must individually embody a parameter covered by a measure and a quality objective or whether all or some of those 99 substances can be brought together within one parameter relating to 'dangerous substances' which would be subject to monitoring and be covered by one quality objective.

37. While questioning whether the French authorities have in fact applied such comprehensive parameters at all, the Commission maintains that those parameters in any event do not meet the requirements of the Directive. It explains in this regard that the quality objectives which must be drawn up pursuant to Article 7 of the Directive must relate specifically to the List II substances mentioned in the annex to that Directive. General objectives, such as the attainment of water that is of a high quality in environmental terms, an objective laid down without any reference to the Directive, were not acceptable.

38. The Commission adds that although quality objectives may be laid down for the sum of individual parameters, experience has shown, however, that the parameters applied do not provide sufficiently stringent values for the individual compounds therein. To illustrate that point, it presents the example of the AOX parameter which expresses the total amount of organic chlorine compounds and which, it claims, for technical reasons cannot be established and monitored as regards the low concentrations inevitable for some of the compounds belonging to that family of substances.

39. Quality objectives referred to the chemical and biological characteristics of the environment into which the relevant substances are discharged. Therefore, they had to be drawn up with precision and, consequently, expressed as a figure for the substance concerned, and it was impossible to work out emission standards in the absence of such objectives expressed in figures.

40. It must, clearly, be observed that the defendant's argument is not supported in case-law.

41. Thus, in its judgment in *Commission* v *Netherlands*, cited above, the Court expressly referred to the obligation to determine limit values for the 114 priority substances. [10] In that judgment it also mentions the close link between the quality of the aquatic environment and the level of polluting substances. Accordingly, that

10 — Paragraph 34 thereof.

level must be determined with precision for each of those substances; in that context data that merely relates to such substances as a whole is insufficient.

42. In the judgment in *Commission* v *Belgium*, cited above, the Court likewise held that it was for the Kingdom of Belgium to fix quality objectives for the 99 substances listed in the annex to the application in that case, the same substances as those to which the Commission refers in this case.

43. As regards the abovementioned judgment in *Commission* v *Germany*, on which the defendant relies, although the expression 'all the substances' used in paragraph 34 of the judgment provides no absolute certainty in this matter, the expression is to be construed in the light of the judgment as a whole and, specifically, the Court's reference to pollution 'by any of the substances' in question. [11]

44. As to the defendant's argument that it is impossible in practice to set objectives for all the substances in question, it should be pointed out that a similar line of argument has already been rejected by the Court in its abovementioned judgment in *Commission* v *Netherlands* where it held that difficulties relating to identification of the substances concerned cannot release a Member State from the obligation to transpose the Directive and pointed out that the Member State in question could have contacted the Commission or had scientific studies carried out at the appropriate time.

45. Furthermore, I share the Commission's view, which for that matter is not contested by the defendant, that the use of aggregate parameters does not always make it possible to lay down values that are sufficiently stringent for the individual compounds contained therein. Therefore, such parameters cannot be considered to be an appropriate quality objective under the Directive.

46. I should like to add that, even if the approach involving aggregate objectives were, in principle, compatible with the requirements of the Directive, as it is interpreted by the Court, which it is not, I agree with the other criticisms raised by the Commission concerning the approach adopted by the French authorities.

47. Indeed, in my view, by adopting an approach based on reference to five overall levels of quality which are established on the basis of multiple parameters, only one of which covers dangerous substances, the priority that those substances are granted by the Directive clearly cannot be of benefit in the control of those substances. Such an approach on the contrary implies that those overall objectives are the result of a compromise as between a number of considerations, all of which are not necessarily connected with the combating of pollution

11 — At paragraph 56.

by the substances listed in the annex to the Directive. It is apparent from the wording of Article 7 that the objectives mentioned therein must, on the contrary, specifically relate to reduction of pollution caused by those substances.

48. Lastly, it is clear that the defendant fails to dispel the doubts raised by the Commission as to whether the measures at issue have in fact been implemented. Accordingly, Law No 92-3, for instance, is a measure of general application, implemented *inter alia* by the Order of 1 March 1993, which refers to many limit values but which, as the Commission points out and the French Republic does not refute, has been annulled by the Conseil d'État (French Council of State).

49. It follows from all the foregoing considerations that by failing to establish quality objectives for the 99 substances listed in the annex to the application, the French Republic has failed to fulfil its obligations under the Directive.

50. Moreover, since the programmes that the Member States must establish under Article 7 of the Directive include those objectives, it necessarily follows that the defendant could not have established such programmes and that the Commission's complaint as regards the absence of such programmes is valid.

51. It is therefore only for purposes of exhaustiveness that it is necessary to examine whether there are other grounds for considering that the measures communicated by the French authorities do not constitute a programme within the meaning of the Directive and whether, consequently, a failure to comply with Article 7 thereof exists on two grounds.

The complaint concerning the establishment of programmes to reduce pollution caused by the substances in List II

52. The Commission infers from the case-law relating to the Directive that the programmes referred to in Article 7 thereof must:

— be specific and designed to reduce pollution caused by any of the relevant substances in List II, thereby differing both from general purification programmes and from bundles of *ad hoc* measures designed to reduce water pollution;

— comprise a transparent, comprehensive and coherent structure providing practical and coordinated arrangements;

— include the setting of practical objectives for reducing emissions within specified time-scales;

— cover the entire State concerned;

— apply to the substances and those belonging to the groups of substances in List II which are liable to be present in the waters of the Member State concerned, and the relevant substances must be identified by the competent authorities on the basis of the results obtained from studies on the waters affected, and the 99 substances mentioned in the Commission's communication of 1982 must, of course, be included in the measures taken by Member States, unless those substances have not been found in their waters;

— include, as I have stated above, quality objectives drawn up on the basis of analyses specifically targeted at the individual bodies of water affected, those objectives serving as the point of reference for calculating the emission standards specified in the authorisations; and

— be communicated to the Commission in a form which facilitates comparative appraisal and their harmonised implementation in all the Member States.

53. The Commission goes on to assess the measures adopted by the French authorities in the light of those criteria.

54. First of all, it carries out a comprehensive analysis of the 'national programme' or of the 'programme of measures to reduce pollution caused by discharges of toxic substances' communicated in the annex to the letter of 25 October 1991 by which the defendant replied to the letter of formal notice of 26 February 1991. In the Commission's view, that programme comprises a series of uncoordinated measures with no objectives or overall schedule. It therefore was not such as to provide any practical or coordinated arrangements or to set any practical objectives for reducing emissions within specified time-scales.

55. The Commission notes that not all of the waters affected in French territory are covered and that no reference whatsoever concerning territorial coverage is made in that letter. Furthermore, no documents concerning any near-shore waters or areas of water have been communicated.

56. Moreover, the 'national programme' did not lay down comprehensive arrangements for reducing pollution by any specific substances. The Commission states that although some of the measures contained in that programme (such as the prerequisite that an inventory be drawn up of the

substances discharged and the measures regulating discharges from classified facilities) refer to the 99 priority substances, they cannot, however, be defined as 'programmes'. As regards the other measures contained in that 'national programme', they did not specifically refer to the dangerous substances in List II. In that regard the Commission points out that, in practice, the Member States were able to focus their efforts on substances mentioned by name, an approach based on the individual substance concerned which, moreover, facilitates the setting of quality objectives and by which implementation of the programmes in question can be monitored more effectively.

57. The Commission concludes that the 'national programme' does not meet the requirements of a 'programme' for the purpose of Article 7(1), (5) and (6) of the Directive.

58. The French Government reasserts its view that its reply to the letter of formal notice may be regarded as a summary of the measures taken by the French Republic pursuant to Article 7 of the Directive.

59. While observing that the Commission itself acknowledges that the Circular of 18 May 1990, annexed to the defence, includes an objective, expressed as a figure, for pollution reduction that covers the entire territory for the period from 1985 to 1995, the defendant explains that if there was no overall schedule or overall objective, then that was because objectives and programmes have to be determined by assessing each watercourse individually. The main provision of the French programme in actual fact consisted in the juxtaposition of thousands of work schedules designed to meet locally defined objectives and embodying as many practical arrangements.

60. As regards the Commission's observation that the programme is not directed at any specific substance, the French Government explains that the dangerous substances liable to be discharged into the water, the impact of such discharges into the water, the need, if at all, to carry out additional work and the timetable for completion of such work are all determined upon consideration of the order to grant authorisation to the individual facility concerned.

61. In particular, the French Government emphasises that the fundamental part of its action involves the criteria governing the issue of authorisations to classified facilities, authorisations which are issued by prefectorial decision, on the basis of the quality objectives for the waters into which substances are to be discharged. According to the French Government, those objectives determine all the measures taken by French local authorities with a view to reducing industrial pollution.

62. The French Government therefore explains that, since what is involved is

application of the Directive in a manner that is locally relevant, identifying substances and carrying out work to reduce discharges of those substances, there is no benefit in identifying a particular substance at national level. In so far as the programme concerned is, above all, the juxtaposition of a large number of local programmes, the Commission should be taking account of the link that exists between the French rules governing classified facilities and the national programme for combating pollution.

63. Secondly, the Commission conducts a more detailed analysis of the various measures contained in that 'national programme' to assess whether those measures, either as a whole or separately, are such as to constitute programmes to reduce pollution by dangerous substances in accordance with Article 7 of the Directive. It explains that that programme has been described as consisting of five separate parts, namely sectoral programmes, local programmes to recycle the main types of industrial waste, measures relating to diffuse sources (spent batteries and accumulators, dry-cleaning of textiles), quality objectives and measures relating to accidents.

64. As regards the 'sectoral programmes', the Commission considers that they are no more than a description of the legal framework applicable (or even just contemplated), resulting from national legislation relating to facilities classified for the purpose of environmental protection, and do not contain any specific arrangements or objectives to reduce pollution by the dangerous substances referred to in List II or for those of the 99 priority substances which are relevant in the national context for France, or any implementation deadlines.

65. The applicant points out that the Directive makes a clear distinction between 'prior authorisation' and 'pollution reduction programmes' and that it makes no provision whatsoever for the adoption of either of those instruments instead of the other. In its view, it cannot be argued that the programmes in question can make redundant the prior authorisation system, the setting up of which is a specific requirement of the Directive. The Commission explains that the pollution reduction programmes are designed to make arrangements as far as possible for such reduction to a level lower than that existing when they were drawn up and implemented and to achieve this within a reasonable timescale to be specified by the competent authorities. From that point of view, the Commission considers it self-evident that, vital though it is, a prior authorisation system for discharges of dangerous substances cannot be considered to make redundant the programmes mentioned in Article 7 of the Directive.

66. The Commission therefore concludes that the part of the 'national programme' concerning 'sectoral programmes' cannot constitute a 'reduction programme' for the purpose of that provision.

67. It similarly criticises the local reduction programmes mentioned by the defendant.

68. Indeed, according to the Commission, the letter from the French authorities of 30 July 1993 which refers to 'methodology problems', the 'limitations of the approach' consisting in pollution reduction programmes implemented on a substance-by-substance basis and the introduction of minimum national discharge rules by the Order of 1 March 1993 would suggest that the local reduction programmes have not, in fact, been carried out, if they were ever commenced in the first place.

69. The Commission infers from the above that the 'local recycling programmes' have not been set up to deal specifically with pollution by all the relevant substances in List II.

70. The French Government considers that the Commission's argument is incorrect and reflects its poor understanding of that mechanism. It explains that the 'local programme' concerns reference to the orders granting authorisation issued in accordance with the body of rules governing classified facilities, the characteristics of which, described on several occasions by the French authorities, were such as to provide the answers to the Commission's questions concerning the local focus and time-scale of the French programme, the implementation of the measures listed, the failure to deal specifically with the dangerous substances and the absence of any timetable.

71. As regards the measures relating to diffuse sources, the defendant does not dispute that although those sources cannot be identified and dealt with by means of the rules governing classified facilities, they are for the most part caught, if only entirely incidentally, not to say contingently, by general rules on the manufacture of products or on waste management, which clearly does not correspond to the concept of the programme as provided for in the Directive but, rather, at best, to the concept of measures which may be included in a programme for the purpose of Article 7(4) of the Directive, a provision relied on, for that matter, by the French Government in that context.

72. Similarly, measures relating to accidents cannot constitute a programme.

73. Thirdly, the Commission examines the other measures which, the defendant claims, are designed to implement Article 7 of the Directive.

74. The Commission notes in particular that although the Order of 1 March 1993 indeed does lay down discharge standards for the 99 priority substances contained in List II, it by definition covers only point sources, not diffuse sources. Furthermore, of all the point sources, the order applied only to those originating in facilities that were classified as being subject to authorisation, that is to say it applied only to

65 000 of the 550 000 French classified facilities. Lastly, and in any event, the Commission points out, as I have stated above, that the order in question was annulled by the Conseil d'État on 21 October 1996, meaning that the Directive could not even be transposed retroactively.

75. In that regard the French Government contends that the body of rules governing authorisation of classified facilities covers facilities which present serious risks or drawbacks in terms of inconvenience for the neighbourhood and in terms of public health and safety, agriculture, nature conservation and environmental protection, which includes the aquatic environment, or preservation of beauty spots and monuments. It therefore concludes that, by definition, the concept of the classified facility includes fixed facilities which are liable to discharge the substances in Lists I and II and adds that, where it appears that a facility not subject to authorisation presents serious risks or drawbacks, on account of substances discharged into the aquatic environment for example, the relevant préfet may lay down requirements as to the discharge values to be observed or indeed may suspend the operation of that facility altogether.

76. The Commission replies that the method by which the task of specifying emission standards for dangerous substances falls to the préfet in each of his decisions to authorise a particular facility does not constitute a programme as provided for in Article 7 of the Directive since it is based on *ad hoc* measures for each of the substances at issue with no overall framework that lays down quality objectives concerning the various watercourses or areas of water. The Commission points out in this connection that it follows from paragraph 58 of the abovementioned judgment in *Commission* v *Germany* that 'neither general rules nor *ad hoc* measures adopted by a Member State which, though comprising a wide range of water-protection standards, none the less do not lay down quality objectives relating to a given watercourse or area of water can be deemed to constitute a programme within the meaning of Article 7 of the directive'.

77. As regards the 'long-term action programmes of the respective financial bodies of the six river authorities', in respect of which there was nothing, in the Commission's view, to suggest that they included any arrangements that provided for practical objectives to reduce pollution by List II substances or implementation deadlines, the French Republic draws attention to the importance of those programmes in terms of quantity, claiming that they cover all the drainage basins of metropolitan France and make up the financial part of the programme to eliminate pollution from the waters into which the dangerous substances referred to by the Directive are discharged and, in general, all forms of industrial pollution.

78. The work prescribed under the orders granting authorisation to classified facilities was financed in that way and those financial bodies within the river authorities earmarked substantial funds for the completion of such work.

79. However, the French Republic does concede that whilst the action of those authorities may contribute to the implementation of the programmes mentioned by the Directive, it cannot in any event be a substitute for those programmes.

80. The French Government none the less considers itself to have fulfilled its obligations under the Directive and to have established a 'programme' as provided for in the Directive.

81. It explains in that regard that the fundamental component of that programme is the link made with the issuing, by prefectorial decision, of authorisations to classified facilities on the basis of the quality objectives for the waters into which the substances concerned are to be discharged, and that each decision incorporates a schedule of work to be carried out by the manufacturer concerned at the same time as a new order is adopted authorising the continued operation of the facility. In order to facilitate the implementation of that mechanism, first, funding for the work designed to eliminate pollution, which became essential as a result of the orders granting authorisation to discharge, was available through the programmes set up by the water authorities and, secondly, sectoral rules applying at all times and covering the whole of France existed for the purpose of reducing comprehensively pollution by certain types of waste. Those rules, implemented by means of the orders granting authorisation, constituted national measures which applied to highly polluting sectors.

82. The French Government adds that the provisions of Article 7(1) and (4) of the Directive clearly show that the authorisation system under which emission standards are laid down and calculated on the basis of quality objectives for water must constitute a key element in programmes for eliminating pollution. It also challenges the Commission's interpretation of paragraph 28 of the judgment, cited above, in *Commission* v *Germany*.

83. It is apparent from the foregoing considerations that there are two parts to the disagreement between the Commission and the defendant. First, they have different conceptions of the scope of the obligations laid down by the Directive and, secondly, they consequently disagree as to whether the defendant has fulfilled those obligations.

84. As regards the first point, the two parties are at odds over the scope of Article 7 of the Directive which, it should be borne in mind, reads as follows:

'1. In order to reduce pollution of the waters referred to in Article 1 by the substances within List II, Member States shall establish programmes in the implementation of which they shall apply in particular the methods referred to in paragraphs 2 and 3.

2. All discharges into the waters referred to in Article 1 which are liable to contain any of the substances within List II shall require prior authorisation by the competent authority in the Member State concerned, in which emission standards shall be laid down. Such standards shall be based on the quality objectives, which shall be fixed as provided for in paragraph 3.

3. The programmes referred to in paragraph 1 shall include quality objectives for water; these shall be laid down in accordance with Council Directives, where they exist.

4. The programmes may also include specific provisions governing the composition and use of substances or groups of substances and products and shall take into account the latest economically feasible technical developments.

5. The programmes shall set deadlines for their implementation.

6. Summaries of the programmes and the results of their implementation shall be communicated to the Commission.

7. The Commission, together with the Member States, shall arrange for regular comparisons of the programmes in order to ensure sufficient coordination in their implementation. If it sees fit, it shall submit relevant proposals to the Council to this end.'

85. It is indisputable, in my view, from those provisions that the essential obligation of the Member States is to draw up programmes. Such programmes include objectives and are implemented by means of a system of authorisation. Such authorisations are granted by reference to the objective specified previously.

86. It therefore follows clearly from the wording of that article that authorisation systems are no more than a tool for setting up a programme and that a Member State cannot therefore claim to have fulfilled its obligations by mere virtue of its having established such a system.

87. What is more, the defendant does not arrive at a different conclusion in its arguments relating to that article. It points out that authorisation systems are a key element in reduction programmes and that the very use in Article 7(1) of the expression 'in particular' in itself shows that other measures may be involved in those programmes. The optional nature of such measures was, again, apparent from the use of the word 'may' in Article 7(4).

88. It must be pointed out, however, that although authorisation systems are a key element in reduction programmes, this by no means implies that those programmes have to be confined to a system of authorisation.

89. This is, moreover, expressly shown by Article 7(3) of the Directive which, unlike Article 7(4), does not set out an option, providing instead that the programmes referred to in Article 7(1) are to include quality objectives for water. It necessarily follows that such programmes cannot merely be a system of authorisation.

90. That conclusion also applies to the interpretation of case-law.

91. Indeed, it follows from the judgment in *Commission* v *Germany*, cited above, that under Article 7 of the Directive 'the Member States are required, *inter alia*, to adopt programmes which include both water quality objectives and a requirement that any discharge of substances in List II be subject to prior authorisation laying down emission standards calculated on the basis of those quality objectives'. [12]

12 — Paragraph 28 thereof.

92. In the French Government's view, the Court had accordingly confirmed the central, if not almost exclusive, nature of the provisions relating to the authorisation mechanism within the programmes, which was inconsistent with the Commission's argument that the programmes are separate from the system of prior authorisation.

93. Indeed, the defendant submits that the clause introduced by 'which include' and that introduced by 'a requirement that... be subject ...' both qualify the concept of the programme. It argues that that paragraph should therefore be regarded as a definition of the programmes under Article 7 of the Directive which must, in essence, require that any discharge of substances in List II be subject to authorisation, and, therefore, as confirmation that the French programme exists.

94. As illustrated in the Court's use of the expression 'both Y and Y', the fact remains that the Court held the establishment of a system of authorisation and the establishment of a programme to be two different matters entirely and that consequently it is insufficient for a Member State to lay down provisions for one of those mechanisms in order automatically to obtain the other and thereby fulfil its obligations under Article 7 of the Directive.

95. The fact that the defendant's reasoning in terms of the scope of that provision does not stand up to examination still does not

point to any failure to fulfil obligations. I should like to explain here in this second point of my analysis that it is necessary to ascertain whether or not the various measures which have been established by the French authorities and are mentioned above do, all the same, constitute a programme for the purpose of the Directive.

96. It is apparent from the case-law [13] that the programmes to be established under Article 7 of the Directive 'must embody a comprehensive and coherent approach, covering the entire national territory of each Member State and providing practical and coordinated arrangements for the reduction of pollution caused by any of the substances in List II which is relevant in the particular context of the Member State concerned, in accordance with the quality objectives fixed by those programmes for the waters affected. They differ, therefore, both from general purification programmes and from bundles of *ad hoc* measures designed to reduce water pollution'.

97. However, it must be noted, as the documents before the Court show, that I am dealing specifically with such a bundle of measures in these proceedings.

98. Indeed, the Commission's observations indicate that the French authorities communicated to it, as measures transposing the Directive, a broad range of information from amongst which it appears difficult to distinguish a comprehensive set of programmes as referred to in the case-law.

99. Besides, whilst the defendant, as I have shown above, challenges the Commission's arguments regarding any number of specific matters, it does not, however, succeed in demonstrating that it has set up a comprehensive and coherent programme to reduce pollution by all the priority substances in any of the waters affected.

100. It itself concedes that the mechanism is essentially made up of a juxtaposition of thousands of work schedules designed to meet locally defined objectives and embodying as many practical arrangements, which would account for the absence of any overall schedule or, where appropriate, overall objective.

101. It should therefore be concluded that, according to the French authorities' own description, the measures they adopted do not meet the conditions listed in that case-law.

102. On the contrary, those measures are presented as '*ad hoc* measures, not comprehensive and coherent programmes for

13 — *Commission* v *Belgium*, cited above, at paragraphs 39 to 41.

pollution reduction, based on studies of the waters affected and setting quality objectives'. [14]

103. This is apparent not only in view of the abovementioned assertion by the French authorities but also from the fact that the main focus of the programmes in question, as those authorities point out, is the authorisation mechanism operating at local level.

104. After all, the defendant points to the various characteristics of the authorisation system in order to highlight its central role as regards implementing a bundle of measures, some specifically concerning the reduction of pollution by dangerous substances, which includes timetabling factors and takes as its basis consideration of the condition of the local waters as opposed to one standard national value.

105. The system of authorisation covered all the relevant facilities since, under the relevant Law, all facilities which were liable to discharge the substances concerned were regarded as 'classified facilities'. Moreover, authorisations were issued, where necessary, together with a schedule requiring that the necessary work be completed in order to achieve the quality objectives laid down in respect of the waters concerned.

106. Furthermore, *ad hoc* measures imposed at prefectorial level and sectoral measures applying, where appropriate, to specific substances together made up the mechanism.

107. The defendant considers itself to have thus rebutted the Commission's criticisms in particular as regards the geographical scope of the French measures, the failure to refer in those measures to specific substances or even the extent to which those measures have actually been implemented.

108. However, it must be observed that such a mechanism, by its very nature, cannot constitute a programme. Authorisations are, after all, granted on the basis of various considerations relating to the local situation, not on the basis of comprehensive arrangements focused on reducing pollution in each watercourse by priority substances, which are defined from an overall perspective.

109. Even if they covered the entire territory and all the relevant facilities, thousands of local measures cannot compensate for the absence of comprehensive arrangements. This point is illustrated perfectly by

14 — *Commission* v *Belgium*, cited above, at paragraph 45.

diffuse sources in that they are unlikely to be caught by a system of authorisation. Another perfect illustration of that point is found in the Circular of 18 May 1990, annexed to the defence, which itself mentions the piecemeal nature of the steps taken thus far and in which respect the Commission points out that the circular does not cover all the substances at issue and that it does no more than request that a programme be drawn up. Those criticisms are not rebutted by the defendant.

110. It is apparent from the foregoing that, as the Commission has pointed out, inasmuch as they are focused on the issue of authorisations, the French rules meet a requirement other than the requirement to draw up a pollution reduction programme, given that the authorisation system actually prescribed by the Directive is separate from the obligation to establish programmes including water quality objectives. Therefore, it would be incorrect to consider the French Government as having fulfilled its obligations under the Directive on the ground that a system of prior authorisation had been set up.

111. Accordingly, the breach of obligations under Article 7 of the Directive is also established by virtue of the fact that the French authorities have failed to establish programmes within the meaning of that provision.

The complaint concerning the failure to notify programmes

112. The Commission complains that the French Republic has also infringed Article 7 of the Directive by having failed to communicate summaries of the programmes and the results of their implementation. It draws attention to the particular importance in these circumstances of that obligation to communicate since such communication has to enable the Commission, in accordance with Article 7(7), together with the Member States, to arrange for regular comparisons of the programmes in order to ensure sufficient coordination in their implementation and, if it sees fit, to submit relevant proposals to the Council to that end.

113. The Commission points out that a large number of documents were not communicated to it within the appropriate time and that the information it received was not presented in a format that lent itself to comparison with the programmes of other Member States, a measure provided for in the Directive.

114. The French Republic maintains that it has communicated a substantial amount of information to the Commission, if only most recently in the annex to its defence. The French Government does not deny that the manner in which the documents forwarded to the Commission during the pre-litigation procedure were presented could have made it difficult to grasp the reasoning underlying its strategy for transposing the Directive. It therefore considers

it necessary to re-examine those documents in order to show that the measures set out in the various items of correspondence indeed had been notified to the Commission in accordance with Article 7(6) of the Directive.

115. Lastly, while accepting that failure to communicate measures to the Commission was inevitable in view of the highly decentralised nature of the programme, the French Government none the less submits that the French authorities are occupied in the drawing up of instruments with a view to improving the supply of information and communication to the Commission of the results obtained.

116. However, the fact remains on any view that the measures adopted by the French authorities did not constitute a programme for the purposes of the Directive, as I have already established. It necessarily follows that those authorities could not have communicated such a programme to the Commission, regardless, moreover, of the information they forwarded to the Commission.

117. It must therefore follow that the failure to fulfil obligations is established in this respect too.

118. I shall therefore, purely in the alternative, proceed to examine in greater detail the arguments of the parties in that regard.

119. On a number of occasions, the Commission dwells on the shortcomings of the information it received from the French authorities.

120. Thus, for instance, it observes that the specific results ensuing from implementation of the 'national programme' were never communicated to it. As regards the 'sectoral programmes', to which the defendant refers, the Commission points out that it never received any notification of their results in terms of pollution reduction, nor any information on how they were developing in the light of technical developments and changes in the legal framework. Nor had it been informed as to whether the 10 industrial sectors covered by those programmes were the only ones to discharge the 99 priority substances relevant in the national context for France.

121. As regards the 'local programmes to recycle the main types of industrial waste', the Commission points out that it did not receive notification of any laws, regulations or administrative measures forming the basis of such programmes, even though the legal framework appears to have developed.

122. The Commission adds that the documents communicated by the French Government as regards those local programmes are very vague. It dwells on the fact that the defendant has not provided a single example of one such programme, not even in summary form, which, it argues, is indeed sufficient to determine that Article 7(6) of the Directive has been infringed, and that no items of correspondence from the French authorities establish that those programmes have in fact been implemented.

123. The applicant raises similar complaints with regard to the measures concerning diffuse sources.

124. As to the system of prior authorisation for discharges, the Commission observes that it did not receive notification of the Order of 25 April 1995 supplementing the Order of 1 March 1993. This was also true of the results of the inventory of substances discharged into the water, any reference to which, it claims, in the end was not contained in any correspondence sent by the French Government, and consequently there was no proof of the inventory's completion. Similarly, the Commission maintains that it did not receive any notification of the legal framework for the 'long-term action programmes of the respective financial bodies of the six river authorities'.

125. The Commission adds that the fact that the French Government failed to refer to the various aspects contained in the report communicated on 26 November 1996 on the implementation of the Directive as a programme in any event constitutes a failure to fulfil the obligation under Article 7(6) of the Directive; that obligation is separate from the obligation under Article 13(1) resulting from the amendment laid down by Council Directive 91/692/EEC.

126. It also points out that that report comprises unexplained, substantive inconsistencies as compared with the previous items of correspondence sent by the French Government, which likewise concern the implementation of the Directive, in that, it claims, reference is no longer made in that report to any national programme or local recycling programmes, or to the measures concerning diffuse sources and accidents. On the contrary, it made references merely to a 'programme' with no identifying features and to a programme relating to the Nord-Pas-de-Calais region, a copy of which was not received by the Commission either.

127. The Commission states that the Circular of 18 May 1990, also mentioned in the 1996 report, was not communicated to it.

128. The defendant, also in this respect, points to the essential nature of orders granting authorisation *vis-à-vis* its pollution reduction programme.

129. In that regard, the French Government first of all makes it clear that it indeed did notify the method it applied to the Commission, in particular in the reply to the letter of formal notice and in subsequent documentation, and that, rather than containing a summary of a new programme, the report of 26 November 1996 did no more than set out the broad outline of the French programme, the essential focus of which, that is to say that work should be carried out in classified facilities in the event that the discharges from such facilities do not meet the water quality objectives laid down at local level, had been determined right at the outset.

130. Relying on the judgment in *Commission* v *Germany*, cited above, [15] the French Government submits that it did not see fit to notify every analysis of the discharges concerned and every decision requiring that work be carried out because the essential objective involved in communicating programmes to the Commission was to arrange for 'comparisons' of the programmes implemented for the purpose of sharing experiences or facilitating the drawing up of future Community rules. In its view therefore, it is more the link between the combating of water pollution and the authorisation system for classified facilities, rather than the details of every works project undertaken, that seems relevant as far as the comparison provided for under Article 7(7) of the Directive is concerned.

131. It is, after all, clear in the French Government's view that the Commission is not requesting notification of every analysis made of the discharges concerned or notification of all the work projects required to be undertaken inasmuch as the main objective involved in communicating programmes to the Commission is, ultimately, to achieve the most effective system possible as a result of the Member States' contributions.

132. As regards the failure to notify 'local programmes', the French authorities maintain that such programmes are covered by the mechanism contained in the second part of the reply to the letter of formal notice and that their legal basis, Article 68 of the order concerning discharges from classified facilities, has indeed been communicated to the Commission. They emphasise that this is not a matter concerning documents that should have been communicated to the Commission; what is involved is, rather, a term describing the means by which recourse may be had to orders granting authorisation.

133. The defendant therefore considers that it has communicated a national programme, its description clearly presenting the major principles thereof: application at local level by means of the rules on classified facilities in connection with the locally defined quality objectives, part-financing of the work by the water authorities and sectoral measures or measures on a product-by-product basis for the minority of cases where the discharges do not issue from classified facilities. It therefore considers it incorrect to describe the 1996 report as a summary of an entirely

15 — Paragraphs 31 and 32 thereof.

new programme that has never been notified when the report in actual fact merely sets out the broad outline of the French programme and presents the first recorded results.

134. The defendant considers itself to have demonstrated that the abovementioned inventory has been successfully completed and communicated in the form of a summary to the Commission.

135. Finally, it submits that the Circular of 18 May 1990 was informally communicated to the Commission by fax on 27 June 2000 and was, in any event, annexed to the defence.

136. It should, however, be pointed out that, for the purpose of establishing whether there has been an infringement, only the information communicated prior to expiry of the period prescribed by the reasoned opinion is to be taken into account. [16] Furthermore, information communicated in a purely informal manner cannot be regarded as the notification of measures transposing a directive.

16 — Case C-119/00 *Commission* v *Luxembourg* [2001] ECR I-4795.

137. The defendant adds that, in its view, it seems contradictory to require notification of the circular relating to the inventory and at the same time to maintain that that inventory does not constitute a programme for the purposes of the Directive. However, the Commission rightly responds that, in the absence of such notification, it cannot possibly assess whether the substance of the circular meets the criteria of a programme under the Directive.

138. In the light of the foregoing, it is clear that the French Republic does not answer all the criticisms raised by the Commission. Furthermore, and in particular, it itself accepts, as I have already shown, that, owing to the different terminology used as well as the highly decentralised nature of its programme, there was room for improvement in terms of supplying information to the Commission and that steps must be taken to remedy that situation.

139. Accordingly, the failure to fulfil obligations is in any event established.

Conclusion

140. In the light of the foregoing considerations, I propose that the Court should:

— declare that, by failing to adopt pollution reduction programmes including quality objectives for the 99 dangerous substances listed in the annex to the application and by failing to communicate to the Commission summaries of those programmes and the results of their implementation, contrary to 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 French Republic has failed to fulfil its obligations under the EC Treaty;

— order the French Republic to pay the costs.