OPINION OF ADVOCATE GENERAL MISCHO

delivered on 15 September 1998 *

1. The Commission complains that the United Kingdom has failed, as regards England and Wales, to fulfil its obligations under Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption ('the Directive'). [1] The term 'water intended for human consumption' means water supplied for consumption or taken from private wells or water used in or affecting food production (Article 2).

2. The Member States are required to fix values applicable to water, which must be less than or the same as those shown in the 'Maximum admissible concentration' column in Annex I (Article 7(1)). They must take the steps necessary to ensure that water intended for human consumption at least meets the requirements specified in Annex I (Article 7(6)).

3. The Member States are required 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. In addition, under Article 19, they must take the necessary measures to ensure that the quality of water intended for human consumption complies with the Directive within five years of its notification. As regards the United Kingdom, those time-limits expired on 18 July 1982 and 18 July 1985 respectively.

4. Member States are permitted, however, to make provision for derogations in order 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 situations arising from exceptional meteorological conditions (Article 9). In the event of emergencies, the competent national authorities may, for a limited period of time and up to a maximum value to be determined by them, allow the maximum admissible concentration to be exceeded (Article 10).

5. In addition, Member States may, in exceptional cases and for geographically defined population groups, submit a special request to the Commission for a longer period for complying with Annex I. In the event of disagreement with the Member State concerned, the Commission is required to submit appropriate proposals to the Council (Article 20).

* Original language: French.

1 — OJ 1980 L 229, p. 11.

The national rules

6. Section 68(1)(a) of the Water Industry Act 1991 requires water companies to supply only water which is 'wholesome' at the time of supply, where that water is intended for human consumption. 'Wholesomeness' is defined in the Water Supply (Water Quality) Regulations 1989, as amended, in particular by the Water Supply (Water Quality) (Amendment) Regulations 1991 and the Private Water Supplies Regulations. The parameters established by those provisions incorporate those laid down by the Directive and, in some cases, impose more stringent requirements. According to the United Kingdom Government, the obligation laid down by the Water Industry Act 1991 to supply wholesome water is an absolute one. It is not a defence for a water company to show that it has done everything practicable or possible to supply wholesome water. Furthermore, according to section 37 of the Act, water companies are under a duty to maintain supplies of water sufficient to ensure that they can meet all their obligations under Part III of the Act, including the obligation under section 68 to supply water which is wholesome.

7. Under the domestic legislation, water companies are therefore under a primary obligation to supply water which complies with the standards of the Directive.

8. Sections 18 to 24 of the Water Industry Act 1991 establish a specific enforcement framework which deals, *inter alia*, with the situation where a water company is in breach of that primary legal obligation. In so far as is relevant to the present case, those sections provide, in essence, as follows:

(a) Where a water company is in breach of its primary obligation to supply wholesome water, the Secretary of State must make a provisional or final enforcement order (section 18) unless the company concerned has provided him with an appropriate undertaking (section 19).

(b) Where the Secretary of State chooses to make a final enforcement order, that order must make 'such provision as is requisite for the purpose of securing compliance' (section 18(1) and (5)(a)).

(c) An enforcement order may be revoked at any time (section 18(5)(c)).

(d) The obligation to comply with an enforcement order is a duty which is owed to any person who may be affected by a contravention of that order and any breach of that duty which causes loss or damage

is actionable at the suit of the person affected (section 22(1) and (2)).

(e) In addition, where a water company has failed to comply with an enforcement order, the Secretary of State may seek an injunction from the courts requiring compliance (section 22(4)).

(f) The Secretary of State is not required to make an enforcement order where the relevant water company has given, and is complying with, an undertaking to take all such steps as it appears to him for the time being (undertakings are kept under continuous review) to be appropriate for the company to take for the purpose of securing or facilitating compliance with the requirements of the Directive (section 19(1)(b)).

(g) The requirement to comply with an undertaking is a separate statutory requirement and gives rise to an independent legal obligation — described as a secondary obligation in the proceedings before the Court — over and above the primary obligation to supply wholesome water. [2] Failure to comply with an undertaking itself gives rise to an obligation on the part of the Secretary of State to make an enforcement order to ensure compliance with the terms of the undertaking (section 19(2)).

(h) The Secretary of State may apply to the courts to make a special administration order, *inter alia*, where there has been a serious breach of the secondary obligation to comply with an enforcement order (section 24(1) and (2)). Where the breach is serious enough to make it inappropriate for the company to continue to hold its appointment, the court may order that its functions should be transferred to another company (section 23(1) and (2)).

The scope of the action and the arguments of the parties

9. It should be noted at the outset that the object of the present action is not restricted to a declaration by the Court that, as at the date when the action was brought, the water quality throughout England and Wales did not meet the criteria laid down by the Directive.

10. As is apparent from the Commission's application, it is requesting the Court to rule that,

2 — See the wording of the defence (English version).

'by failing, by the acceptance of undertakings, to enforce compliance by water companies with the requirements of 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 Directive 80/778/EEC in that maximum admissible concentrations for several parameters in the Directive are exceeded',

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

11. The defendant emphasises the significance, for the purposes of discharging the burden of proof, of the precise terms of the order sought in the application. According to the defendant, it is apparent from the form of order sought that the Commission is requesting the Court to rule not only that the water supplied for human consumption failed at the material time to fulfil the quality standards laid down by the Directive but also that that failure results from the mechanism set up by the United Kingdom authorities to enforce the Directive and, in particular, from their acceptance of undertakings given by water companies.

12. Consequently, it is not enough for the Commission to show that the quality of water supplied in the United Kingdom did not conform to the requirements of the Directive; indeed, that claim is not contested by the United Kingdom.

13. The Commission is further required, according to the defendant, to show that that situation results from the system of undertakings operated by the United Kingdom authorities.

14. In order to contest the effectiveness of the mechanism set up, the Commission makes the following criticisms.

15. First, it produces figures showing that, as at the date provided for by the Directive and even, in certain cases, over ten years later, the standards laid down by the Directive had not yet been achieved in various parts of the United Kingdom.

16. Thus, the Commission points out, by way of example, that in 1995, in the Thames region, 4.3 million people out of a total population of 7.3 million were supplied with water contaminated by the pesticide isoproturon. The Commission calculates from the figures provided by the defendant that in 1995 20% of the population of England and Wales received water which did not comply with the standard for pesticides.

17. Next, the Commission undertakes a comparative analysis of the mechanisms set up under the United Kingdom legislation. It notes that, where there is a breach of the requirements relating to the supply of wholesome water, the competent authorities are in principle obliged to make an enforcement order against the company which has committed that breach. The obligation to comply with the terms of an enforcement order is a statutory duty, and the legislation prescribes the penalties which may be imposed in the event of non-compliance.

18. According to the Commission, there is a striking contrast between enforcement orders and undertakings. The latter contain no obligation to achieve any specific results; instead, they merely require certain works to be carried out. Moreover, they enable water companies to seek amendment both of the target dates and of the technical specifications of the works required to secure compliance with the Directive. Such companies can therefore easily go for years without applying the standards laid down by Community law.

19. The Commission further considers that, by accepting undertakings, the authorities refrain in practice from having recourse to enforcement orders. In its view, such a cooperative attitude towards the water companies would have been acceptable during the first few years when the Directive was to be implemented, in the mid-1980s, but is wholly inappropriate ten years later.

20. Lastly, the Commission states that the undertakings given frequently fail even to mention the Community standards to be reached, referring instead to lower standards published in a booklet entitled 'Guidance on Safeguarding the Quality of Public Water Supplies'.

21. The United Kingdom advances the following arguments in opposition.

22. First, it asserts that the Commission's arguments fail to distinguish between the primary obligation incumbent on a Member State in such circumstances, namely the duty to ensure that water supplied to the consumer conforms, on the due date, to the standards prescribed, and its secondary obligation, which is to take all necessary steps, in the event of non-compliance with the primary obligation, to remedy the situation as rapidly as possible.

23. The United Kingdom does not deny that it has failed to fulfil its primary obligation; it considers, however, that it has discharged its secondary obligation. It proceeds to point out that the Water Industry Act 1991 also imposes a primary obligation on the water companies, requiring them to supply water which meets the standards laid down by the Directive. That obligation subsists at all times and in all circumstances — even, therefore, after an undertaking has been accepted.

24. Contrary to what is suggested by the Commission, the fact that undertakings do not necessarily set out the applicable standards does not therefore in any way mean, according to the United Kingdom, that the water company concerned is not required to conform to those standards.

25. As regards the booklet referred to, the defendant observes that this relates to different circumstances, being concerned not with enforcement of the standards laid down in the Directive but with the identification of emergency situations. Moreover, unlike those standards, it is not binding.

26. The United Kingdom Government further observes that, in the event of failure by a water company to fulfil its primary obligation to supply water meeting the requisite standards, the competent authorities are required to make an enforcement order against that company unless it offers an undertaking to carry out the works needed in order to comply with that obligation. Once it is accepted, an undertaking is binding on the company.

27. Those authorities are under a duty to refuse such an undertaking if they consider that it does not constitute the most rapid means of achieving the objective of supplying water which meets the standards laid down by the Directive. The legality of a decision by them to accept an undertaking is subject to judicial review.

28. According to the defendant, it cannot therefore be claimed that the system of undertakings affords the national authorities a means of allowing water companies easily to evade, at least temporarily, their obligation to achieve the objectives provided for by the Directive.

29. The defendant concedes that undertakings may be amended, as regards both the nature of the works to be carried out and the time allowed for completing them. However, this does not constitute a flaw in the system. Contrary to the arguments of the Commission, which regards the possibility of such amendment as enabling water companies systematically to postpone the deadline by which they must finally achieve the objectives of the Directive, the United Kingdom Government maintains that it in fact affords a certain flexibility enabling undertakings to be adapted to technological progress, in that they can be modified as more effective solutions to a company's problems become available.

30. As regards enforcement orders, the United Kingdom Government does not deny that, in practice, the authorities resort to making such an order only in the event of breach of an undertaking.

31. It points out in that regard that the Water Industry Act 1991 is based on the premiss that it is the company concerned which is best placed to assess the precise nature and timetable of the works needing to be carried out in order to comply with the Directive. It is logical, therefore, to afford it the possibility of making a proposal in that regard by offering the authorities an undertaking.

32. Moreover, the procedure for making an enforcement order is far more cumbersome than that relating to undertakings. The onus is on the authorities themselves to identify the precise nature of the works to be carried out, and there is a risk that their assessment will be challenged by the company concerned. Since the procedure involved is adversarial in nature, unlike that relating to undertakings, it is necessary to respect the rights of the defence. Furthermore, the obligation to carry out inquiries amongst members of the public operates to render the procedure more protracted.

33. According to the United Kingdom Government, it follows from the foregoing that the binding force attaching to enforcement orders is offset, wholly or in part, by those drawbacks.

34. Lastly, the enforcement order procedure is more effective if it is preceded by the offer and acceptance of an undertaking. In such circumstances, the company in breach can scarcely contest the making of an enforcement order in terms reflecting those of the undertaking, since those terms will have been previously accepted by the company itself.

The system of undertakings

35. What are we to make of the arguments in the present case?

36. My opinion can be summarised in the following four remarks, which will be developed below:

— for the purposes of implementing directives, Member States are free to choose the methods used, but those methods must produce results within the time-limits prescribed;

— failure to achieve those results must be penalised by the application of effective mechanisms;

— the system of undertakings does not constitute an effective mechanism; in reality, it operates as a system for granting temporary derogations which is not provided for by the Directive;

— the arguments regarding the burden of proof and the distinction between primary and secondary obligations are therefore irrelevant.

37. As is confirmed by the case-law of the Court, the very nature of a directive, as defined in Article 189 of the Treaty, is necessarily such that, in the absence of express provisions in the directive, the Member States are free to choose the appropriate ways and means of achieving the objective pursued by it. [3]

38. It may therefore be concluded that it is open to a Member State, in its discretion, to choose to have recourse to a system based on cooperation on the part of the companies concerned rather than on coercion. This fully reflects the intention of the Community legislature in the present case, since the

3 — See, for example, Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891.

Directive lays down the standards to be met as regards the quality of water supplied for human consumption but does not require the Member States to adopt any specific method in order to achieve that result.

39. Consequently, the Commission is correct in its acknowledgement that the system of undertakings would have been perfectly acceptable prior to the date by which the objectives of the Directive were to be achieved.

40. Moreover, it is apparent from the documents before the Court that that system has led, and continues to lead, to a constant improvement in water quality.

41. The fact remains, however, that the system of undertakings continues to be applied in cases where the objectives of the Directive have evidently not been achieved by a given company, notwithstanding that the deadline for achieving them expired years ago.

42. By virtue of that system, the water companies have the assurance of knowing that no enforcement order will be made against them during the period covered by the undertaking as long as they proceed towards completion of the programme of works for which it provides.

43. It must be stated, therefore, that the system of undertakings appears, in reality, to constitute an alternative to the system of enforcement orders provided for under the same statute.

44. As the Court has held on numerous occasions, Member States must ensure that effective penalties are imposed for infringements of the rules laid down by directives. [4]

45. According to the United Kingdom Government, the system of enforcement orders is neither more efficacious nor more expeditious than the system of undertakings. However, it appears from the documents in the case that the competent authority in the United Kingdom has so rarely resorted to making an enforcement order that it is impossible to compare the effectiveness of the two systems.

46. In any event, the system of undertakings clearly results in the water companies being allowed additional time in which to achieve the quality objectives prescribed.

47. The system of undertakings must therefore be regarded as a derogation mechanism,

4 — See, in particular, Case 68/88 *Commission* v *Greece* [1989] ECR 2965.

albeit one to which conditions are attached, which is unilaterally applied by a Member State.

48. It cannot be claimed that that system falls within the ambit of any of the special derogations provided for in Articles 9 or 10 of the Directive; nor does it fulfil the conditions attaching to the more general derogation provided for in Article 20 (see points 4 and 5 above). Consequently, it does not comply with the provisions of the Directive.

49. The United Kingdom Government denies, however, that the system of undertakings can be regarded as granting the water companies a derogation from the requirement of the Directive, since, even after an undertaking has been accepted, and regardless of its contents, the water company concerned remains at all times subject to its primary obligation to supply water which is 'wholesome', that is to say, which conforms to the requirements of the Directive.

50. That argument is excessively finical. There can be doubt that a company from which an undertaking has been accepted will in practice measure its obligations against the yardstick of that undertaking. Only if it fails to fulfil the terms of the undertaking will it face any possible consequences. As long as the undertaking remains in force, on the other hand, the fact that it has failed to fulfil its primary obligation will not prompt the authorities to take any action against it. Consequently, that obligation is rendered purely theoretical, being replaced, *de facto*, by the contents of the undertaking.

51. The United Kingdom is, in fact, effectively seeking to contend that, by operating the system of undertakings, it has taken the only practicable measures to bring about, with the minimum of delay, the achievement of the objectives of the Directive, given the situation prevailing in the water supply network and having regard to the incidence of fresh pollution by pesticides and the possibility of detecting pollution which could not have been discovered by the methods previously employed.

52. Even though that reasoning may be correct — and I am personally inclined to think that it is —, it was up to the United Kingdom Government to request the Commission to propose to the Council the extension or annulment of the time-limit provided for in Article 19 of the Directive pending the adoption of a 'more realistic' directive.

53. The Court, for its part, has no option but to apply the Directive in accordance with its terms.

54. That is what it did in the first action brought by the Commission against the United Kingdom regarding the implementa-

tion of the Directive, [5] in which it ruled as follows:

'The directive therefore requires Member States to ensure that certain results are achieved and, except within the limits of the derogations laid down, they may not rely on *special circumstances* [6] in order to justify a failure to discharge that obligation.

It follows that the defendant's claim that it took *all practicable steps* to secure compliance cannot justify, *except within the limits of the derogations expressly laid down*, its failure to comply with the requirement to ensure that water intended for human consumption at least meets the requirements of Annex I of the directive.'

It went on to state:

'As the Court held in its judgment in *Commission* v *Belgium*, [7] ... a request under Article 20 of the directive for a longer period for complying with Annex I must be made within the period laid down in Article 19 for implementation of the directive.'

55. The present case involves, in reality, defective transposition of the Directive, resulting from the very scheme of the legislation enacted in the United Kingdom. The effect of the transposition of the objectives laid down by the Directive, which has in itself been correctly carried out, is counterbalanced by the possibility, very frequently resorted to, of obtaining, in circumstances not covered by the Directive, a deferral of the deadline for respecting the parameters, by means of undertakings negotiated with the competent national authority.

56. Thus, the legislation enacted in the United Kingdom in itself constitutes evidence of the existence of the infringement, and there is no need for the Commission to adduce any additional proof. It is, admittedly, undeniable that the water companies have run up against considerable problems. However, it is equally undeniable that there is an indissoluble link between the system of undertakings, which necessarily involves, each time it is applied, a deferral of the deadline for complying with the wholesomeness standards, and the fact that those standards are not always met.

The other arguments relied on

57. It nevertheless remains for me to examine a series of arguments advanced by the United Kingdom, relating to the circumstances in

5 — Case C-337/89 *Commission* v *United Kingdom* [1992] ECR I-6103, paragraphs 24, 25 and 27.

6 — Emphasis added.

7 — Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, paragraph 23.

which the Water Industry Act was enacted. I must state, at the outset, that none of them seems to me to be decisive.

58. The defendant refers, first, to the submission by the Commission of a proposal [8] for a new directive concerning the quality of water intended for human consumption, which, it contends, provides for a system analogous to the system of undertakings and allegedly constitutes, in any event, recognition by the Community legislature of the difficulties facing the Member States in achieving the objectives prescribed.

59. The Commission considers, however, that the system provided for in the new directive involves far stricter conditions for its application than those governing the giving of undertakings pursuant to the Water Industry Act 1991, and that the two systems are not comparable.

60. In my view, there can be no doubt that that proposal for a directive, with regard to which the Council has adopted a common position dated 19 December 1997, [9] is designed to show that implementation of the Directive has been dogged by major problems in many of the Member States.

61. Thus, the new legislation provisionally approved by the Council lays down, in Article 14, a new period of five years for bringing water quality up to the prescribed standard. That period may be extended to 15 years for certain chemical substances.

62. It allows Member States to provide for derogations for two successive periods of three years and, subject to authorisation by the Commission, for a third derogation for a period of three years (Article 9).

63. Lastly, the Commission may grant derogations of up to six years for certain geographically defined areas (Article 15).

64. It is clear, therefore, that, even as matters currently stand, neither the Commission nor the Council regards it as possible for all the quality objectives which were to have been complied with by 1985 to be achieved for many years to come. It may therefore be thought surprising that the Commission should nevertheless have brought this action.

65. Only the Commission can judge, however, whether it is appropriate to make an application. Furthermore, as is shown by the case-law of the Court, 'the Member States are bound to comply with all their obligations under an existing directive. That applies even when the adoption of a proposal for a new

8 — Proposal dated 4 January 1995, COM(94) 612.

9 — OJ 1998 C 91, p. 1.

directive in the same field is envisaged (see the judgment in Case 220/83 *Commission* v *France* [1986] ECR 3663). In any event the binding force of a directive may not be challenged as long as it has not been abrogated or amended.' [10]

66. The United Kingdom also maintains that the system of undertakings was the subject of detailed consultations with the Commission, which expressed its approval of the provisions proposed, in particular in a letter from one of its Members dated 16 May 1989.

67. The Commission points out that the letter in question expressly reserved the Commission's right to bring such actions as might be necessary if it concluded that the system established was not, or was no longer, satisfactory.

68. In any event, it is settled case-law that approval by the institutions does not absolve Member States from having to comply with their obligations under Community law. Consequently, the defendant cannot found any argument on the fact that approval may have been given by the Commission.

10 — Summary of the judgment in Case C-310/89 *Commission* v *Netherlands* [1991] ECR I-1381 (summary publication).

69. The United Kingdom further states that the issues raised by the present action were considered by its national courts in the case of *R.* v *Secretary of State for the Environment, ex parte Friends of the Earth Ltd.* Those courts concluded that the manner of proceeding decided on by the competent national authorities constituted the most appropriate method of implementing the Directive.

70. The Commission states in reply that the subject-matter of those national proceedings was different from that of the present action and, moreover, that they concerned undertakings dating from 1991, whereas the Commission is seeking in the present case to show that it is the continued operation of the system of undertakings in 1996 which constitutes the alleged failure to fulfil obligations.

71. It suffices in that regard to recall that it is for the Commission to assess whether it is appropriate to bring an action for failure to fulfil obligations. Where such an action is brought, the decision on its merits is a matter for the Court alone. In that context, decisions of the national courts cannot bind those institutions.

72. The defendant also points out that the system of undertakings is applied in other areas of United Kingdom law.

73. However, the Commission correctly counters that submission by pointing out that the criticism levelled at the United Kingdom is not that it penalises infringements of the rules deriving from Community law less strictly than comparable infringements under national law.

74. I would add that the fact that the system of undertakings has proved effective in the context of, for example, application of the United Kingdom competition rules does not justify the conclusion that it is acceptable in the context of implementation of the Directive in issue.

The specific issue of individual rights

75. The Commission and the United Kingdom also disagree about the issue of the protection of the rights conferred on individuals by the Directive. The Commission states in its application that the system of undertakings 'would seem' to preclude reliance by individuals on the rights conferred by the Directive in proceedings against water companies before the national courts, where the authorities responsible for ensuring compliance with the rules have accepted an undertaking offered by a company and that undertaking is still in force.

76. The defendant contests the admissibility of that argument, on the ground that it was never raised in the course of the pre-litigation procedure.

77. The Commission considers, for its part, that this plea supports the complaint, consistently maintained by it throughout the proceedings, that, by accepting undertakings, the United Kingdom has failed to fulfil its obligation to secure compliance by water companies with the provisions of the Directive. That plea has not therefore been raised out of time.

78. I am unable to accept that argument. It is true that the applicant cites a judgment of the Court [11] in which it was held that the Commission may set out further details of its submissions in its application to the Court. That does not mean, however, that it is entitled to raise for the first time at the stage of the application a complaint such as that relating to the right of individuals to bring proceedings, which is not mentioned in the Directive and to which, by contrast with the situation in the case cited, the Commission had not previously made any reference.

79. This is an important and specific issue, such that it cannot be regarded as a secondary matter necessarily flowing from the main argument advanced by the Commission.

11 — Case 23/84 *Commission* v *United Kingdom* [1986] ECR 3581.

80. It must be emphasised in that regard that this issue extends far beyond the scope of the Water Industry Act 1991, since it concerns the entire system of rights of action under national law against a supplier who fails to comply with his legal obligations. It is quite possible that a right of action which does not arise from the legislation specifically adopted in implementation of the Directive may exist pursuant to other national legislation of general application.

81. Since the Commission had previously alleged defective application of the Directive without making any reference to that issue, which, as has been noted, is not mentioned in the Directive itself, the defendant was justified in thinking that the scope of the Commission's complaints did not extend beyond the ambit of the national legislation specifically enacted for the purposes of implementing it.

82. I therefore conclude that the purpose of the pre-litigation procedure as defined by the case-law of the Court, which is intended, in particular, to indicate to the Member State concerned the information needed for the preparation of its defence and to enable it to take the steps needed in order to comply with its obligations, [12] would not be achieved if the Commission were permitted to put forward detailed issues of such a nature and of such moment at the stage of the application.

12 — See, for example, Case 229/87 *Commission* v *Greece* [1988] ECR 6347.

83. Consequently, the following considerations regarding that plea are mentioned only as wholly secondary points.

84. The Commission initially stated, in its application:

'The provisions of the Directive on the quality of drinking water are clearly intended, in the sense of the case-law of the Court, to create rights for individuals. Unlike the usual run of cases which have come before the Court the problem in the present case is not one of an absence of binding measures or of a specific legal framework. By the Water Industry Act 1991 and the regulations made thereunder the United Kingdom has implemented the Directive in a sufficiently clear and precise way to allow individuals to ascertain the full extent of their rights. However, under the system of undertakings they are, it seems, prevented from asserting these rights against a water company before the national courts where an undertaking from the company to the enforcement authorities has been accepted and is still in force.'

85. The defendant states in response to this that consumers are entitled to apply for judicial review of the legality of the authorities' decision to accept an undertaking. Moreover, if a consumer suffers damage resulting from poor water quality, he may bring an action for compensation under the Consumer

Protection Act 1987, which transposes into English law the provisions of Directive 85/374/EEC on product liability. [13] The right to bring such an action against a water company exists regardless of the fact that an undertaking may have been accepted.

86. The Commission accepts that argument but goes on to point out that the relief available to a consumer under the Consumer Protection Act does not include compensation for damage to property intended for commercial or industrial use. However, the submissions of the United Kingdom Government show that, where such damage is sustained, an action may be brought under the common law of negligence, even where an undertaking has been accepted.

87. It follows, therefore, that the issue is confined to the fact that an individual cannot obtain an injunction against a water company where an undertaking has been accepted and is subsisting. This, according to the Commission, is 'of course contrary to the principle of guaranteeing the full application or effectiveness of Community law, as established by the case-law of the Court — see, in particular, [the] judgment of 19 June 1990 [in] *Factortame and Others* [1990] ECR I-2433'.

13 — Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29).

88. In order to decide this issue, it is in my view necessary to take into consideration the following points.

89. As the Commission acknowledges, the Directive has been transposed into national law by legislation which is sufficiently clear and precise to allow individuals to ascertain the full extent of their rights. The present case does not concern any question of the 'direct effect' of a directive, let alone that of its 'horizontal' application.

90. Second, the present case concerns an action brought under Article 169 of the Treaty for failure to fulfil obligations, and not a reference for a preliminary ruling made pursuant to Article 177. It is not a case in which the Court is being asked by a national court to rule on the question whether the Directive confers on consumers a direct right, enforceable against a water company, to receive water complying with the standards of the Directive.

91. The sole issue here is the general principle that, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national authorities, in exercising the choice open to them as to the form and methods for

implementation, have conducted themselves in accordance with that directive. [14]

92. There remains to be considered the question whether the legal remedies which the United Kingdom describes, and the existence of which is not disputed by the Commission, render those rights enforceable.

93. In my view, the Commission is right to regard as an unsatisfactory remedy the right to bring an action for damages pursuant to the Consumer Protection Act 1987, which transposed Directive 85/374. A remedy which is limited to a right to obtain compensation where failure to comply with the applicable standards has caused damage does not fulfil the criteria laid down by the Court.

94. On the other hand, the right of a consumer to bring proceedings contesting a decision by the Secretary of State to accept an undertaking (an example of which is provided by the United Kingdom in the annexes to its defence) is in my view sufficient to warrant the conclusion that the rights of individuals are adequately protected.

95. The essential issue in the present case is the failure to achieve quality objectives resulting from the acceptance of undertakings which defer the achievement of those objectives to a later date.

96. Once such an undertaking is annulled at the suit of an individual, the quality objectives laid down in the statute take immediate effect and the Secretary of State is bound to make an enforcement order against the water company concerned.

97. The fact that an action challenging an undertaking can be brought only against the Secretary of State, and not against a water company, does not substantially alter the situation. In the context of undertakings, there exists a close link between the competent authority and the water company — the latter has even been regarded by the High Court [15] as an emanation of the former, following the decision in *Foster and Others* [16] — and annulment of a decision to accept an undertaking gives rise to immediate consequences for the water company.

98. Consequently, I consider that the Commission's complaint concerning the absence of legal remedies for individuals is inadmissible and, in the alternative, unfounded.

14 — See, in particular, Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 56.

15 — *Griffin* v *South West Water Services Ltd* [1995] IRLR 15.

16 — Case C-188/89 *Foster and Others* [1990] ECR I-3313.

99. In concluding this analysis, I am therefore compelled to say that, whilst the system of undertakings is far from ineffective in practical terms, it is nevertheless unacceptable in law, inasmuch as it enables companies, in circumstances not provided for by the Directive, to put off to a later date compliance with the obligations with which they have been under a duty to comply with since 18 July 1985.

100. Whether it is regarded as a method of implementing the Directive or as a penalty mechanism coupled with the grant of a suspension or period of grace, the fact remains that the inescapable conclusion must be — to borrow the phrase used by the Commission at the hearing — that that system 'does not guarantee full and complete application of the Directive'.

Conclusion

101. I therefore propose that the Court should uphold the Commission's application in the terms in which it has been made and declare that:

(1) 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, and

(2) 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 Treaty.

102. I further propose that the Court should order the United Kingdom to pay the costs.