OPINION OF ADVOCATE GENERAL JACOBS
delivered on 12 February 1992 *

My Lords,

1. In this case the Commission seeks a declaration under Article 169 of the EEC Treaty to the effect that Germany has failed to fulfil its obligations by not taking all necessary steps to implement Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11).

The relevant legislation

2. Directive 80/778 lays down quality standards for water intended for human consumption. The standards are contained in a list of 'parameters' in Annex I. For most of the parameters set out in Tables A to E of Annex I the directive fixes a maximum admissible concentration (MAC) and a guide level (GL). For others it fixes an MAC or a GL. For a few parameters it fixes neither an MAC nor a GL. For a small number of parameters contained in Table F of Annex I a minimum concentration is fixed.

3. Article 7 of the directive provides as follows:

'1. Member States shall fix values applicable to water intended for human consumption for the parameters shown in Annex I.

2. Member States may refrain from fixing, pursuant to the first paragraph, the values of parameters in respect of which no value is shown in Annex I, as long as these values have not been determined by the Council.

3. For the parameters given in Tables A, B, C, D, and E of Annex I:

— the values to be fixed by the Member States must be less than or the same as the values shown in the "Maximum admissible concentration" column;

— in fixing the values, Member States shall take as a basis the values appearing in the "Guide level" column.

4. For the parameters appearing in Table F of Annex I, the values to be fixed by Mem-

* Original language: English.

ber States must be not lower than those given in the "Minimum required concentration" column for softened water, of the kind referred to in the first indent of Article 2.

5. In the interpretation of the values shown in Annex I account shall be taken of the observations [i. e. observations contained in the right-hand column of Annex I in relation to certain parameters].

6. Member States shall take the steps necessary to ensure that water intended for human consumption at least meets the requirements specified in Annex I.'

4. Certain derogations are provided for in Articles 9 and 10. Article 9 is worded as follows:

'1. Member States may make provision for derogations from this Directive in order to take account of:

(a) situations arising from the nature and structure of the ground in the area from which the supply in question emanates.

Where a Member State decides to make such a derogation, it shall inform the Commission accordingly within two months of its decision stating the reasons for such derogation;

(b) situations arising from exceptional meteorological conditions.

Where a Member State decides to make such a derogation, it shall inform the Commission accordingly within 15 days of its decision stating the reasons for this derogation and its duration.

2. Member States shall report to the Commission only those derogations referred to in paragraph 1 which relate to a daily water supply of at least 1 000 m^3 or a population of at least 5 000.

3. In no case shall the derogations made by virtue of this Article relate to toxic or microbiological factors or constitute a public health hazard.'

Article 10 provides:

'1. 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 shown in Annex I to be exceeded, provided that this

does not constitute an unacceptable risk to public health and provided that the supply of water for human consumption cannot be maintained in any other way.

2. Without prejudice to the application of Directive 75/440/EEC, and in particular Article 4(3) thereof, when, for its supply of drinking water, a Member State is obliged to resort to surface water which does not reach the concentrations required of category A3 water within the meaning of Article 2 of the aforementioned Directive and when it cannot devise suitable treatment to obtain drinking water of the quality laid down by this Directive, it may, for a limited period of time and up to a maximum permissible value which it shall determine, authorize the maximum admissible concentration shown in Annex I to be exceeded provided that this does not constitute an unacceptable risk to public health.

3. Member States which have recourse to the derogations referred to in this Article shall immediately inform the Commission thereof, stating the reasons for and probable duration of such derogations.'

5. It may be noted that the French version of Article 10(1) commences with the words 'en cas de circonstances accidentelles graves', which seem rather more explicit than the English expression 'in the event of emergencies' or the German expression 'in Notfällen'. In my view, however, nothing turns on that discrepancy.

6. Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years following its notification (Article 18). They were required to ensure that the quality of water intended for human consumption complied with the directive within five years of its notification (Article 19). The Commission states that the directive was notified to Germany on 18 July 1980.

7. The principal German provision implementing the directive is the Trinkwasserverordnung (TWV) of 22 May 1986 (BGBl. 1986 I, p. 760), as amended by the Verordnung zur Änderung der Trinkwasserverordnung und der Mineral-und Tafelwasser-Verordnung of 5 December 1990 (BGBl. 1990 I, p. 2600). The amended version of the TWV came into force on 1 January 1991.

The procedural background

8. By letter of 30 October 1987 the Commission informed the German Government that, in its view, the directive had not been properly transposed into German law. The German Government was invited to submit observations. Dissatisfied with the German

Government's response, the Commission issued a reasoned opinion on 6 July 1989, in which it invited Germany to take the necessary measures to comply with the directive within a period of two months. By letter of 6 September 1989 the German Government informed the Commission that, in its view, the directive had been properly transposed into German law by the TWV. In the same letter the German Government noted that it had drafted a regulation to amend the TWV. The draft regulation referred to was apparently the one that came into force on 1 January 1991.

9. The application was lodged on 27 July 1990. It identifies ten respects in which Germany is alleged to have failed to implement the directive properly. However, in the reply the Commission withdraws six heads of claim because it recognizes that some of the alleged breaches may be regarded as having been terminated, following the amendment of the TWV. In reply to a written question from the Court the Commission has withdrawn a further head of claim. Hence there remain only three on which the Court must now rule.

Derogations under Paragraph 4(1) of the TWV

10. Paragraph 4(1) of the TWV provides that:

'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 derogations from the limits fixed in Annex 2, provided that this does not constitute a risk to public health and provided that the supply of water for human consumption cannot be maintained in any other way.'

11. The original version of Paragraph 4(1) referred to 'individual cases' (im Einzelfall) rather than 'emergencies' (in Notfällen) and permitted derogations on condition that the water supply could not be maintained in any other way 'at an acceptable cost'. The Commission considers that the original version of Paragraph 4(1) was inconsistent with Article 10(1) of the directive, which only permits derogations 'in emergencies' and makes no reference to acceptable costs when it lays down the condition that the water supply cannot be maintained in any other way. Germany contends that even in its original version Paragraph 4(1) of the TWV was consistent with Article 10(1) of the directive: on the one hand, derogations were only granted in emergencies, even though that concept was not expressly incorporated in the text of Paragraph 4(1); on the other hand, the expression 'at an acceptable cost' was intended to ensure compliance with the principle of proportionality.

12. I do not see how those arguments can be accepted. According to the Court's case-law the provisions of the directive permitting derogations must be interpreted strictly: Case 228/87 *Criminal Proceedings against X*

[1988] ECR 5099, at paragraph 10. The term 'emergencies' must be construed as meaning 'urgent situations in which the competent authorities are required to cope suddenly with difficulties in the supply of water intended for human consumption': ibid., at paragraph 14. By not expressly confining derogations to emergencies and by adding the words 'at an acceptable cost' to the condition that the water supply cannot be maintained in any other way, the original version of Paragraph 4(1) of the TWV widened the scope of the derogation contained in Article 10(1) of the directive. If Member States could unilaterally widen the scope of such a derogation the effectiveness of the directive would be seriously undermined.

13. The Commission concedes in the reply, that the amended version of Paragraph 4(1) of the TWV complies formally with the directive. But it states that it cannot regard this branch of the application as settled until Germany undertakes to ensure that the requirements of the directive result in a *de facto* modification of the practice of the German authorities. According to the Commission, complaints lodged with it about the quality of drinking water in Germany indicate that derogations are granted in breach of the directive. It also states that a recommendation issued by the Federal Office for Public Health shows that derogations have been authorized in circumstances that did not amount to emergencies. The Court put a written question to the Commission, asking it whether it wished to persist with this head of claim, since it recognized that Paragraph 4(1) of the version of the TWV that entered into force on 1 January 1991 complied with the directive. In its reply the Commission gives several reasons for not abandoning this branch of the application. First, Germany has not stated that it interprets the term 'emergencies' as covering only unforeseeable events. Secondly, the German authorities continue to grant derogations in circumstances that do not amount to emergencies, as is evidenced by an extract from the 'Alfterer Nachrichten' (the journal of the commune of Alfter), according to which a waterworks in Heidgen, which had been allowed to exceed certain MACs from 1 October 1989 to 30 September 1991, was granted an extension of that derogation for a further two years. Thirdly, having regard to the possibility of actions for damages it would be desirable to have a declaration from the Court that the TWV, in the version in force before 1 January 1991, did not accord with the directive. Finally, the Commission considers that it would be equally desirable for the Court to declare that even after that date the directive cannot be regarded as having been properly transposed into national law unless the amendments then introduced entail the necessary consequences in practice.

14. Although, as I have already indicated, there is no doubt that the original version of Paragraph 4(1) of the TWV was inconsistent with Article 10(1), I do not think that the Commission has established a breach of the directive as regards the period subsequent to 1 January 1991. Since that date the German legislation has reproduced the exact terms of Article 10(1) of the directive. The Commission is of course right when it says that it is not sufficient simply to incorporate the terms of a directive into national legislation; in addition, Member States must ensure that the legislation is applied in practice. But I do not think that the Commission has succeeded in showing that the German authorities are not applying the directive in practice. Most of the complaints referred to by the Commission, concerning the quality of German drinking water, relate to the period prior to the amendment of the TWV. The same may be said of the recommendation issued by the Federal Office for Public Health. Admittedly, it is questionable whether the derogation referred to in the 'Alfterer Nachrichten', which covers a period of four years altogether, can be said to relate to an 'emergency' within the meaning of Article 10(1) of the directive. But even if we assume that the derogation was granted in breach of the directive, there remains the objection that it was never the purpose of the present proceedings to establish that a particular derogation was unlawful. The object of the proceedings is to establish that Germany has failed to transpose a directive into national law. It is clear that since 1 January 1991 Article 10(1) of the directive has been transposed into national law. If the Commission considers that specific derogations are being granted in breach of Article 10(1) of the directive (and in breach of the corresponding provision of German law), then it is open to the Commission to commence separate proceedings against Germany in respect of those breaches.

15. It remains to be considered whether the Court should give judgment against Germany as regards the failure to transpose Article 10(1) of the directive properly into German law before 1 January 1991. It is now well established that, where a Treaty infringement is eliminated after the expiry of the period laid down by the Commission in its reasoned opinion, there remains a legal interest in the continuation of the proceedings, because they may serve to establish a basis for the liability of a Member State for its Treaty infringement with respect to another Member State, the Community or individuals: see, most recently, the Opinion of Advocate General Lenz delivered on 21 January 1992 in Case C-337/89 *Commission* v *United Kingdom* [1992] ECR I-6103, at paragraph 41, where further cases are cited. As regards liability towards individuals, the circumstances in which an action for damages may be brought by an individual in respect of a Member State's failure to implement a directive were defined in paragraph 40 of the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* v *Italy* [1991] ECR I-5357. In particular, the directive must be such as to confer rights on individuals. It may be inferred from paragraph 14 of the judgment in Case C-58/89 *Commission* v *Germany* [1991] ECR I-4983 that the directive in issue in the present proceedings does indeed confer rights on individuals, in so far as its purpose is to protect public health and a failure to comply with it might endanger public health. It follows that the Commission has a sufficient legal interest in obtaining a ruling from the Court that Paragraph 4(1) of the TWV was not consistent with the directive until it was amended with effect from 1 January 1991. I therefore conclude that the Court should declare that Germany failed to fulfil its obligations under the Treaty by not properly implementing Article 10(1) of the directive before 1 January 1991.

Notification of derogations to the Commission under Articles 9(1) and 10(3) of the directive

16. The original version of the TWV did not require the 'competent authority' (*zuständige Behörde*) or the government of the *Land* in question to inform the federal government of derogations granted pursuant to Paragraph 4(1) of the TWV (which, as we have seen, corresponds to Article 10(1) of the directive) or pursuant to Paragraph 4(2) of the TWV (which corresponds to Article 9(1) of the directive). In its application the Commission implies that that may make it impossible for the federal government to comply with its obligation to notify such derogations to the Commission, as required by Articles 9(1) and 10(3) of the directive. The Commission considers that that is the case even though the *Länder* are obliged to inform the federal government of derogations in accordance with the principle of loyalty towards the federation (*Grundsatz des bundesfreundlichen Verhaltens*). The Commission states in the application that its fears have been confirmed in practice inasmuch as Germany has notified it of numerous derogations without specifying the reasons or the duration and without observing the time-limits laid down in the directive.

17. Paragraph 4(3) of the amended version of the TWV requires the competent authority to inform immediately the highest health authority of the *Land* (which must in turn inform the competent federal minister) of derogations granted under Paragraph 4(1). The competent authority must inform the federal minister immediately of derogations granted under Paragraph 4(2), subject to exceptions that correspond to the terms of Article 9(2) of the directive.

18. In its reply the Commission concedes that Paragraph 4(3) of the amended version of the TWV complies in principle with the directive as regards the notification of derogations. It points out, however, that Annex 4, part III, of the TWV allows the MACs laid down for a number of substances to be exceeded, within certain limits, where the excess is due to geogenic factors. In fact, the relevant provisions are contained in comments in column (g) of Annex 4, point III. They relate to four substances: namely, ammonium, potassium, magnesium and sulphates. For example, under the directive the MAC for ammonium (parameter 22) is 0.5 mg/l, but Annex 4 of the TWV requires concentrations of up to 30 mg/l to be disregarded if they are due to geogenic factors. The Commission contends that the German legislation is therefore contrary to the directive inasmuch as it provides for general derogations on account of geogenic factors, whereas the directive only permits specific

derogations, which must in each case be notified to the Commission.

19. Germany disputes that contention in its rejoinder. It maintains that Article 9(1) of the directive allows Member States to authorize general derogations on account of geogenic factors and that a Member State which opts for such a solution complies with its duty of notification by notifying the relevant legislation to the Commission.

20. I cannot see how Germany's argument can be accepted. Article 9(1)(a) provides that, where a Member State decides to make a derogation on account of situations arising from the nature and structure of the ground in the area from which the supply in question emanates, it must inform the Commission within two months of its decision, stating the reasons for such derogation. The language of Article 9(1)(a) implies that each individual derogation must be notified to the Commission, along with the specific reasons invoked as justification for the derogation in question. The purpose of notification is presumably to put the Commission in a position to judge whether the derogation is justified on account of the 'nature and structure of the ground' in the area in question. The Commission can only do that if it is informed of specific derogations relating to the water supply in specific areas. One can quibble about whether Germany's breach lies in failing to make adequate provision for the notification of derogations or whether it has infringed the directive by authorizing general derogations rather than specific ones. But whichever view is taken, Germany has failed to transpose the directive correctly into national law.

Specific derogations from the MACs

21. This head of claim now seems to overlap entirely with the one that I have just dealt with. In the application the Commission complained that under the original version of the TWV (Annex 4, part III, points 9, 11, 12 and 16) the MACs set for ammonium, potassium, magnesium and sulphates were not applicable if the water came from ground which was 'strongly reductive' or which contained the substances in question. The Commission also contended that there was no legal basis in the directive for derogations made by the TWV in respect of iron and silver (Annex 4, part III, points 10 and 15). Although the TWV has been amended in those respects, the Commission argues that there is still no guarantee that specific derogations will be notified in accordance with the directive because of the special provisions made with regard to ammonium, potassium, magnesium and sulphates in Annex 4, part III. For the reasons given above in paragraph 19, that is doubtless true, but I do not think it necessary for the Court to make a separate declaration in respect of this head of claim, since it now overlaps entirely with the one dealt with above.

Costs

22. The Commission has in my view succeeded in all three of the outstanding heads of claim and is therefore at first sight entitled to be awarded costs in accordance with Article 69(2) of the Rules of Procedure. It is true that seven of the ten heads of claim were withdrawn during the written procedure, and the German Government maintains, with regard to those heads of claim, that its legislation was consistent with the spirit of the directive, if not with its letter, even before the amendment of the TWV. It seems to me however that most of the alleged infringements subsisted upon the expiry of the period laid down in the reasoned opinion and continued to subsist at the moment when the application was lodged. Moreover, there is no doubt that if Germany had acted more expeditiously in bringing into force the regulation amending the TWV, most of the heads of claim withdrawn by the Commission in the course of the written procedure would never have come before the Court in the first place. I therefore conclude that Germany should be ordered to pay the costs.

Conclusion

23. Accordingly, I am of the opinion that the Court should:

(1) declare that, by not adopting within the prescribed period all the measures necessary to implement Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty;

(2) order the Federal Republic of Germany to pay the costs.