OPINION OF ADVOCATE GENERAL JACOBS
delivered on 17 October 1996 *

1. In this case, the Commission is seeking a declaration under Article 169 of the Treaty that Germany has failed properly to implement Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life ('the Fresh Water Directive') [1] and Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters ('the Shellfish Water Directive'). [2]

2. In particular the Commission alleges that Germany has failed to implement Articles 3 and 5 of the Fresh Water Directive and Articles 3 and 5 of the Shellfish Water Directive.

The Fresh Water Directive

3. The aim of the Fresh Water Directive is stated in Article 1(3) to be:

'to protect or improve the quality of those running or standing fresh waters which support or which, if pollution were reduced or eliminated, would become capable of supporting fish belonging to:

— indigenous species offering a natural diversity, or

— species the presence of which is judged desirable for water management purposes by the competent authorities of the Member States.'

* Original language: English.
1 — OJ 1978 L 222, p. 1.
2 — OJ 1979 L 281, p. 47.

4. It is further stated in the preamble to the Fresh Water Directive:

'in order to attain the objectives of the Directive, the Member States will have to designate the waters to which it will apply and will have to set limit values corresponding to certain parameters; ... action will be taken to ensure that the waters so designated will conform to these values within five years of this designation'. [3]

5. Member States are required within two years of notification [4] of the directive to designate salmonid waters and cyprinid waters, [5] defined respectively as waters capable of supporting species such as salmon, trout, grayling and whitefish and waters capable of supporting fish of the carp family or other species such as pike, perch and eel.

6. The provisions of the directive at issue are as follows:

'*Article 3*

1. Member States shall, for the designated waters, set values for the parameters listed in Annex I, in so far as values are listed in column G or in column I. They shall comply with the comments contained in each of these two columns.

2. Member States shall not set values less stringent than those listed in column I of Annex I and shall endeavour to respect the values in column G taking into account the principle set out in Article 8. [6]

...

Article 5

Member States shall establish programmes in order to reduce pollution and to ensure that designated waters conform within five years following designation in accordance with Article 4 to both the values set by the Member States in accordance with Article 3 and the comments contained in columns G and I of Annex I.'

7. Annex I sets out parameters for temperature, acidity, suspended solids and numerous

3 — Sixth recital.

4 — See paragraph 11.

5 — Article 4(1).

6 — Article 8 provides that implementation of the measures taken pursuant to the Directive may on no account lead, directly or indirectly, to increased pollution of fresh water.

chemical constituents. There are separate parameters for salmonid and cyprinid waters, set out in two columns, column G and column I. Some of the parameters are a guide (column G) and some are mandatory (column I, the initial being presumably a relic of the French text).

8. Articles 6 and 7 lay down detailed criteria for determining conformity within the meaning of Article 5. Those criteria concern sampling points and periods (frequency is dealt with in Annex I) and the percentage of samples which, for each parameter, must conform to the values and comments.

The Shellfish Water Directive

9. The Shellfish Water Directive concerns the quality of shellfish waters and applies to those coastal and brackish waters designated by the Member States as needing protection or improvement in order to support shellfish life and growth and thus to contribute to the high quality of shellfish products directly edible by man. [7] According to its preamble, its objectives are to protect waters, including shellfish waters, against pollution and to safeguard certain shellfish populations from various harmful consequences resulting from the discharge of pollutant substances into the sea. [8]

10. The sixth recital in the preamble and Articles 3 to 7 are in essentially the same terms, *mutatis mutandis*, as the corresponding terms of the Fresh Water Directive, except that (i) there is an Article 3(3) relating to discharges of effluents and (ii) Article 5 refers to a six-year period rather than a five-year period.

11. Both directives required implementation within two years of notification, [9] namely by 20 July 1980 in the case of the Fresh Water Directive and 5 November 1981 in the case of the Shellfish Water Directive.

7 — Article 1.

8 — First and second recitals.

9 — Article 17(1) of the Fresh Water Directive and Article 15(1) of the Shellfish Water Directive.

The complaint relating to Article 3

12. The Commission's principal complaint is that Germany failed properly to transpose Article 3 of both directives into national law by the prescribed date. More specifically, it argues that the two directives also seek to protect human health and that the Court has stated in such cases that implementation must be by mandatory rules. [10]

13. It is common ground that to date the values which Article 3 requires Member States to set have not been set by Germany in binding legislation. This represents a considerable delay, in part attributable to Germany's apparent assumption until 1992 that administrative provisions sufficed to implement the directives. Germany has since accepted that mandatory legal measures are necessary for proper implementation. It states in its defence that the necessary steps are now being taken. However it appears that in only six of the 16 *Länder* (the competent entities for the transposition of the directives) has the legislature empowered the executive to make the necessary decrees; even those six do not yet seem to have adopted the draft law prepared for implementation of the Fresh Water Directive (no mention is made in the defence of a draft law for implementation of the Shellfish Water Directive).

14. The Court has consistently held that a Member State may not plead provisions, practices or circumstances in its internal legal order to justify a failure to comply with its obligations under a Community directive. [11] Moreover, the fact that Germany is currently attempting to rectify its non-compliance does not afford it a defence. An action based on Article 169 of the Treaty requires only an objective finding of a failure to fulfil obligations and not proof of any inertia or opposition on the part of the Member State concerned. [12]

The complaint relating to Article 5

15. With regard to Article 5 of both directives, the Commission asserts that no programme has been presented. Germany's defence to the allegation of non-implementation of Article 5 is as follows.

10 — Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 16 of the judgment; Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 19 and Case C-58/89 *Commission* v *Germany* [1991] ECR I-4983, paragraph 14.

11 — Case 58/81 *Commission* v *Luxembourg* [1982] ECR 2175, paragraph 4 of the judgment.

12 — Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraph 8 of the judgment.

16. In relation to the Fresh Water Directive, it states that in its view attaining or maintaining water quality permitting indigenous fish life is only a partial goal of a general water protection plan and cannot be considered in isolation. In Germany, the basis of that general plan is the extension of preventive water protection. The aim is the reduction of water pollution by waste water, achieved by means of control of waste water quality. Over the last two decades the *Länder* have carried out exceptionally effective water protection measures by extensive (and expensive) programmes of actions and investments. As a result, water cleanliness generally and the quality of water capable of supporting fish life in particular have significantly improved. The broad objective of the Fresh Water Directive as set out in Article 1(3) corresponds to an essential partial objective of the water protection policy. The action programmes which have been in place in the *Länder* since the 1950s were not aimed solely at making fish life possible, but essentially constitute programmes which improve the quality of water and may be recognized under Article 5.

17. That argument is to my mind unconvincing. Article 5 is both mandatory and explicit. It requires programmes to be established in order both to reduce pollution generally and to ensure compliance within a prescribed period with values set for the parameters listed in Annex I and with the comments in columns G and I of that annex. Those parameters, of which there are 14 in the Fresh Water Directive and 12 in the Shellfish Water Directive, are both detailed and precise. Furthermore, Article 6 lays down comprehensive criteria expressed to be for the purposes of implementing Article 5. It is clear from the wording of these provisions that, as stated by the Commission, they require Member States to draw up specific five or six-year programmes.

18. Moreover it is clear from the scheme and objectives of the Fresh Water Directive that it seeks to ensure that water is specifically of a quality to support fish life. It is not obvious, at least without corroboration, that general measures for improving the cleanliness of water will of necessity have that effect: it may, for example, be the case that certain pollutants may be neutralized by other chemicals which, while making the water purer in one sense, may not be beneficial to fish life.

19. In relation to the Shellfish Water Directive, Germany states that the controls which are in practice carried out on designated shellfish waters show that the requirements of the directive are met. It contends that programmes within the meaning of the directive are necessary only if the parameters laid down in the directive are not respected.

20. It appears from the application that Germany is referring to sampling operations apparently carried out by it in Lower Saxony pursuant to Article 7 of the directive. In its response to the reasoned opinion, Germany states that the results of those operations correspond with the requirements of the directive. It annexes the results for 1991.

21. The Commission responds that the results communicated to it for the purposes of that argument concern only one *Land* and one year. Even if results were communicated for all the *Länder*, however, the Commission rightly points out that a specific state of affairs in 1991 cannot in any event replace a programme which should have been established in 1981 at the latest.

Conclusion

22. I accordingly conclude that the Court should rule as follows:

(1) By failing to adopt by the prescribed date all the measures necessary to comply with Articles 3 and 5 of Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life and Articles 3 and 5 of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters, Germany has failed to fulfil its obligations under the EC Treaty.

(2) Germany is ordered to pay the costs.