OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 17 March 1987 *

Mr President,
Members of the Court,

1. In the context of criminal proceedings against persons unknown, the Pretore di Salò (Brescia Province) asks the Court to interpret Council Directive 78/659 of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life (Official Journal 1978, L 222, p. 1). The national judge wishes to know (a) whether the Italian legislation on the protection of waters against pollution is consistent with the principles and objectives of quality laid down in that measure, and (b) whether there is laid down in that measure an obligation to maintain the quantity of water essential to the survival of the protected forms of aquatic life.

2. On 5 July 1984 the Pretura di Salò (Magistrate's Court for the District of Salò) received a document from the 'Gruppo Ecologico Pescatori per la Salvaguardia del Fiume Chiese' (Anglers' Ecological Group for the Protection of the River Chiese). The association complained first of the frequent fish die-offs observed in the watercourse which, between Lake Idro and the River Oglio, crosses the judicial district ('mandamento') of the said court. The group also claimed that this phenomenon was due essentially to the significant and sudden changes in the level of the Chiese brought about by the many dams built for irrigation and for hydro-electric purposes. Finally, it asked the Pretore to take measures against the concessionaries or, in any event, those responsible for diverting he water not merely in order to protect the various fish species but also for the protection of health and the environment.

The order for reference states that the facts set out by the complainants correspond to a series of offences of varying degrees of gravity. The more serious offences — aggravated pollution of waters, diversion of water and interference with the state of the premises — are provided for in Articles 635, 625 (7) and 632 of the Criminal Code. The less serious offences are covered by three series of provisions: Articles 6 and 33 of the Consolidated Law on Fishing (Royal Decree No 1604 of 8 October 1931), Article 21 of Law No 319 of 10 May 1976, which punishes the discharge of substances harmful to fish in the framework of rules designed to protect water against pollution, and Articles 25 to 29 of Decree No 915 of the President of the Republic of 10 September 1982 in which the Italian legislature transposed into Italian law Council Directives 75/442 on waste, 76/403 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls, and 78/319 on toxic and dangerous waste.

On the basis of those factors, the Pretore, who, as we will see later, also performs the functions of public prosecutor, initiated criminal proceedings and carried out certain preliminary enquiries. More precisely, he extracted from the file of proceedings terminated on 31 December 1982 three

* Translated from the Italian.

documents which other anglers' associations had sent to him some years previously. Those statements indicated that the Chiese is particularly suited to the reproduction of salmonid species and complained both of the excessive amounts of water which were being removed from it for the purposes of irrigation and the production of electric energy and of the discharge of noxious substances into it by industry and local authorities. In the second place, the Pretore asked the mayors of the municipalities bordering the river to supply him with further information on the state of the watercourse.

At that point, the Pretore developed the syllogism in which this case would find its source. In other words, he considered (a) that the criminal liability for the damage to the Chiese basin and, in particular, for the periodic destruction of aquatic fauna could be determined only on the basis and in the light of provisions which specifically regard water as being a habitat for fish; (b) that provisions of that nature are to be found in Directive 78/659; and (c) that there are doubts as to whether the Italian legislation on the protection of waters, as contained in Law No 319 of 1976, as later supplemented and amended, and other laws adopted by the State or the region of Lombardy concerning the protection of the environment, is compatible with the abovementioned directive in regard in particular to preserving 'the quantity of water with a view to ensuring the actual existence of the aquatic environment for fish life'.

Thus, according to the Pretore, the abovementioned Community measure is at the centre of the proceedings which he has initiated for at least three reasons: because it is 'an essential basis' for the criteria to be applied in the investigation, because it is of 'decisive importance for the purposes of the requirements laid down by the rules of criminal law in force' and because it contains 'undeniable possibilities [for] broadening the sphere of the protection afforded by the criminal law'. That conclusion led him to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling by order of 13 January 1986:

'(1) Is the existing system of rules established by the Italian Republic for the protection of waters from pollution consistent with the principles and quality objectives laid down in Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life?

(2) Do the quality objectives, as laid down in the directive, presuppose the comprehensive management of water resources — that is to say a system for regulating the discharge and the volume of water — and, consequently, the need for rules which apply to water basins or watercourses and are capable of ensuring a constant flow with a view to preserving the minimum volume of water which is essential for the development of the fish species?'

3. In their written observations and at the hearing, the Italian Government and the Commission of the European Communities argued that the reference was entirely inadmissible or, at least, that the first question was inadmissible. With regard to the first submission, both parties rely (a) on the Pretore's role in the context of criminal proceedings; (b) on the stage of the proceedings at which the reference was made; and (c) on the fact that the proceedings in question have been brought against persons unknown.

Let me begin with the problems mentioned under (a) and (b), which are closely related to each other. The Italian Government

doubts that in this case the conditions laid down in the second paragraph of Article 177 of the EEC Treaty have been fulfilled and, in particular, it expresses doubts as to whether the reference comes from a 'court or tribunal'. Those doubts arise from the ambiguous nature of the office of Pretore, a peculiar institution in the Italian legal system in which the functions of public prosecutor and judge are combined. At the time when he made the reference to the Court the Pretore di Salò had just initiated the criminal procedure and had carried out certain preliminary investigations. He was therefore acting in his capacity as public prosecutor, that is to say, as a party, and it is clear that a party may not refer questions to the Court of Justice for a preliminary ruling. In any event, the Pretore was not a judge. If the Court were to give him an answer which led him to the conclusion that the diversion of the water was not of a criminal nature, he would have to order that no further action be taken. However, the order that he makes for that purpose can never acquire the force of *res judicata*; it may be revoked even as a result of a different assessment of facts already known and the reasons on which it is based do not have to be stated. It therefore is not covered by the guarantee contained in Article 111 of the Constitution in regard to judicial acts properly so-called (see Judgment No 688 of 6 December 1984 of the Corte di Cassazione, Fifth Criminal Chamber, *Cassazione Penale* 1985, p. 1130).

Nor is that all, according to the argument mentioned under (b). What is most striking about the procedural situation in which the Pretore formulated the questions is, so to speak, its premature nature. In other words, it is still fluid or, to express it better, *in fieri*, and is far from affording a glimpse, even by way of provisional conclusions, of any outcome. In the event, there is not even as yet a specific charge and — let it be borne in mind — that defect is not so much the result of a subjective fact (the persons responsible for the diversion of the water are in reality known to everybody) as of an objective factor, namely the uncertainty as to whether the facts may be regarded as constituting criminal offences.

In the result, the Italian Government considers that since the request for a preliminary ruling was made to the Court at a stage in the procedure which does not involve the presence of a judge and which is clearly preliminary in nature, it is premature and, for that reason, improper. The making of the request removes recourse to the Community mechanism provided for in Article 177 from the trial properly so-called.

4. Having regard to the case-law of the Court, that argument cannot be upheld. It is fundamentally contradicted by the judgments which establish the Community nature of the concept of 'court or tribunal' within the meaning of Article 177 (judgment of 30 June 1966 in Case 61/65 *Vaassen* v *Beambtenfonds voor het Mijnbedrijf* [1966] ECR 408; judgment of 27 November 1973 in Case 36/73 *NV Nederlandse Spoorwegen* v *Minister van Verkeer en Waterstaat* [1973] ECR 1299; judgment of 6 October 1981 in Case 246/80 *Broekmeulen* v *Huisarts Registratie* [1981] ECR 2311). The principle laid down in those judgments and the fact, which follows from it, that no reliance may be placed on the conditions which a measure must satisfy under the laws of the various Member States in order to be of a judicial nature, render totally irrelevant, for example, the argument based on the nature of the order that no further action be taken. The lack of merit in that argument is in any event evident even if account is taken of the information which we may glean from Italian law. In regard to offences within the jurisdiction of the Tribunale (District Court) and the Corte d'Assise (Assizes), it is the

examining magistrate, that is to say, the holder of an office which is beyond all doubt exclusively judicial in nature, who has the power, under the same conditions and with the same effects, to order that no further action be taken.

However, it is another point which is decisive. The criteria by which the Community concept of 'court or tribunal' is defined could not be wider. That explains why the Court has permitted national judicial bodies of all kinds to consult it, irrespective of the nature and purpose of the proceedings in the course of which they raise a question or of whether the robe they are wearing when they do so is more or less markedly judicial. The Italian Pretori acting in criminal cases are fully qualified members of that class and it is of little importance whether they refer questions to the Court of Justice in their judicial capacity or in their capacity as prosecutors because the corresponding duties overlap, are interlinked and complement each other so as to form an indivisible whole. The Pretore, as has been well put, is a person to whom the judicial system accords the status of judge and who in the exercise of that function 'formulates the charge [initiating] the proceedings, carries out the enquiry and investigates [the case] for and against the accused, ensures that the charges are finalized, decides ... the question whether there is a case to answer by summoning the accused to appear or by ordering that no further action be taken and [plays] a leading role at the hearing' (Dominioni, Parte 'Diritto Processuale Penale', *Enciclopedia del Diritto*, Volume XXXI, Milan, 1981, p. 957).

Undoubtedly, that derogation from the rule *ne procedat judex ex officio*, that concentration in a single office-holder of powers so different as to be incompatible and the fact that they are combined in a single set of functions could give rise to revulsion. I myself find it hard to stomach something so close to the model of the ancient inquisitorial procedure. With greater authority, the Corte Costituzionale (Constitutional Court) called upon the legislature a few months ago to eliminate it from the legal system (Judgment No 268 of 10 December 1986, *Gazzetta Ufficiale della Repubblica Italiana*, 1a Serie Speciale, No 60, p. 20). The attempts to render it more palatable by separating the functions performed by the Pretore according to the sequence of the measures which he takes in such a way as to fit his office once again into the traditional dualist scheme are therefore understandable. This, however, does not render them any the less misconceived from the point of view of the *jus conditum* or any the less exemplary, as an eminent specialist has written, of the tendency of many lawyers to 'distort even the most recalcitrant facts' and to 'devise weird formulae in order to conceal the real situation' (Cordero, *Procedura Penale*, 6th Edition, Milan, 1982, page 27).

I accept none the less that someone who is impressed by the fact that the Pretore is accorded the status of a 'party' when acting as public prosecutor would find those observations insufficient. All that such a person need do is to reread the judgment of 12 November 1974 in Case 32/74 *(Haaga* [1974] ECR 1201). In that case, the Court considered that it had jurisdiction to rule on a reference from a court to which an application had been made for an order in non-contentious proceedings. However, everybody knows that in that context the court is not a 'third party', that is to say, it has no connection with the interests to be protected or that at the very least the point is debatable.

5. Let me now turn to the argument which criticizes the reference for a preliminary ruling on the ground that when it was submitted the Pretore had not classified the facts from a legal point of view, or, better, was not yet able to do so. That argument is strongly reminiscent of the words used by Lord Denning to define the time at which a reference for a preliminary ruling is most appropriate: 'As a rule, you cannot tell whether it is necessary to decide a point until the facts are ascertained. So in general it is best to decide the facts first' (*Bolmer* v *Bollinger*, 1974 2 All. ER 1226 at p. 1235).

However, the Court of Justice has decided differently. Thus, in its judgment of 10 March 1981 in Joined Cases 36 and 71/80 (*Irish Creamery Milk Suppliers' Association* v *Ireland* [1981] ECR 735, paragraphs 6 and 7), the Court accepted that, by establishing 'the facts in the case' settling 'questions of purely national law' before the reference is made, the national court does not assist it. However, the Court added that 'those considerations do not in any way restrict the discretion' of the national court. It alone has 'a direct knowledge of the facts of the case and of the arguments of the parties' and it alone will have 'to take responsibility' for giving judgment and it is therefore 'in the best position to appreciate at what stage in the proceedings it requires a preliminary ruling'. Hence, the choice of the appropriate time for making a reference must be dictated 'by considerations of procedural organization and efficiency to be weighed by that court' (paragraph 8) (see also the judgment of 10 July 1984 in Case 72/83 *Campus Oil Ltd and Others* v *Minister for Energy and Others* [1984] ECR 2727, paragraph 10).

In my opinion, that approach is fully in conformity with the spirit of Article 177. I would add that is also the one that is most espoused in academic legal writing (see Waelbroeck, 'Commentaire à l'article 177', in *Le droit de la Communauté économique européene*, Brussels, 1983, Vol. 10, Book 1, p. 208) and coincides with that taken by the Italian Corte Costituzionale. Precisely in regard to the point I am discussing, it was held in Judgment No 104 of 18 April 1974 (*Giurisprudenza costituzionale* 1974, I, p. 878) that orders for reference made by the Pretore *in limine litis*, or even before criminal proceedings had been initiated and the investigation had commenced, were properly made.

6. The third ground on which it is alleged that the reference submitted by the Pretore di Salò is inadmissible is based on the stage of the main proceedings at which it was made and that argument was advanced primarily by the Commission. According to the Commission, the fact that the proceedings were brought against persons unknown entails two alternative consequences, both of which are unacceptable, namely to render the judgment of this Court useless in practical terms or to give rise to a serious restriction of the right to a fair hearing in the proceedings before it.

It is true, says the Commission in the first place, that 10 years ago the Court did not refuse to reply to the Pretore di Cento even though the proceedings before him were also against persons unknown (judgment of 5 May 1977 in Case 110/76 [1977] ECR 851). However, that court had raised a question of procedure which in any event dealt with one precise point. He asked the Court whether the Community could be regarded as an injured party in the proceedings which he had initiated and the Court's interpretation was necessary in order to determine whether he was required

to notify it of the initiation of the proceedings. The Pretore di Salò, however, is asking the Court to help him, by interpreting Directive 78/659, to ascertain whether the facts complained of by the anglers in his judicial district may or may not be said to constitute criminal offences. However, such a request brings to mind the well-known problems referred to the Court by the Pretore di Bra in Case 244/80 *Foglia* v *Novello* (see the judgment of 16 December 1981 [1981] ECR 3045). In this case too there is a whiff of something artificial or fictitious and, albeit from a different standpoint, a real prospect of the Court's working to no useful purpose. The reason is obvious. There is a risk that the Pretore will not succeed in identifying the accused, and if that happens, the proceedings cannot be brought to their ultimate conclusion. The same Pretore would in those circumstances have to make an order that no further action be taken.

Let us suppose, however — the Commission added at the hearing — that our Pretore does obtain sufficient information to identify the persons responsible for erecting the dams on the Chiese and let us imagine moreover that the Court replies to his second question in the way that he wishes, that is to say, that it accepts that the parameters of quality laid down in the directive impose an obligation to maintain the quantity of water necessary to maintain fish life. In that case it must be presumed that the Pretore will summon the accused and charge them with a criminal offence — unlawful diversion of waters — punishable under Article 632 of the Penal Code by a term of imprisonment of up to three years and a fine of up to LIT 400 000.

That situation, however, would be even more serious than the one envisaged earlier. The persons responsible for erecting the dams would run the risk of being exposed to a serious measure depriving them of their personal liberty without being in a position to intervene in the present proceedings, either because the order making the reference could not be notified to them or because, since they were not parties to the main proceedings, Article 20 of the Protocol on the Statute of the Court did not permit them to submit observations. Nor can it be said that they could avail themselves of that possibility at a later date if it is the case that the Pretore may consider that the question of interpretation is already resolved and accordingly not refer it to the Court again. Thus, this reference for a preliminary ruling could in the result infringe their right to a fair hearing which, in this case, consists of the opportunity of putting before the Court the arguments most favourable to them on the interpretation of Directive 78/659. The Court should draw the necessary inferences from the fact that it restricts so important a guarantee and declare it inadmissible.

7. The Commission's arguments do not seem to me to be any more persuasive than those put forward by the Italian Government. Thus, the arguments concerning the accused's right to a fair hearing are tenable only if the special nature of the proceedings under Article 177 and the position which the parties occupy in the context of those proceedings is ignored or minimized.

It has long been accepted that proceedings for a preliminary ruling are not subject to the rules governing adversary proceedings. It was stated in the order of 3 June 1964 (Case 6/64 *Costa* v *Enel* [1964] ECR 614) that Article 177 'does not envisage contentious proceedings designed to settle a dispute but prescribes a special procedure' under which the national courts seek 'the

interpretation of Community provisions which they have to apply in disputes brought before them'. From that principle, the judgment of 9 December 1965 (Case 44/65 *Hessische Knappschaft* v *Singer et fils* [1965] ECR 965) draws the conclusion that 'any initiative of the parties' is excluded. They are 'merely invited to be heard' (see, in the same sense, the order of 14 July 1971 in Case 6/71 *Rheinmühlen* v *Einfuhr- und Vorratsstelle für Getreide* [1971] ECR 719) and the order of 18 October 1979 in Case 40/70 *Sirena* v *Eda* [1979] ECR 3169).

However, the most significant decision in that respect, also in view of its obvious link with the problem now before us, is the judgment of 16 June 1981 (Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563). The national court had asked the Court of Justice to rule on the compatibility with Community law of a collective agreement the parties to which — two associations of publishers and newspaper distributors — were not parties to the main proceedings and therefore could not submit their observations. The Court rejected the request, made on those grounds by the defendants in the main proceedings, that the reference be declared inadmissible. It did so on the basis of reasoning which was perhaps somewhat elliptical but was such as to let it be understood that the absence of the signatories to the agreement did not call in question the jurisdiction of the Court: 'The application of Article 177 of the Treaty', the Court held, 'is subject to the *sole* requirement that national courts must be provided with all the relevant elements of Community law which are necessary to enable them to give judgment' (paragraph 8; the emphasis is mine).

The theoretical results of the situation thus outlined seem to me to be obvious. The Court's decision is addressed only to the national court which requested it whereas the parties to the main proceedings may draw from it only indirect and purely factual inferences because these are derived via the judgment of the national court which, for their purposes, is the only decision having legal effects. From this it follows that, to employ concepts current in Italian legal writing, in Luxembourg they are not parties in the substantive sense, that is to say, protagonists in the dispute which the court is called upon to resolve, but only in the formal sense. That means a person who, without necessarily being the holder of the right asserted before the court, is entitled to take certain procedural steps, for example, with a view to giving effect to the right or interest of another person or to ensuring that the rules applicable to the case are correctly construed (see, in that regard, Ferrari-Bravo, 'Commento all'Articolo 177' in *Commentario al Trattato CEE,* Milan, 1965, Vol. III, p. 1319, and Monaco, 'Le Parti nel Processo Comunitario', in *Studi Morelli,* Milan, 1975, p. 574 *et seq.*).

If, therefore, the role of the parties in proceedings on a reference for a preliminary ruling is reduced to that, if the purpose of those proceedings is an enquiry which goes beyond such interests as the parties may have because it seeks to determine, in a manner which is strictly objective and tendentially abstract, the precise content of the Community rules, if all that is true, I repeat, then it seems to me to be difficult to regard the possibility of submitting written observations as part of the right to a fair hearing. That guarantee falls to be protected, if need be, in the context of the main proceedings. Thus, it will be for the national court to decide whether the fact that the parties were not present in Luxembourg has had a

negative impact on their chances of success before it and if it considers that there has been such an effect, there is nothing to prevent it from questioning the Court once again, if necessary by asking the same questions (judgment of 24 June 1969 in Case 29/68 *Milch-, Fett- und Eierkontor* v *Hauptzollamt Saarbrücken* [1969] ECR 165, paragraph 3, and recently the order of 5 March 1986 in Case 69/85 *Wünsche* v *Federal Republic of Germany* [1986] ECR 947, paragraph 15. As is clear, those two decisions also refute the Italian Government's argument, to which I referred in paragraph 3, *in fine*).

8. The arguments which seek to show that the Court's interpretation is in danger of being *inutiliter data* are even weaker. Let me dispose immediately of the parallel which the Commission draws between this case and *Foglia* v *Novello*. It is true that in the 1960s and 1970s, many Pretori forgot that 'enthusiasm is not and cannot be a judicial virtue' (Lord Devlin, 'Judges and Lawmakers', 39 *Modern Law Review* (1976) p. 1), and engaged in an adventurous and sometimes irresponsible activism. However, that phenomenon is now in full decline and I do not consider that this case is a vestige of it. What I mean is that it is possible to imagine that a judge would let himself be persuaded to refer to the Court of Justice a question raised by parties in a *civil* case which is more or less clearly 'manufactured'. However, I find it frankly impossible to believe that he would himself 'manufacture' *criminal* proceedings in order to obtain a preliminary ruling on interpretation from the Court and on the basis of this put into effect a legal policy of his own.

To come to the core of the problem, the Commission's view is already placed in difficulty by the very restrictive terms which the Court has employed to define the cases in which a decision on its part is truly pointless. The Court has stated that that will be the case 'only if it is quite obvious that the interpretation of Community law ... bears no relation to the actual nature of the case or to the subject-matter of the main action' (judgment of 16 June 1981, cited above, paragraph 6; judgment of 26 September 1985 in Case 166/84 *Thomasdünger* v *Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001, paragraph 11; judgment of 19 December 1968 in Case 13/68 *Salgoil* v *Italy* [1968] ECR 453). No less illuminating, moreover, is a consideration of the results to which the Commission's reasoning would give rise if pushed to its logical conclusion. If that were done, the Court's decision would, for example, be useless even if the Pretore succeeded in identifying the accused but decided not to charge them because there was no intent or negligence. What is more, if that line of reasoning is pushed to its extremes, it precludes the possibility of referring a question for a preliminary ruling in any criminal proceedings before the preliminary enquiry or even before the oral argument has been concluded, and in any case, makes such a reference subject to the condition that the existence of the elements of the offence which do not depend on Community law should be established.

However, the view which I am now considering is demolished by another argument. It is essentially contrary to the rules laid down in the aforementioned judgment in *Irish Creamery Milk Suppliers' Association* v *Ireland* (*supra*, paragraph 5) and, more generally, to the principle upon which that judgment is based, namely the allocation of jurisdiction between the national courts and the Court of Justice. The reason is clear. Whether the

Commission realizes it or not, it is asking the Court to decide that it is for the Court not merely to interpret the Community rules but also to decide whether the national court *must or may use* the Court's interpretation in the proceedings pending before it. That in fact is what a refusal to reply to the question would amount to if it was based on the futility (in concrete terms: the doubtful utility) of the preliminary ruling because the reference was made too early in the proceedings for it to be certain that those proceedings would in fact reach their ultimate conclusion, and that, logically, is what is prohibited by the judgment of 28 March 1979 in Case 222/78 *ICAP* v *Beneventi* [1979] ECR 1163, paragraphs 11 and 12.

9. The request for a preliminary ruling is therefore admissible in its entirety. Can the same be said of the first question? The Commission does not believe so for two reasons. It points out that the national court is asking the Court of Justice to decide essentially whether Italy has correctly implemented Directive 78/659 and, instead of referring to a provision or a definite group of provisions, it is couched in vague and general terms. The subject-matter of the judgment on the question of compatibility with the directive is in fact 'the Italian Republic's current rules on the protection of waters against pollution'.

Those arguments are well-founded. In other words, it is correct to say that a reference for a preliminary ruling cannot be used to establish that a Member State has failed to fulfil its Community obligations (abundant and settled case-law; see, most recently, the judgment of 9 October 1984 in Joined Cases 91 and 127/83 *Heineken Brouwerijen* v *Inspecteurs der Venootschapsbelasting, Amsterdam and Utrecht* [1984] ECR 3435). It is also correct to say that the question is expressed in a form which is too indefinite to bring out 'those elements which come within the interpretation of Community law' and, for that reason, to 'lend itself to a suitable reply' (judgment of 21 March 1972 in Case 82/71 *Pubblico Ministero* v *Società Agricola Industria Latte* [1972] ECR 119, paragraph 3, and the judgment of 28 March 1979 in *ICAP*, cited above, paragraph 20). That said, if the Court does not agree with my opinion, I think it useful to point out (a) that there is still pending before the Court a case (Case 322/86) under Article 169 in which the Commission is asking the Court to declare that Italy has not implemented the directive at issue; (b) that there is in fact a considerable divergence between the methods of intervention provided for in the Italian and the Community legislation.

It is certainly true that Law No 319 of 1976 seeks to protect waters against pollution but it does so indirectly. More precisely, rather than laying down quality requirements and prescribing limit-values for them, it determines the characteristics of certain of the discharges from industrial or domestic installations and fixes the limits within which they are acceptable, that is to say, the maximum concentration of polluting substances. With a few exceptions, those limits are moreover fixed in an identical manner for the whole of the national territory, that is is to say, the destination, purpose and use of the receiving water are disregarded. On the other hand the Community directives, and in particular Directive 78/659, are operative in specific environmental milieux (for example, waters intended for the support of fish life) and identifies those sectors by reference to the use that is made of them. They are thus concerned with determining the final quality of the receiving water and fix for that purpose limit-values and reference parameters (F. and P. Giampietro, *Commento alla Legge sull'Inquinamento delle Acque et del Suolo*, Second Edition, Milan, 1981, p. 349 *et seq.*).

10. The second question seeks to determine whether the parameters of quality laid down in the directive imply that the quantity of water essential to fish life must be maintained.

The Italian Government proposes that the Court should reply in the negative. In its opinion, the sole objective pursued by the directive in requiring protection of the quality of waters is the protection of fish stocks from the harmful consequences — reduction or extinction of certain species — brought about by the discharge of polluting substances. Other forms of water management are not *directly* imposed. In particular, no provision requires the Member States to assess the overall situation of the hydrographic system of which fresh waters form part. Naturally, that does not mean that the national administrations must do nothing. Thus, when they establish the programmes designed to reduce pollution and adopt appropriate measures where the limit-values are exceeded (Articles 5 and 7 (3)), the national authorities *may* consider the state of the aquatic environment as a whole and take action in order to achieve the result sought by the directive.

That argument is attractive but it does not stand up to a systematic interpretation of the Community measure. The Commission has observed that at least 11 of the 14 parameters laid down in Annex I are given in milligrams per litre and that the corresponding maximum values may be exceeded in two ways: by causing or permitting excessive discharges of substances harmful to fish life or by diminishing to an excessive degree the quantity of water in which such substances are dissolved. If that observation is correct I find it difficult not to accept that the Member States are required to prohibit the excessive extraction of 'designated waters' if this automatically involves a sudden increase in the concentrations of harmful substances in the remaining water. Furthermore, Article 7 (3) provides that if it appears that a value set by the national authorities is not respected 'the Member State shall establish whether this is the result of chance, a natural phenomenon (the floods or other natural disasters referred to in Article 6 (2)) ... and *shall adopt appropriate measures*' (the italics are mine).

That is not all. The Commission has rightly pointed out that, considered in the context of the spirit of the directive, the protection of 'designated waters' is not an end in itself but rather a means of ensuring the survival of the species of fish referred to in Article 1 (3). Thus, such waters are protected from the concentration of harmful substances primarily because they constitute the *habitat* of the fish which live in them or could live in them if the pollution were eliminated. However, that statement has an obvious corollary. If the Member States are free to permit extractions of water which bring about an increase in that concentration or reduces the quantity of water beyond the limit essential for the survival of the protected species, the directive as a whole, and not just one or another of its provisions, would be deprived of all practical effect.

11. As I pointed out when considering the facts of the case (*supra*, paragraph 2), the reason which led the Pretore di Salò to ask the Court to interpret Directive 78/659 is to be found in its importance for the purposes of the proceedings initiated by him as 'an essential basis' under the rules of criminal law in force and in view of the 'undeniable

broadening' of the 'sphere of the protection afforded by the criminal law' which it entails. The judge thus seems to consider, although he does not say so expressly and still less does he ask the Court to rule on the view which he puts forward, that a directive which has not been implemented or has been incorrectly implemented may impose on individuals obligations as to conduct the breach of which may give rise to criminal penalties under national law.

For my part, I would observe (a) that the directive applies only to 'waters designated by the Member States' (Articles 1 (1) and (4)); (b) that the Member States are required to fix limit-values only in regard to such waters (Article 3); (c) that the Member States are entitled to set more stringent values than those indicated in Annex I (Article 9); (d) that the Member States are not required to back up the measures required by Article 17 with criminal sanctions, but nothing prevents them from doing so. From that summary examination it emerges, so it seems to me, that the measure leaves the national legislatures a wide discretion, especially in regard to the designation of waters and, for that reason, its provisions do not meet the requirements — clarity, precision, unconditional character — which, according to the case-law of the Court, must be satisfied if a measure is to be capable of producing direct effects.

Let me add that in the recent judgment of 26 February 1986 in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723 at p. 737, the Court stated that: '... it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each Member State to which it is addressed". It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual' (paragraph 48). I must say that the premise on which that paragraph is based leaves me rather puzzled, but I agree with its conclusion, at least in so far as it may be understood as meaning that the directive cannot of itself impose obligations on individuals *vis-à-vis* the public administration. In any event, I accept that the abovementioned judgment puts an end to any discussion of the question whether the premise in the light of which (if not on the basis of which) the Pretore di Salò seems to have formulated his question is well-founded.

But the question does not for that reason become irrelevant. At the hearing, the Agent of the Italian Government denied, as I do, that the directive gives rise to requirements or prohibitions which could concern natural (or legal) persons and thus that it might be capable, even indirectly, of constituting a prerequisite enabling certain conduct to be regarded as a criminal offence. He admitted, however, that the measure in question might have the effect of rendering offences against existing or future provisions of criminal law more serious. Waters that are 'designated' by the State in the manner prescribed by the provisions of Community law constitute an object of legal protection which, in so far as it assures a benefit for the Community as a whole, has a special value. Offences of which these waters are the subject may therefore entail a more severe penalty because they involve not just any waters but waters which are deserving of protection (Article 133 (1), Point 2, of the Criminal Code).

That observation seems to me to be correct and in the light of it it may be said that the

directive may, once Article 4 is put into effect, have an impact on the proceedings initiated by the Pretore, at least in so far as the protection afforded by the criminal law is thereby reinforced. The 'designation' of the Chiese, if this were to occur before the termination of the proceedings, would in fact be a *jus superveniens*, but this would remain irrelevant since the seriousness of the damage is plainly of objective significance.

12. On the basis of all the foregoing considerations, I propose that the Court reply as follows to the questions referred to it by the Pretore di Salò by order of 13 January 1986 in the context of proceedings against persons unknown:

'(1) Article 177 of the EEC Treaty is based on a clear distinction between the jurisdiction of the national courts and that of the Court of Justice. It therefore does not allow the Court of Justice to rule on the compatibility of the Italian legislation on the protection of waters against pollution with Council Directive 78/659 of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life.

(2) The parameters of quality laid down in Annex I to Directive 78/659 are to a large extent indicated in terms of milligrams per litre. On the other hand, the protection of waters capable of supporting fish life from the point of view of quality implies that excessive quantities must not be drawn from them to an extensive degree or, in any event, in such a way as to frustrate the purpose which the directive seeks to achieve. It follows that the Member States are obliged to ensure that so far as waters which they classify as 'designated waters' within the meaning of the said directive (Article 4) are concerned, the quantity of water indispensable for the survival of protected fish species is conserved.'