OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 25 September 1990 *

Mr President,
Members of the Court,

1. In this case the Commission is seeking a declaration that by failing to adopt within the prescribed period the measures necessary to transpose into national law Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances [1] ('the directive'), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty. The time allowed for transposing the directive elapsed on 19 December 1981.

The dispute between the parties involves both a question of principle, the scope of the duty to implement directives imposed on the Member States by the third paragraph of Article 189 of the Treaty, and a question of fact, whether the provisions adopted by the Federal Republic are sufficient to implement the directive. The Opinion which follows is accordingly built on those two issues; naturally, the factual issue will be largely determined by the answer to the first question.

By way of introduction I shall first give a general outline of the provisions of the directive and of German law which are relevant to the dispute.

Outline of the directive and of the German implementing measures

2. The purpose of the directive is to prevent pollution of groundwater by either prohibiting or restricting the introduction of certain substances. Its provisions govern two kinds of substances, each listed in the Annex. As regards the substances mentioned in list I, the Member States are required to take the steps necessary to *prevent* their introduction into groundwater; as regards the substances in list II, the Member States are required to take the steps necessary to *limit* their introduction into groundwater so as to avoid pollution of the groundwater by those substances (see Article 3). To that end the directive contains a number of detailed provisions implementing the principles laid down in Article 3. I shall just list briefly the provisions which were referred to in the arguments exchanged between the parties.

Article 4 describes in practical and detailed terms what the duty to prohibit the introduction into groundwater of list I substances entails; Article 5 is concerned with restricting the introduction of list II

* Original Language: Dutch.

1 — Council Directive of 17 December 1979, OJ 1980 L 20, p. 43.

substances. Articles 7 and 8 concern the prior (to the grant of an authorization) investigations which must be carried out in certain cases by the competent authorities of the Member States. Articles 9 and 10 concern the stipulations which must be made in the authorizations which in some cases may be given by the Member States. Articles 11 to 13 discuss the renewal, amendment or withdrawal of authorizations and the monitoring of compliance with the conditions laid down in the authorizations. Article 14 permits the Member States to stipulate a transitional period for compliance as regards discharges of substances already occurring at the time of notification of the directive. Article 18 provides that the application of the measures taken pursuant to the directive may on no account lead, either directly or indirectly, to pollution of the groundwater. Article 19, finally, states that the Member States may take measures more stringent than those provided for by the directive.

3. The German Government maintains that all the provisions of the directive have been duly transposed into national law. It refers to three Federal laws: the Wasserhaushaltsgesetz of 1976 (the 'WHG'),[2] the Abfallgesetz of 1986 (the 'AbfG')[3] and the Verwaltungsverfahrensgesetz, the Federal legislation on administrative procedure. None of that legislation was drawn up specifically in order to implement the directive: that is also true of a number of provisions adopted by the *Länder* which served in the opinion of the German Government to fill the remaining gaps in the Federal legislation. However, there is a draft of a Musterverwaltungsvorschrift (model administrative provision, see paragraph 22) which is specifically intended to implement the directive and which is to be elaborated at the level of the *Länder* and must be adopted by each of them. The representative of the Federal Republic explained at the hearing that the provision has been implemented up to now in only seven of the *Länder*.

4. Before I start my consideration of the case I would just like to mention something that occurred during the written procedure. After the application had been lodged the German Minister responsible for the environment informed the Commission in a letter of 29 June 1988 that after a thorough investigation of the arguments set out in the application the German Government had come to the conclusion that the Commission's complaints regarding the absence of implementing measures were to a large extent well founded. It stated that the necessary legislative measures were to be adopted at federal and *Land* level without delay in order to remedy the absence of implementation. In order to enable representatives of the Federal Government to come to an agreement with the Commission regarding the measures to be adopted and the timetable therefore the Federal Government's Agent requested the Court of Justice on 4 July and 13 September 1988 to adjourn the proceedings or to extend the time-limit for lodging a defence until 31 December 1988.

A letter from the Commission dated 20 September 1988 indicated *inter alia* that the discussions between the Commission's

2 — As amended on 23 September 1986, BGBl 1986, I, pp. 1529 and 1654.

3 — *Gesetz über die Vermeidung und Entsorgung von Abfällen* of 27 August 1986, BGBl I, pp. 1401 and 1501.

representatives and the Federal Government were fruitless and on 28 October 1988 the German Government lodged a defence in which it adopted the view that the provisions of the directive had been duly transposed into present German legislation (the defence was admittedly lodged subject to 'intensive negotiations' between the Commission and the German Government aimed at achieving an amicable settlement of the dispute). In its rejoinder the German Government argued that the relevant letter was to be considered in the context of the discussions between the Commission and the German Government, which meant that it had been drafted subject to closer investigation of the additional implementing measures requested by the Commission. The letter did not recognize that the Commission's objections were well founded, it claimed, it merely indicated that the German Government was prepared to cooperate

5. The question arises whether a breach of the Treaty may be regarded as proven by an admission subsequently retracted. In view of the objective nature of the kind of breach covered by Article 169 of the Treaty and in view of the fact that the admission was made by a member of the Government who is not charged with defending the Federal Republic in these proceedings, I consider that that question must be answered in the negative. However, I consider that the German Government's letter is not entirely irrelevant. It does in fact show that the German Government was aware that the precise and detailed provisions of the regulation could not readily be implemented by means of the existing general legislation, as opposed to legislation designed specifically to implement the directive. That difficulty will be illustrated in more than one respect in the following discussion of the case.

The scope of the duty to implement the directive

6. The parties are essentially in disagreement as to the scope of the duty imposed by the third paragraph of Article 189 of the Treaty to transpose directives into national law. The disagreement concerns both the measures permissible (and adequate) to implement them and the criteria which those measures must satisfy. I shall endeavour to clarify that fundamental difference with the aid of the case-law which has been developed by the Court of Justice in recent years.

7. One must always start with the principle that a directive is binding as regards the result to be achieved; Article 189 leaves to the Member States the choice of form and methods. Consequently, the Court has held that the implementation of a directive in national law does not necessarily require the provisions of the directive to be adopted formally and verbatim in an express legislative provision designed for that purpose; *depending on the content of the directive* the existing general legal context may suffice, at least if it ensures that the directive will in fact be applied in full in a sufficiently clear and precise manner.[4] Clear and precise implementing provisions, it was added, are

4 — See judgment in Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23

particularly important where a directive is intended to create rights for individuals; imprecise legislation which leaves those individuals uncertain as to their rights (in the case of directives concerning the protection of the environment it may well be a question of *obligations*) under Community law and their right to rely on Community law before the national courts is not sufficient to satisfy the duty imposed by Article 189 of the EEC Treaty. [5]

Let us now consider Directive 80/68/EEC in the light of that case-law. The purpose of the directive is to protect groundwater from pollution by prohibiting or restricting the discharge, tipping or other treatment of a range of substances. To that end the Member States must provide in national law for a range of prohibitions, authorizations and monitoring procedures. In other words, the directive requires the Member States to introduce a set of rights and duties as between national authorities and those concerned with the substances referred to by the directive, and therefore is designed to create rights for individuals. Clear and precise implementation of the directive's provisions may also be important for third parties (for instance environmental groups or neighbourhood residents) seeking to have the prohibitions and restrictions contained in the directive enforced as against the authorities or other individuals.

8. The Commission has emphasized, moreover, that the comparative criteria to be applied by the Court in this case must be particularly precise and stringent. It argues that if compliance with the interest protected by the directive (in this case, the prevention of groundwater pollution) cannot be ensured by economically motivated individuals and if there are no simple means of monitoring observance of the rules laid down by the directive, the need for clarity and precision in implementing the directive becomes even more compelling. [6] The Federal German Government does not agree: it maintains that all that is necessary is to ensure that the directive is in fact fully applied by national rules of law and administrative practices; it regards the literal adoption of the directive's provisions, on which it considers the Commission insists, as an excessive requirement.

I agree with the Federal German Government to the extent that the purpose of the directive at issue before this Court can be achieved without necessarily adopting literally all the rules it contains — and in fact that has not been denied by the Commission. What is required, however, is that the existing 'general legal context' in a Member State ensures the application of directives in such a way that there is no practical or even theoretical risk of misapplying the rules laid down by the directives. [7] The Federal German Government considers that the second possibility reflects the situation in the Federal Republic with regard to the application of the directive. It maintains that the combination of existing national rules of

5 — Judgment, *ibid.*; see also the judgment in Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7, and the judgment in Case 116/86 *Commission* v *Italian Republic* [1988] ECR 1323, paragraph 21.

6 — With reference to the judgment in Case 252/85 *Commission* v *France* [1988] ECR 2243, paragraph 5.

7 — See the judgment in Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraphs 7 to 12.

law and the application and interpretation of those rules in accordance with the directive's provisions by the appropriate authority ensures in practice that there is no possibility of authorizations being granted for discharges prohibited by the directive.

The Court of Justice has rejected such an argument more than once: directives which, like the one we are considering here, contain very precise and detailed provisions, cannot be implemented by means of a series of already existing imprecise provisions on the one hand and an administrative practice (even one which cannot be reversed) on the other.[8] The Federal German Government's argument assumes in fact that precise and detailed provisions of a directive may be implemented *inter alia* by administrative practices which are not adequately publicized, a view which has been consistently rejected by this Court.[9] Furthermore, the Court has stated emphatically that neither the alleged absence of any practice incompatible with the directive nor the alleged compliance of an administrative practice with rules contained in a directive releases a Member State from the duty to transpose the directive in its entirety.[10] The latter applies in particular whenever a directive contains a prohibition: such a provision must be expressly laid down in national legislation.[11] The Commission rightly emphasized that point: the effective and full application of a prohibition can only be guaranteed if the authorities charged with applying the directive and with adjudicating on applications for authorizations to discharge may rely on an express prohibition of national law.

9. The choice of criteria must also take into account the nature of the interests protected by the directive and the division of responsibility between the Community and the Member States as regards the drafting and monitoring of compliance with protective rules. In that connection the Commission referred rightly, in my view, to the lack of economic stimuli for enforcing compliance with the rules of this directive by individuals, and to the difficulties connected with investigation and monitoring as regards activities which might lead to the spoiling of groundwater. There is an evident comparison to be made here with Directive 79/409/EEC on the conservation of wild birds,[12] which raises similar problems as regards compliance and monitoring. Now, in a case concerning the transposition of that directive the Court stated that a faithful transposition was particularly important where a directive entrusted the management of a common heritage to the Member States in their respective territories;[13] it seems to me that that remark is even more apt in this case, which concerns the pollution of groundwater.

8 — See for instance the judgment in Case 29/84, referred to in footnote 4, in particular paragraphs 25 to 38.

9 — See for example the judgment in Case 116/86 *Commission* v *Italy* [1988] ECR 1323 and the judgment in Case 429/85 *Commission* v *Italy* [1988] ECR 849

10 — Judgment in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, in particular paragraphs 22 to 25 and paragraph 32

11 — See the judgment in Case 252/85 *Commission* v *France* [1988] ECR 2243, paragraphs 18 to 19, and the judgment in Case 339/87, referred to in the previous footnote, paragraphs 35 to 36 The judgments concern the interpretation of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ 1979 L 103, p 1

12 — Cited in the previous footnote.

13 — See the judgment in Case 252/85 (cited in footnote 6), paragraph 5.

10. Finally, there is another reason for requiring a precise and detailed transposition of the rules contained in the directive at issue here; the directive seeks to create equal conditions of competition as between undertakings responsible for discharges by eliminating disparities between national legislations regarding the discharge of certain dangerous substances into groundwater. [14] In order to achieve that harmonization it was necessary to formulate very precise and detailed rules.

11. Those considerations lead me to conclude that Directive 80/68/EEC leaves the Member States little leeway as regards the manner in which its rules are transposed into national law. The same view, I believe, inspired an earlier judgment which has also been referred to in connection with the transposition of the relevant directive and in which the Court ruled that a number of that directive's provisions must be transposed 'with sufficient precision [and] clarity to satisfy fully the demands of legal certainty'. [15]

Prohibition of direct discharges of list I substances

12. The Commission's first three complaints concern the measures which must be adopted in order to ensure compliance with the obligation contained in Article 3(a) of the directive to prevent the introduction into groundwater, by direct or indirect discharge, of list I substances. The measures which the Member States must adopt in that connection are set out in Article 4 of the directive.

13. I shall first discuss the rules governing direct discharges. The *first* indent of Article 4(1) of the directive provides that Member States

'shall prohibit all direct discharge of substances in list I'.

During the procedure prior to the application and before the Court of Justice the Federal German Government maintained that the obligations imposed on the Member States by that provision were satisfied by Paragraphs 1a(1), 2(1), 3(1)(5) and 34(1) of the WHG. Paragraphs 1a(1), 2(1) and 3(1)(5) of the WHG lay down two general principles. In the first place water resources (including groundwater) are to be managed, as part of the natural environment, for the common good and, in harmony with that, in the interests of individuals, in such a way as to prevent any avoidable damage thereto. The second extends the duty to make use of water with care ('use' being in principle always subject to an authorization or permit pursuant to Paragraph 2(1) of the WHG) to the introduction of substances into groundwater. The most relevant provision as regards the transposition of the first indent of Article 4(1) of the directive is, however, the first subparagraph of Paragraph 34 of the WHG. Paragraph 34 is also relevant to the

14 — Fourth recital in the preamble.

15 — See the judgment in Case 291/84 *Commission* v *Netherlands* [1987] ECR 3483, paragraph 15 (re. Article 4(3) of the directive); see also paragraphs 16 to 18 (re. Article 6).

consideration of the Commission's other complaint. I shall therefore cite it in full:

'(1) Authorization to introduce substances into groundwater may be granted only if there is no risk of harmful pollution of the groundwater or of any other impairment of its properties.

(2) Substances may be stored or deposited only in such a way as to avoid pollution of the groundwater or any other impairment of its properties. This provision shall also apply to the transportation of liquids and gases by means of pipelines.'

At first sight the Federal German legislation is clearly in conflict with the directive: whereas the first indent of Article 4(1) lays down unequivocally a duty to *prohibit* any direct discharge of list I substances, what Paragraph 34(1) of the WHG creates is a general *authorization* to discharge 'substances', discharge being prohibited only if the competent authorities decide that it would pose a risk for the groundwater.

14. The Federal German Government nevertheless maintains that such a discretion does coincide with Article 4(1) of the directive. It considers that the provisions should be read in conjunction with Article 2(b) of the directive, which reads as follows:

'This directive shall not apply to:

...

(b) discharges which are found by the competent authority of the Member State concerned to contain substances in lists I or II in a quantity and concentration so small as to obviate any present or future danger of deterioration in the quality of the receiving groundwater.'

In the opinion of the Federal German Government the combination of those two provisions shows that as regards the introduction of list I substances into groundwater the first indent of Article 4(1) imposes not an absolute prohibition but a prohibition subject to exceptions; in other words, application of the prohibition depends on the judgment of the competent national authority. That being so, it maintains that the conditions laid down in Article 34(1) of the WHG for granting an authorization are substantially the same as the criteria laid down in Article 2(b) of the directive for deciding that the directive does not apply, so that application of the WHG leads to precisely the result aimed at by the directive.

15. Careful consideration of the wording and scheme of the directive shows that that argument is not valid. It is evident from Articles 3 and 4 that the directive really does seek to impose a complete prohibition on direct discharges of list I substances,

leaving no power to the authorities of the Member States to assess the risk posed for groundwater by such discharges. Article 2(b) of the directive, which precedes Articles 3 and 4, is not intended to convert the prohibition into an authorization scheme (were it otherwise, as the Commission rightly noted, Article 4 could have been drafted on the same lines as Article 5 of the directive, which does introduce an authorization scheme as regards discharges of list II substances). On the contrary, Article 2(b) makes it clear that substances other than those referred to in list I or II (that is to say, those not covered by the directive), which contain very small quantities or very small concentrations of list I or list II substances do not fall within the ambit of the directive. The provision was introduced for practical reasons; it is frequently impossible to remove all traces of list I or list II substances from discharges of other substances. That is why the national authorities may *decide* that the quantity or concentration of the list I or list II substances in the substance to be discharged is so small 'as to obviate any present or future danger of deterioration in the quality of the receiving groundwater'. Article 2(b) can never serve to make the directive inapplicable as regards *discharges of list I substances* (in pure or diluted form): they remain, without any possibility of exemption, prohibited by the first indent of Article 4(1).

Consequently, the provision in Paragraph 34(1) of the WHG is incompatible with the provision in the directive: it gives an interpretation of Articles 2(b) and 4(1) of the directive which enables the competent authority to assess the risk of pollution represented by a discharge of list I substances, whereas the first indent of Article 4(1) of the directive prohibits such discharges absolutely. The distinction is subtle but essential for the correct transposition of the contents and logic of the directive: full and effective protection of the resource protected by the directive (in this case, groundwater) can only be guaranteed by expressly laying down the prohibitions contained in the directive in a provision of national law, so that the competent authority is allowed no individual discretion as regards the risk of pollution.

16. Article 2(b) of the directive is also not correctly transposed into the law of the Federal Republic since the discretion allowed by Paragraph 34(1) of the WHG is broader than the precisely defined power given by Article 2(b) of the directive to the competent authorities to *find* that the directive does not apply. In fact, neither in Paragraph 34 nor in any other provision of the WHG is it stipulated that the 'discretion' of the competent authority relates solely to a *finding* that list I or list II substances *are contained* in the material to be discharged in a quantity or concentration *so small* as to obviate any present or future danger of deterioration in the quality of the receiving groundwater.

17. I discussed earlier (paragraphs 7 to 10) the need for a precise and detailed transposition of the directive's rules (that is to say, the prohibitions) into national law. The difficulty of interpretation to which the Federal German legislation may lead in that respect can only serve to strengthen those considerations: the provisions are not

sufficient to guarantee legal certainty. The conclusion must therefore be that the prohibition in the first indent of Article 4(1) of the directive must be expressly embodied in national law. So, too, it is only possible to rely on an exception made pursuant to Article 2(b) of the directive if the contents of that provision have been laid down clearly and precisely in a provision of national law.

Prohibition of indirect discharges of list I substances

18. We must now see how the obligation laid down in the *second* indent of Article 4(1) has been transposed into Federal German law. It concerns the measures to be adopted by the Member States in order to prevent the *indirect* discharge of *list I* substances. More precisely, it provides that:

'[Member States] shall subject to prior investigation any disposal or tipping for the purpose of disposal of these substances which might lead to indirect discharge. In the light of that investigation, Member States shall prohibit such activity or shall grant authorization provided that all the technical precautions necessary to prevent such discharge are observed'.

The Federal German Government contends that that obligation has been implemented by Paragraphs 3(1)(5), 19a, 19g, and 34(1) and (2) of the WHG. Those provisions draw a distinction according to whether substances (i) have been drawn off through pipelines, (ii) have been disposed of by means of other facilities, (iii) have been disposed of without the aid of facilities, or (iv) have been eliminated. I shall now consider whether those provisions constitute an adequate implementation of the various obligations (I see four of them) imposed by the second indent of Article 4(1).

19. In the first place, that provision defines the scope of the obligation to *prevent* the introduction into groundwater of list I substances. In order to satisfy that obligation Member States must either prohibit certain activities, or permit them subject to authorization, provided that all the technical precautions necessary to prevent a discharge are observed. The Federal German Government has adopted a different interpretation: here, again, it maintains that the second indent of Article 4(1) must be read in conjunction with Article 2(b) of the directive, with the result that the Member States have merely to adopt a conditional prohibition.

I can answer that argument on the basis of my previous discussion of the relationship between Article 2 and Article 4 of the directive. In practical terms that means as regards the second indent of Article 4(1) that the Member States must adopt rules which either prohibit unconditionally the activities described in the provision, or ensure that those activities do not result in an indirect discharge. A system such as the German one, whereby prohibition or authorization depends on the competent authority's assessment of the risk of pollution, is no longer in conformity with that. In other words, the WHG applies only to the occurrence (or only to the prevention) of *pollution* of the water (see for

example Paragraphs 19b and 34(2) of the WHG and page 10 of the Federal German Government's rejoinder), whereas the directive instructs the Member States unequivocally to prevent any *discharge* of list I substances.

20. In the second place, the second indent of Article 4(1) provides that the prohibition or authorization is to apply to 'any disposal or tipping for the purpose of disposal [of list I substances] which might lead to indirect discharge'. The Federal German Government is of the opinion that the combined application of the abovementioned paragraphs of the WHG to which I have referred (paragraph 18) ensures the application of that provision: Paragraph 19a of the WHG refers to the conveyance of 'harmful substances' (see paragraph 21, below) in pipelines: Paragraph 19g applies to facilities for treating such substances. Those provisions by no means cover all activities whereby list I substances are disposed of or tipped for the purpose of disposal and which may lead to indirect discharge.

The gap was filled, however, in the opinion of the Federal German Government, by Paragraph 34 of the WHG (which makes any 'introduction' of substances into groundwater and any 'tipping or disposal' subject to an *authorization*) and by the *Abfallgesetz*, which concerns the disposal of substances kept in waste dumps. The Commission has not denied that the scope of Paragraph 34(2) of the WHG is sufficiently wide to embrace the activities prohibited by the second indent of Article 4(1) of the directive. Nevertheless, as I said, neither that paragraph nor the other provisions of the WHG or of the *Abfallgesetz* embodies the *prohibition* laid down by the directive (see above).

Both lead to the result that the Federal German legislation does not satisfy the prohibition laid down in the second indent of Article 4(1). Paragraphs 19a to 19g of the WHG are too restrictive in scope to satisfy that provision.

21. In the third place, the prohibition or authorization in the second indent of Article 4(1) must apply to all the substances mentioned in list 1. The rules contained in the WHG are not very precise: they apply to 'substances which are harmful to water'. That expression is interpreted differently (in Paragraphs 19a(2) and 19g(5) of the WHG) according to the manner in which the substances are transported. Those definitions do not refer to the substances appearing in list I, but comprise vague descriptions such as 'other substances, in liquid or gaseous form, which may pollute water or otherwise be harmful to its properties' (Paragraph 19a(2) of the WHG) [16] or 'toxic substances which may lead to long-term changes in the physical, chemical or biological properties of the water' (Paragraph 19g(5) of the WHG). If substances are disposed of or tipped without

16 — Paragraph 19a(2) provides that those substances are to be defined in a regulation. The regulation is the *Verordnung über wassergefährdende Stoffe bei der Beförderung in Rohrleitungsanlagen* of 19 December 1973, BGBl 1973, I, p. 1946. As the Commission states, that regulation also does not cover all the substances referred to in list I.

the use of special facilities or eliminated there is no definition at all, and one must fall back on the general rule laid down in Paragraph 3(1)(5) and 3(2) of the WHG, which mentions as 'use' of water (for which an authorization or permit is required) also 'measures which may lead to a permanent or not negligible alteration in the physical, chemical or biological properties of the water'.

Leaving aside the question whether the combined application of those provisions does in fact cover all the substances mentioned in list I, it should be pointed out that they do not implement with sufficient clarity and precision the second indent of Article 4(1). It is also necessary to make it clear to persons who wish to engage in the activities covered by that provision (or to prevent them) that the provision applies to the substances referred to in list I.

22. The Federal German Government has stated that a *Verwaltungsvorschrift* (administrative provision) (to be adopted by the various *Länder*) is being prepared, in which the applicable rules are to be defined by reference to lists I and II of the directive. As I said (paragraph 3) it has been adopted so far in seven *Länder*: the others, who have already adopted their own rules, do not see any need to adopt it. There is also the question whether a *Verwaltungsvorschrift* takes precedence over the legislative provisions of the WHG already discussed; in that respect, I would refer to the case-law of this Court in which it has been stated that directives must be transposed into national law by means of provisions having the same force of law as the provisions which must be amended. [17]

23. In the fourth place, the second indent of Article 4(1) requires that authorizations be granted for the activities referred to in the provision only *after* prior investigation, and that the authorization be granted only *in the light of* the results of the investigation and provided that all the technical precautions necessary to prevent an indirect discharge are observed. What that investigation entails is described more fully in Article 7 of the directive: the conditions and restrictions which may be attached to the authorization are listed in detail in Articles 10 and 11. None of those provisions is expressly stated in a rule of German law.

The Federal German Government considers that it is unnecessary to incorporate the wording of Article 7 because 'it goes without saying' that any administrative decision must be preceded by an investigation; [18] it also refers to the *Verwaltungsverfahrensgesetz* (Law on administrative procedure), which provides that the authorities must initiate an investigation of the facts of their own motion and make use of such proofs as they deem necessary. Whether such general provisions ensure that the detailed investigation prescribed in Article 7 will always be carried out seems to be highly questionable. It is particularly important to incorporate precisely the requirements laid down in Article 7 because for individuals who apply for an authorization under the second indent of Article 4(1) it may be vital to know the detailed

17 — See for instance the judgment in Case 116/86 *Commission v Italy* [1988] ECR 1323, in particular paragraph 17 et seq

18 — Defence p. 20, paragraph 30.

provisions regarding the kind of investigation which must be undertaken and the considerations which will be taken into account. The Court has held in relation to a provision of the directive which is not here at issue that if the directive makes the grant of an authorization subject to a *condition*, that condition must be expressly incorporated in a provision of national law; it is not sufficient to rely on an established administrative practice.[19] That applies here *mutatis mutandis*.

24. It should also be noted that the absence of clear and precise provisions regarding the prior investigation has direct repercussions on authorizations which may be granted on the basis of the second indent of Article 4(1): the directive makes it quite clear that such authorizations may only be granted on the basis of the results of such an investigation. In other words, the conditions under which an authorization may be granted must flow directly from the results of the investigation. The failure to incorporate the relevant provisions thus also has practical consequences for groundwater management.

The Federal German Government also considers it unnecessary to incorporate the provisions of Articles 10 and 11 of the directive: the conditions and restrictions that they contain flow already from the duty imposed on the competent authorities to refuse an authorization if there is a risk of pollution. That argument must also be rejected, for similar reasons.

Prevention of other indirect discharges of list I substances

25. The *third* indent of Article 4(1) requires the Member States to

'. . . take all appropriate measures they deem necessary to prevent any indirect discharge of substances in list I due to activities on or in the ground other than those mentioned in the second indent . . . '.

26. With regard to the implementation of that provision the Federal German Government refers to the same provisions as those which in its opinion suffice to implement the second indent of Article 4(1), that is to say Paragraphs 19a et seq., 19g et seq., 3(2) and 34 of the WHG.

As I have said, Article 4 of the directive is intended to give effect to the duty imposed on Member States by Article 3(a) to prevent the introduction into the groundwater of list I substances. The third indent of Article 4(1) is a residual provision: any activities other than those referred to in the second indent on or in the ground must be subject by the Member States to all appropriate measures to prevent any indirect discharge

19 — See the judgment in Case 291/84, referred to in footnote 15, paragraphs 16 to 18 (re. Article 6 of the directive).

of list I substances. The Federal German Government maintains that that provision, too, is to be read in conjunction with Article 2(b) of the directive, so that the obligation imposed on the Member States is merely a conditional one. For the reasons given above (paragraphs 15 to 16) that interpretation is incorrect.

27. Again, I need only repeat my earlier conclusion, that a provision such as that contained in the WHG, which seeks to prevent not all direct or indirect discharges of list I substances but merely the pollution of the water (and to that end allows the competent authorities to grant authorizations to discharge), does not suffice to implement the directive.

Moreover, my remarks regarding the other shortcomings of the WHG as regards the implementation of the second indent of Article 4(1) apply *mutatis mutandis* here, too. The main difficulty is that list I has not been properly incorporated in a rule of German law; the definitions given in the WHG of 'substances harmful to water' are not sufficiently clear and precise. It is also far from clear whether the provisions referred to by the Federal German Government in fact ensure the application of the rule in Article 4 as regards all activities on or in the ground not referred to in the second indent of the first paragraph. I have already discussed the limited scope of Paragraphs 19a and 19g of the WHG; Paragraph 34(2) of the WHG is also inadequate since it refers merely to tipping or disposal of substances or their transportation by means of pipelines. Admittedly, Paragraph 2 of the WHG makes any use of water subject to authorization, but nowhere in that legislation is the grant of an authorization made dependent on the condition that any indirect discharge must be prevented.

28. Lastly, the Commission has argued convincingly, and without having been contradicted by the Federal German Government on this point, that the implementing provisions of the *Länder* are not sufficient to fill the gaps left by the Federal legislation. Some of the provisions adopted by the *Länder*[20] refer only to activities covered by Paragraph 19g of the WHG and not to all activities other than those referred to in the second indent of Article 4(1), as required by the directive. List I has also not been incorporated into the laws of all the *Länder*,[21] nor have they converted the provisions of the WHG on the prevention of pollution into rules on the prevention of indirect discharges.[22]

Restriction of discharges of list II substances

29. The second main obligation which the directive imposes on the Member States is to

'limit the introduction into groundwater of substances in list II so as to avoid pollution

20 — The Commission referred to the legislation in force in Schleswig-Holstein.

21 — The Commission referred *inter alia* to the Free and Hanseatic City of Hamburg, Hessen, Baden-Württemberg, Bavaria, Rheinland-Pfalz and Bremen

22 — Schleswig-Holstein is an example.

of this water by these substances' (Article 3(b)).

What that obligation entails is set out in Article 5 of the directive, which reads as follows:

'1. To comply with the obligation referred to in Article 3(b), Member States shall make subject to prior investigation:

— all direct discharge of substances in list II, so as to limit such discharges,

— the disposal or tipping for the purpose of disposal of these substances which might lead to indirect discharge.

In the light of that investigation, Member States may grant an authorization, provided that all the technical precautions for preventing groundwater pollution by these substances are observed.

2. Furthermore, Member States shall take the appropriate measures they deem necessary to limit all indirect discharge of substances in list II, due to activities on or in the ground other than those mentioned in the first paragraph.'

As regards the transposition of those provisions into national law the Federal German Government refers to the paragraphs of the WHG which in its view already ensure the correct implementation of the second and third indents of Article 4(1). It points out that Federal German law, which makes no distinction between discharges of list I substances and discharges of list II substances, is even stricter than the directive, at least if Article 5 of the directive is read in conjunction with Article 2(b). As regards that last point, I refer once again to my earlier discussion regarding the precise scope of Article 2 of the directive. As I said, Article 2 provides for a number of cases in which the directive does not apply, whereas Article 5 defines the scope of the obligation in Article 3(b). Article 2 does not reduce the obligations in Article 5, any more than it does those in Article 4.

30. The first obligation in Article 5 of the directive concerns direct discharges of list II substances. The obligation is twofold: in the first place, Member States must make all such discharges (or activities which may lead to discharges) subject to prior investigation with a view to limiting them; in the second place, an authorization based on the results of that investigation may be granted only if all the technical precautions for preventing groundwater pollution by such substances are observed. The question is whether Paragraph 34(1) of the WHG imposes requirements at least as strict.

As regards the prior investigation, which must also satisfy Article 7 of the directive, it has already become apparent that the Federal German law is not sufficiently clear and precise. Just as in the case of the second indent of Article 4(1), that fact has practical

consequences, since authorizations to discharge may be granted only on the basis of the results of that prior investigation.

31. Although those considerations suffice already to establish the failure to implement the directive, in order to eliminate all doubt it is necessary to consider the Federal German Government's contention that compliance with the obligations to which Article 5 makes the grant of an authorization subject has already been ensured by the application of Paragraph 34 of the WHG. The Commission doubts that: it points out that the 'Besorgnisgrundsatz' (principle of risk) laid down in Paragraph 34 of the WHG has always been interpreted by the courts as meaning that there must be no likelihood of pollution in the light of human experience, but that pure chance cannot be fully ruled out.[23] Article 5 of the directive is strict: it requires that *all* the requisite technical precautions for *preventing* groundwater pollution be observed.

There does in fact appear to be a (slight) difference in the degree of emphasis expressed by those provisions, and one writer has remarked that it has not yet been expressly confirmed by the courts that Paragraph 34(2) of the WHG imposes an absolute prohibition on the discharge of pollutants.[24] It would therefore be preferable to incorporate into national law a provision which is as clear and precise as Article 5(1) of the directive.

23 — The reference is to the judgment of the Bundesverwaltungsgericht of 16 July 1965, ZfW 1965, pp. 113 and 116.

24 — See P. Kromarek, 'Federal Republic of Germany Water and Waste', in European Community Environmental Policy in Practice, Vol 4, 1986 at p 82

32. The rest of Article 5(1) concerns the rules governing indirect discharges of list II substances. In this case, too, prior investigation is necessary and an authorization may only be granted subject to the same conditions as those relating to direct discharges. I may therefore refer the Court to my earlier observations.

33. Finally, Article 5(2) requires the Member States to take the appropriate measures to limit indirect discharges of list II substances due to activities on or in the ground other than those mentioned in Article 5(1).

At the hearing the Commission gave a number of examples of activities which may require such measures: it referred to indirect discharges of list II substances connected with the activities of agricultural concerns, petrol stations and garages; it also referred to storage of list II substances prior to recycling. In view of the fact that the Federal German Government has taken the view that specific measures are not necessary in order to transpose that provision and has therefore not mentioned the existence of any such measures, I must regard the failure to implement the directive as established in this respect.

The procedural rules laid down by the directive

34. Before I discuss in relation to each article whether and how the procedural rules laid down in the directive have been transposed into Federal German law, I

would like first to consider a more general argument put forward by the Federal German Government. It has argued that it was not necessary to incorporate the procedural rules provided for in the directive into specific rules of national law; in fact, more general rules applicable at the federal and *Länder* level in administrative procedure already suffice to ensure achievement of the aims of the directive in practice.

That argument fails for a reason already given more than once in this Opinion: the need for precise and clear implementation requires that the detailed provisions of the directive be expressly incorporated into national law. I would like to point out that that is not a purely formal requirement: inadequate implementation of the directive has practical consequences, too, as I emphasized in connection with the requirement that the grant of an authorization be preceded by an investigation. That applies generally: if, as the Federal German Government maintains, most of those procedural rules fall to be applied by the *Länder*, then it is necessary for the competent authorities there to be thoroughly acquainted with the provisions governing those procedures. Article 8 of the directive, for instance, provides that the authorizations referred to in Articles 4 and 5 of the directive may not be issued by the competent authorities of the Member States unless it has been ascertained that the groundwater, and in particular its quality, will undergo the requisite surveillance. The same applies in relation to individuals whose legal position is affected by the provisions of the directive. For instance, it may be very important for those wishing to make (or prevent) discharges to know exactly what the prior investigation will entail and what conditions and restrictions may be attached to an authorization. It was with that consideration in mind that the Court held in a recent judgment concerning a procedural provision in the directive that the condition laid down in Article 6 of the directive regarding authorizations must be expressly incorporated into national law. [25]

Likewise, the argument that various aspects of the procedural provisions lie within the competence not of the federal authorities but of the authorities of the *Länder* cannot alter the conclusion that Community law has been infringed. The Member States are always free to distribute the powers conferred on them among the internal authorities as they choose and to implement Community law by means of measures adopted by the regional or local authorities. That does not release them, however, from the duty to ensure that the provisions of Community law are faithfully transposed into national law. [26]

35. I now come to consider the way in which individual procedural provisions of the directive have been transposed into national law. As regards *Article 7*, which contains detailed rules regarding the subject-matter and purpose of the prior investigation required by Articles 4 and 5 of the directive, I may be brief. I have already said (paragraph 23) that the criteria laid down in Paragraphs 24 and 26 of the

25 — See the judgment in Case 291/84, referred to in footnote 15, paragraphs 16 to 18.

26 — See the judgment in Joined Cases 227/85 to 230/85 *Commission* v *Belgium* [1988] ECR 1, paragraphs 9 and 10.

Verwaltungsverfahrensgesetz are not sufficiently clear and precise to constitute adequate implementation of that article. A specific provision, which may be relied on by individuals and which is published, is required, either at the federal or at the *Länder* level. The Commission has argued cogently in this connection that the existing provisions in the *Länder* are not sufficient to fill the gaps left by the federal legislation. [27]

36. The same considerations apply with regard to *Article 8*, which provides that the authorizations to discharge granted pursuant to the directive may not be issued by the competent authorities until they have ascertained that the quality of the groundwater will be under the requisite surveillance. Clear and detailed implementation of that provision in national law is important for two reasons. In the first place, since the purpose of the directive is to create equal conditions of competition as regards discharges of certain dangerous substances, the competent authorities in the various Member States must abide by identical criteria when granting authorizations. In the second place, third parties must be able to rely on those criteria when they seek to challenge the lawfulness of an authorization. This is again borne out by the judgment in which it was held that the conditions laid down by the directive governing the grant of authorizations to discharge must be expressly incorporated into national law. [28]

37. *Articles 9 and 10* of the directive, which lay down a number of provisions which must be incorporated into authorizations to discharge which may be granted pursuant to the directive, have also not been transposed into Federal German law by a specific provision of law. Once again, the Federal German Government relies on the existing, more general provisions of federal and *Länder* law. It also considers that the provisions listed in Articles 9 and 10 are purely provisions which the competent authorities *may* attach to authorizations, and that the satisfactory application of the directive is in practice ensured by an interpretation of the existing general provisions which is in conformity with the directive.

In answer to those arguments, it is only necessary, in view of my earlier observations (paragraph 34), to state that it is possible to ensure the harmonization of conditions governing discharges and the protection of the rights of individuals only if the incorporation into national law of the provisions contained in Articles 9 and 10 of the directive is not optional but *obligatory*. I have already discussed (paragraph 8) the inadequacy of interpreting or applying national law in a manner in conformity with the directive.

38. As regards the implementation of *Article 11* I refer the Court to my observations concerning Article 8 of the directive. In this case, too, since there are no precise implementing provisions, failure to implement the directive is established.

27 — The Commission stated for instance, without being contradicted by the Federal German Government on this point, that the legislation in Lower Saxony, Hessen and Bavaria contained no provision whatsoever relating to the investigations referred to in Article 7. The Federal German Government did not make it clear at the hearing whether one or more of those *Länder* had adopted the *Musterverwaltungsvorschrift* referred to above.

28 — See the judgment in Case 291/84, referred to in footnote 15, paragraphs 16 to 18.

39. In its reasoned opinion the Commission also alleged that the Federal Republic had failed to implement properly *Articles 12 and 13* of the directive. The Commission's application refers solely to Article 13. At the hearing the Commission's representative stated that there had been an error. It appears that the Commission does not rely on Article 12; therefore I need not discuss it.

Article 13 requires the competent authorities of the Member States to monitor compliance with the conditions laid down in the authorizations and the effects of discharges on groundwater. The Commission has alleged that that provision has not been transposed into national law by means of a specific, binding and adequately publicized provision. Since monitoring of compliance with the authorizations in the Federal Republic is a matter for the *Länder*, the Commission has rightly pointed out that responsibility for actually complying with those provisions must be conferred on them. In order to transpose that provision correctly, therefore, it is necessary to adopt an express legislative provision; internal instructions which may be amended from day to day are not sufficient. It is true that Member States enjoy a certain amount of discretion since unlike Articles 7, 8, 9, 10 and 11 of the directive Article 13 is not capable of creating rights for individuals; accordingly, it is only necessary for it to be apparent from the general legislative context at federal level and at the level of the *Länder* that the authorities responsible for monitoring have a duty to monitor.[29]

Conclusion

40. My consideration of the case leads me to the conclusion that the Commission's application must be upheld in its entirety. I would therefore suggest that the Court declare that the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty by failing to transpose adequately into national law Directive No 80/68/EEC, and order the Federal Republic of Germany to pay the costs.

29 — In this respect Article 13 may be compared with Article 18 of the directive, according to which the application of the measures taken pursuant to the directive may on no account lead, either directly or indirectly, to pollution of the groundwater. In relation to that provision the Court held in its judgment in Case 291/84 (cited in footnote 15) that it was not necessary to implement it in the form of a separate and specific provision of national law (see paragraphs 19 to 21).