

OPINION OF MR ADVOCATE GENERAL
VAN GERVEN

delivered on 25 September 1990 *

*Mr President,
Members of the Court,*

relevant to the assessment of the more concrete dispute as to whether any given provision of the Directive is transposed into Italian law in a technically correct manner. First of all, however, I must review the provisions of the Directive which are relevant to this case.

1. In this case the Commission seeks a declaration that by failing to take the necessary measures to implement Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances¹ (hereinafter referred to as 'the Directive') in national law within the prescribed period, the Italian Republic has failed to fulfil its obligations under the EEC Treaty. The period for implementation of the Directive expired on 19 December 1981.

2. The purpose of the Directive is to prevent the pollution of groundwater by preventing or restricting the discharge of certain substances. The rules in the Directive concern two kinds of substances, each of which is set out in a list in the Annex to the Directive. With regard to substances in list I the Member States must take the necessary measures to *prevent* their introduction into groundwater; with regard to substances in list II the Member States must take the necessary measures to *restrict* their introduction into groundwater, in order to prevent pollution of groundwater by those substances (see Article 3 of the Directive). For that purpose the Directive contains a number of detailed provisions for the implementation of the basic principles set out in Article 3.

In another case now pending before the Court, Case C-131/88, the Commission has brought identical proceedings against the Federal Republic of Germany. In my Opinion in that case I discussed the parties' arguments concerning the *scope* of the Member State's duty to implement the Directive. In this case the parties have not raised that issue as such. I think it may be helpful, however, to give a brief summary of my conclusions in that regard in this Opinion (see below, point 3). They are

Article 4 defines more specifically the obligation of the Member States to prevent the introduction into groundwater of substances in list I; Article 5 concerns the restriction on the introduction of substances in list II. Articles 7 to 16 of the Directive contain a

* Original language: Dutch.

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

number of detailed procedural rules. Articles 7 and 8 concern the prior investigation which must be carried out in a number of cases by the competent authorities in the Member States before an authorization can be issued. Articles 9 and 10 concern the provisions that must be included in authorizations which may in certain cases be issued by the Member States. Articles 11 to 13 deal with the grant, refusal and withdrawal of authorizations and monitoring of the conditions laid down in authorizations. Article 14 allows the Member States to stipulate a transitional period for discharges of substances which were already taking place at the time of publication of the Directive. Article 15 requires the Member States to keep an inventory of authorizations granted in accordance with the Directive. Finally, Article 16 concerns the obligation of the Member States to provide information to the Commission on the results of the prior investigations carried out pursuant to the Directive, the authorizations granted, the results of monitoring and inspection and details of the inventory referred to above.

3. In my investigation in Case C-131/88 of the scope of the duty to transpose this Directive, I mentioned four points from which it appeared that the Member States retained only a restricted discretion in the transposition of the rules in the Directive:

The Directive requires the Member States to establish a set of rights and duties on the part of the national authorities and persons who deal with the substances referred to by the Directive. In other words, it is intended to create rights and duties for individuals;

for that reason the full implementation of the Directive must be ensured by sufficiently clear and precise provisions transposing it, so that those persons are made aware of their rights and duties under Community law and the extent to which they may rely on Community law before the national courts.²

Secondly, the very precise and detailed provisions of the Directive cannot be transposed by the combined application of already existing imprecise provisions and administrative practice (which, moreover, is usually reversible). That is particularly true when a directive contains a prohibition. The effective and full implementation of a prohibition can only be ensured when the authorities which are responsible for implementing the Directive and deciding on applications for discharge authorizations can rely on an express prohibition laid down in national law.³

Thirdly, in examining national implementation measures it is necessary to take into account the absence of economic stimuli for enforcing the rules in the Directive and the difficulty of taking conclusive monitoring and inspection measures with regard to activities which might lead to the pollution of groundwater. The need for accurate

2 — See point 7 of my Opinion in Case C-131/88.

3 — See point 8 of the abovementioned Opinion.

transposition of the Directive into national law is thus all the more compelling.⁴

Finally, it must also be borne in mind that the Directive is intended to create equal conditions of competition in the Community for undertakings which discharge substances, by eliminating disparities between national provisions on discharges of certain dangerous substances. For that purpose the Directive contains very precise and detailed rules.⁵

The relevance of the above conclusions for this case is reinforced by the fact that both the German Government in Case C-131/88 and the Italian Government in this case deny the need for precise and specific rules drawn from the Directive, and take the view that the Directive (which was adopted in December 1979) may be considered to have been transposed by a number of fairly general provisions (that is to say, provisions which do not relate specifically to the protection of groundwater) which date from before the Directive. In my view both Case C-131/88 and this case illustrate quite clearly to what difficulties such a manner of implementation can give rise.

More specifically, the Italian Government has referred for the transposition of the Directive almost exclusively to provisions of national law which were adopted during the period 1976 to 1977. Having regard to the

precise and detailed rules of the Directive it seems obvious that such provisions which are not derived from the Directive will leave gaps and give rise to problems of interpretation and legal uncertainty.

4. Let me now turn to the complaints put forward by the Commission. First of all we must examine how Article 4 of the Directive has been transposed into Italian law. As I have already said, that Article gives substance to the basic rule laid down in Article 3(a), that is to say the obligation to prevent the introduction into groundwater of substances in list I. For that purpose the Member States must take two kinds of measures: the *direct* discharge of substances in list I must be prohibited; authorization may be granted for activities which may result in *indirect* discharge, but only on condition that all precautions are taken in order to prevent such indirect discharge.

5. In its reply to the Commission's reasoned opinion the Italian Government took the position that the Italian legislation contains rules which are even stricter than those of the Directive: it argues that all direct discharges into groundwater are prohibited.

It must be observed right away that Article 4 of the Directive contains not only provisions with regard to direct discharges of substances in list I but also a number of requirements concerning activities that might lead to indirect discharge of those substances. Furthermore, the provisions of Italian law referred to in the abovementioned letter do not appear to contain any

4 — See point 9 of the abovementioned Opinion

5 — See point 10 of the abovementioned Opinion

absolute prohibition on direct discharges, as is required by Article 4 of the Directive. The letter speaks of three rules the combined effect of which is said to be an absolute prohibition on direct discharges. Reference is made in the first place to the last but one paragraph of Article 4 of Law No 319 of 1976,⁶ under which all discharges into the subsoil which are likely to cause harm to groundwater are prohibited. That is merely a conditional prohibition which depends on the assessment of the harmful nature of a discharge.

Secondly, reference is made to the Decision of the Interministerial Committee of 4 February 1977 adopted in implementation of Articles 2 and 3 of Law No 319 of 1976 which provides that where sewage is not discharged into surface water its discharge is only permitted on the ground or in the upper layers of the soil, or in the subsoil, but only if the effluent is discharged into deep geological strata (that expression is defined as porous structures of sufficient capacity which are isolated from groundwater by impermeable geological barriers).⁷ This provision, too, is far from being a prohibition of direct discharges; it concerns activities which may lead to an *indirect* discharge into groundwater, and fails to make such activities subject to authorization. Furthermore, it is not made clear that such authorization can only be granted when all precautions are taken to prevent any indirect discharge into groundwater.

6 — Official Gazette of the Italian Republic No 141 of 29 May 1976, p. 4125.

7 — See the first paragraph of part I of Annex 5 to the decision, published in the Official Gazette of the Italian Republic, Ordinary Supplement No 48, 28 February 1977, p. 1. The Commission has not questioned the normative character of that decision, and I do not think it necessary to consider that issue.

Thirdly, the Italian Government refers to another provision of the abovementioned Decision of 4 February 1977, which provides that discharge into the subsoil may be used as a means of disposing of industrial effluent *only* when it is established that there is no technically or economically feasible alternative and where all the required geological conditions are met.⁸ This provision too appears to contain only a conditional prohibition, and one which in comparison with Article 4 of the Directive is subject to very unclear conditions.

6. I am therefore surprised that in its application the Commission states that it takes note of the Italian Government's statement that any direct discharge of waste water into groundwater is forbidden, and asks the Italian Government to confirm that interpretation before the Court of Justice. In my view it can in no way be said that there is a prohibition such as is required by the Directive.⁹ Since the Commission's representative confirmed at the hearing that it did not wish to maintain its complaint with regard to this point, I have no alternative but to take note of that statement in my turn.

7. Secondly, the Commission maintains that the Italian legislation makes no distinction between discharges of substances in list I and of those in list II. That distinction is important, since the Directive requires the Member States to *prevent* the introduction

8 — Paragraph 3.1 of part I of Annex 5 to the decision.

9 — The Commission's attitude on this point is all the more surprising inasmuch as in support of another complaint it correctly pointed out that the Italian Law No 319 (cited above, note 6) permits *all* discharges under certain conditions (see section 7, below).

into groundwater of substances in list I, while the introduction into groundwater of substances in list II must only be *restricted* in order to prevent its pollution by those substances (Article 5). Referring to Article 9 of Law No 319 of 1976,¹⁰ the Commission argues that as a rule *all* discharges are permitted in Italy when they do not exceed certain 'limits of acceptability'. In its defence and its rejoinder the Italian Government took no position on this point and for that reason the Court asked the Italian Government to reply to a written question.

The Italian Government's answer relates only to discharges of sewage (a substance which does not as such appear on list I or list II), and such discharges are authorized under certain conditions. In respect of substances in list I there thus does not appear to be any prohibition of direct discharges or any system of authorizations to ensure that indirect discharges are prevented. On this point the Commission's application is therefore well founded.

8. Thirdly, the Commission submits that the Italian legislation contains no provisions concerning a number of substances in list I and list II. In its defence and its rejoinder the Italian Government did not deny this deficiency. It simply pointed out that with regard to point 4 in list I ('substances which possess carcinogenic, mutagenic or teratogenic properties in or via the aquatic environment') the Commission has failed to state which specific substances are meant.

The failure of the Italian Government to fulfil its obligations is therefore established. As regards the desired clarification, I see no reason why its absence should present an obstacle to the adoption of a provision of national law concerning those substances. There is nothing to prevent the Italian Government from drawing up a list designating such substances, for example by way of an implementing regulation, after consultation with the Commission if it so wishes. Having regard to the continuing development of scientific knowledge, moreover, it does not seem appropriate to draw up an exhaustive list at Community level of substances with a carcinogenic, mutagenic or teratogenic effect.

Finally, I find it striking that in connection with some provisions of the Directive the Italian Government submits to the Court that the Directive is not intended to achieve complete harmonization and thus leaves the Member States a certain degree of discretion,¹¹ while in connection with other provisions it wishes to be provided with a detailed and comprehensive set of Community rules.

9. The Commission further complains that in the Italian legislation there are no provisions on the issue of discharge authorizations which correspond to the rules contained in the Directive. We are concerned here with Article 7 to 13 of the Directive, and I shall deal with the Commission's complaints article by article.

10 — Cited above, note 6

11 — See, for example, paragraphs 28 and 33 of the Report for the Hearing and section 13 of this Opinion

10. Let us first (this is the fourth complaint of the Commission) examine the transposition of Articles 7 and 8 of the Directive. Under Articles 4 and 5 of the Directive, in a number of cases authorization can be granted only after a prior investigation. Article 7 lays down a number of detailed rules with regard to that investigation; it must include

‘examination of the hydrogeological conditions of the area concerned, the possible purifying powers of the soil and subsoil and the risk of pollution and alteration of the quality of the groundwater from the discharge and shall establish whether the discharge of substances into groundwater is a satisfactory solution from the point of view of the environment’.

Article 8 of the Directive goes on to provide that authorizations may be issued only if the competent authorities of the Member States have

‘checked that the groundwater, and in particular its quality, will undergo the requisite surveillance’.

11. Under Law No 319 of 10 May 1976¹² an authorization must be obtained for all discharges (see Article 9). That authorization is granted when the intended discharges remain below the ‘limits of acceptability’ established by the law (see Article 15 in conjunction with Article 9). In certain cases provisional authorization can be issued beforehand, even where the intended discharge exceeds the limits of acceptability (Article 15). The Commission

points out in that regard that Article 15 of Law No 319 makes it possible to grant authorization on simple demand. Furthermore, under the same article provisional authorization is *deemed* to be granted where the application for the grant of authorization has not been refused within six months from its submission.

12. Those provisions manifestly make no mention of the prior investigations required by Article 7 of the Directive. In answer to a written question from the Court the Italian Government did refer to ‘very detailed rules’ which it said were contained in Annex 5 to the abovementioned Decision of 4 February 1977.¹³ That Decision, which is based on Articles 2 and 3 of Law No 319 of 1976,¹⁴ mainly contains a number of general criteria and technical standards which must be taken into account in the use of water for industrial purposes. Both the law and the decision were adopted well before the Directive, and it is therefore hardly surprising that the Italian Government was not able to point to any specific provision of that Annex which implemented the clear and precise requirements in Article 7 of the Directive concerning the subject-matter and purpose of the prior investigation.

For the implementation of Article 8 of the Directive the Italian Government refers to paragraph 2.8 of part I of Annex 5 to the Decision of 4 February 1977. It provides that a number of checks must be carried out concerning the impact of discharges on the environment. However, the Italian Government was not able to show that the

12 — Cited above, note 6.

13 — Cited above, note 7.

14 — Cited above, note 6.

results of those checks were decisive for the issue of a discharge authorization or an authorization for activities which might lead to indirect discharge. Indeed, on the basis of the material before the Court that is improbable. Article 9 of Law No 319 of 1976 appears to make the permissibility of discharges subject only to compliance with limits of acceptability (see above, section 7). Consequently, neither Article 7 nor Article 8 of the Directive are correctly transposed in Italian law.

regard to Law No 62 of 5 March 1982.¹⁵ The Italian Government states that Article 2 of that law provides that regional authorities must designate appropriate zones for discharges of waste water, and in so doing must apply the criteria laid down in the Decision of the Interministerial Committee of 4 February 1977. The Italian Government has not, however, shown that the very precise and detailed provisions and conditions contained in Articles 9 and 10 must be included in an authorization. I think this failure to fulfil obligations is therefore established.

13. Finally, I must also deal with the argument of the Italian Government that the system of 'tacit provisional authorizations' is in conformity with the Directive. The Italian Government takes the view that such a rule is not expressly prohibited by the Directive and is therefore permitted. It is sufficient once again to refer to Articles 4, 5 and 7 of the Directive (which require a detailed prior investigation for certain authorizations) and to Article 8 of the Directive (which provides that authorization may be granted only where the competent authorities have checked that the quality of the groundwater will undergo surveillance). A rule that provides that where the administration takes no action provisional authorization is deemed automatically to be granted is clearly incompatible with those provisions.

15. The Commission's sixth complaint is that Italy has not transposed Article 11 of the Directive into national law. That article provides that authorizations may be granted only for a limited period and must be reviewed at least every four years. It must in addition be possible for them to be renewed, amended or withdrawn.

The Italian Government did not take a position on this point in its defence or in its rejoinder. In answer to a question from the Court it did not deny that there are no provisions regarding the duration of the authorization (there is nothing in the Italian Government's reply concerning the other rules contained in Article 11). The Italian Government considers, however, that the transposition of this article is not at issue because it is not mentioned in the Commission's application. It is mistaken; on 9 December 1987 the Commission

14. Fifthly, the Commission argues that Articles 9 and 10 of the Directive, which contain a number of specific matters and conditions which must be included in an authorization, have not been properly transposed into Italian law. In its defence the Italian Government referred in this

¹⁵ — That law is entitled 'Conversione in legge, con modificazioni, del decreto legge 30 dicembre 1981, No 801, concernente provvedimenti urgenti in materia di tutela delle acque dall'inquinamento' (Official Gazette of the Italian Republic No 63 of 5 March 1982, p. 1713).

submitted an addendum to its application in which it raises this issue.

national law. That article provides as follows:

Accordingly, it can only be concluded that Article 11 of the Directive has not been transposed properly into Italian law.

‘The competent authorities of the Member States shall monitor compliance with the conditions laid down in the authorizations and the effects of discharges on groundwater.’

16. The Commission’s seventh complaint is that Italy has not transposed Article 12 of the Directive into national law. That article provides that if it appears that the applicant for authorization will be unable to comply with the conditions to be laid down, the authorization must be refused. If the conditions contained in an authorization are not complied with, the competent authority in the Member State concerned must take all appropriate steps to ensure that those conditions are fulfilled, and if necessary withdraw the authorization.

There are two provisions of Italian law which might be considered to transpose that article. First of all, Article 15 of Law No 319 of 10 May 1976¹⁷ provides that the technical functions of surveillance and control of all discharges are to be carried out by provincial laboratories. Secondly, Article 9 of that law defines how that supervision is to be carried out. In answer to a written question from the Court the Italian Government also referred to a number of provisions which require local and regional authorities to monitor discharges, to the establishment of a special force of environmental police, and to the fact that failure to comply with a discharge authorization gives rise to criminal penalties.

Article 15 of Law No 319 of 1976¹⁶ does require the competent authorities to withdraw an authorization where the ‘limits of acceptability’ are not complied with. However, that provision bears no relation to the conditions and requirements referred to in Articles 4 to 10 of the Directive, and is therefore not sufficient. Neither in its defence nor in its rejoinder did the Italian Government refer to any other provision which might be regarded as implementing Article 12. On this point too, therefore, the Commission’s application is well founded.

The Commission is correct to argue that those provisions do not transpose Article 13 of the Directive in a sufficiently precise and detailed manner. The abovementioned Italian law requires only spot checks of discharged substances and does not provide that compliance with the *conditions* which are included in authorizations in accordance with the Directive must be monitored; nor does it make clear that the monitoring must

17. The Commission’s eighth complaint is that Italy has not transposed Article 13 into

16 — Cited above, note 6.

17 — Cited above, note 6.

also relate to the *impact* of the discharge on the groundwater. Here too, therefore, the failure to fulfil obligations is established.

18. The Commission's ninth complaint is that Italy has failed to comply properly with Article 15 of the Directive. That article requires an inventory to be kept of the discharge authorizations issued under Articles 4, 5 and 6 of the Directive.

permitted, indicating the place and the type of discharge. The Commission makes no submission as to the formal compatibility of such a provision with Article 15 of the Directive. It simply points out that, having regard to the fact that the abovementioned procedural rules of the Directive with regard to the issue, monitoring and withdrawal of discharge authorizations have not properly been transposed in Italy, the keeping of an inventory of the authorizations referred to in Articles 4, 5 and 6 of the Directive is impossible.

In the Commission's view, which has not been contradicted by Italy, the only rule of Italian law which is of such a nature as to implement that obligation is contained in the fifteenth subparagraph of paragraph 2.1 of part 1 of Annex 5 to the Decision of 4 February 1977.¹⁸ It provides that a register must be kept of all discharges which are

The Italian Government argues that the applicable provisions of Italian law ensure that the inventory required by Article 15 of the Directive is kept, but it does not dispute the Commission's argument that in practice no register of the authorizations *referred to in the Directive* is kept. On this point too the failure to fulfil obligations must be regarded as established.

Conclusion

19. My examination of the matter brings me to the conclusion that the Commission's application must be upheld in its entirety with the exception of its complaint concerning Article 4 of the Directive. I therefore propose that the Court hold that by failing to implement Directive 80/68/EEC properly in national law the Italian Republic has failed to fulfil its obligations under the EEC Treaty, and order the Italian Republic to pay the costs.

¹⁸ — Cited above, note 7.