



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

18 October 2012\*

(Failure of a Member State to fulfil obligations — Pollution and nuisance — Urban waste water treatment — Directive 91/271/EEC — Articles 3, 4 and 10 — Annex I(A) and (B))

In Case C-301/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 16 June 2010,

**European Commission**, represented by S. Pardo Quintillán, A.-A. Gilly and A. Demeneix, acting as Agents,

applicant,

v

**United Kingdom of Great Britain and Northern Ireland**, represented by L. Seeboruth, acting as Agent, D. Anderson QC, and S. Ford and B. McGurk, Barristers,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, acting as President of the First Chamber, A. Borg Barthet (Rapporteur), M. Ilešič, J.-J. Kasel and M. Berger, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2011,

after hearing the Opinion of the Advocate General at the sitting on 26 January 2012,

gives the following

### Judgment

- 1 By its application, the European Commission requests the Court to declare that, by failing to ensure that appropriate collecting systems pursuant to Article 3(1) and (2) of, and Annex I(A) to, Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ 1991 L 135, p. 40) are in place in Whitburn and at Beckton and Crossness in London and that appropriate treatment is

\* Language of the case: English.

provided with regard to waste waters from the Beckton, Crossness and Mogden treatment plants in London pursuant to Article 4(1) and (3) and Article 10 of, and Annex I(B) to, Directive 91/271, the United Kingdom of Great Britain and Northern Ireland has failed to comply with its obligations under those provisions.

### Legal context

2 According to Article 1 thereof, Directive 91/271 concerns the collection, treatment and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors. Its objective is to protect the environment from the adverse effects of waste water discharges.

3 Article 2 of Directive 91/271 states:

‘For the purpose of this Directive:

1. “urban waste water” means domestic waste water or the mixture of domestic waste water with industrial waste water and/or run-off rain water;

...

5. “collecting system” means a system of conduits which collects and conducts urban waste water;

6. “1 p.e. (population equivalent)” means the organic biodegradable load having a five-day biochemical oxygen demand (BOD<sub>5</sub>) of 60 g of oxygen per day;

...’

4 Article 3 of Directive 91/271 provides:

‘1. Member States shall ensure that all agglomerations are provided with collecting systems for urban waste water,

— at the latest by 31 December 2000 for those with a population equivalent (p.e.) of more than 15 000  
...

2. Collecting systems described in paragraph 1 shall satisfy the requirements of Annex I(A). ...’

5 As set out in Article 4 of Directive 91/271:

‘1. Member States shall ensure that urban waste water entering collecting systems shall before discharge be subject to secondary treatment or an equivalent treatment as follows:

— at the latest by 31 December 2000 for all discharges from agglomerations of more than 15 000 p.e.,

...

3. Discharges from urban waste water treatment plants described in paragraphs 1 and 2 shall satisfy the relevant requirements of Annex I(B). ...

4. The load expressed in p.e. shall be calculated on the basis of the maximum average weekly load entering the treatment plant during the year, excluding unusual situations such as those due to heavy rain.’

6 Article 10 of Directive 91/271 provides:

‘Member States shall ensure that the urban waste water treatment plants built to comply with the requirements of Articles 4, 5, 6 and 7 are designed, constructed, operated and maintained to ensure sufficient performance under all normal local climatic conditions. When designing the plants, seasonal variations of the load shall be taken into account.’

7 Annex I to Directive 91/271, entitled ‘Requirements for urban waste water’, provides in Section A, headed ‘Collecting systems’:

‘Collecting systems shall take into account waste water treatment requirements.

The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding:

- volume and characteristics of urban waste water,
- prevention of leaks,
- limitation of pollution of receiving waters due to storm water overflows.’

8 Footnote 1 to Annex I(A) to Directive 91/271, placed at the heading ‘Collecting systems’, is worded as follows:

‘Given that it is not possible in practice to construct collecting systems and treatment plants in a way such that all waste water can be treated during situations such as unusually heavy rainfall, Member States shall decide on measures to limit pollution from storm water overflows. Such measures could be based on dilution rates or capacity in relation to dry weather flow, or could specify a certain acceptable number of overflows per year.’

9 Annex I(B) to Directive 91/271, headed ‘Discharge from urban waste water treatment plants to receiving waters’, sets the requirements that must be satisfied by discharges from urban waste water treatment plants into receiving waters. The footnote to Annex I(A) to the directive, cited in the preceding paragraph, is reproduced in Annex I(B).

### **Pre-litigation procedure**

10 The Commission received a complaint concerning the Whitburn Steel pumping station and other complaints regarding excessive storm water overflows in other parts of the United Kingdom.

11 On 3 April 2003 the Commission sent a letter of formal notice to the United Kingdom in which it stated that the Whitburn Steel pumping station failed to comply with the urban waste water collecting obligations imposed by Article 3(1) and (2) of, and Annex I(A) to, Directive 91/271.

12 In its reply of 3 June 2003, the United Kingdom stated that the agglomeration in question met the collecting obligations set out in Article 3 of Directive 91/271. However, it accepted that, following further investigations of the collecting system in the area, it was necessary to improve the pass forward flow in that system. Moreover, the United Kingdom explained that the discharge consent conditions under which the water company was operating the Whitburn Steel sewage pumping station had been changed, as a result of which fewer discharges were to be expected. Those improvements were expected to be completed by 31 March 2004 at the latest.

- 13 On 21 March 2005 the Commission sent a second letter of formal notice to the United Kingdom in which it stated that the urban waste water collecting and treatment systems in the London area failed to comply with the obligations on the collecting and treatment of urban waste water imposed by Article 3(1), Article 4(1) and (3) and Article 10 of, and Annex I(A) and (B) to, Directive 91/271. The Commission stated that untreated waste water was being discharged into the River Thames, even in moderate rainfall conditions, and that no immediate measure was foreseen to resolve that problem, which would therefore persist and even grow worse.
- 14 In its reply of 20 May 2005, the United Kingdom explained that the waste water collecting system for London was a combined system that collected and conveyed domestic and industrial waste water and run-off rainwater from a catchment of 557 km<sup>2</sup> for secondary treatment at the Beckton, Mogden, Crossness, Long Reach and Riverside treatment plants prior to discharge into the River Thames. However, it accepted that there were problems related to the volume, load and frequency of wet weather discharges resulting from overflows in announcing its decision to establish the Thames Tideway Strategic Study ('the TTSS') to assess the environmental impact of such discharges.
- 15 With regard to its obligations to provide adequate treatment of urban waste waters, the United Kingdom stated that, while improvements would be completed as soon as possible, the treatment plants serving the London agglomeration had been compliant with the requirements in Directive 91/271 since 31 December 2000. Also, the United Kingdom explained that the discharges of August 2004 occurred due to unusually heavy rainfall.
- 16 Since the Commission was not satisfied with the United Kingdom's response, by letter of 10 April 2006 it sent a reasoned opinion to the United Kingdom stating that, in its view, the United Kingdom had failed to fulfil its obligations under Article 3(1) and (2) of, and Annex I(A) to, Directive 91/271 in relation to Whitburn and its obligations under Article 3(1), Article 4(1) and (3) and Article 10 of, and Annex I(A) and (B) to, Directive 91/271 in relation to the nine treatment plants serving the Greater London area.
- 17 In reply to the reasoned opinion, the United Kingdom, by letter of 15 June 2006, stated that the whole collecting system and the treatment plants serving Whitburn and the metropolitan agglomeration of Sunderland were in compliance with Directive 91/271.
- 18 Following a meeting on 6 July 2007 between representatives of the Commission and of the United Kingdom, the latter provided clarification on that issue by letter of 23 October 2007.
- 19 In relation to the situation in London, the United Kingdom replied that, while improvements needed to be made to the treatment plants at Beckton, Crossness and Mogden, that did not mean that those treatment plants were in breach of Directive 91/271. The United Kingdom, in accepting the need for those improvements, was simply showing its desire to provide a higher level of environmental protection.
- 20 At a meeting on 26 January 2007, representatives of the Commission and the United Kingdom discussed the two possible options for London, which had been suggested by the TTTS report, and the United Kingdom decided to opt for the single 30 km tunnel along the length of the River Thames and the separate tunnel for its tributary, the River Lee. The whole project was to be completed by 2020.
- 21 Following two further letters of 29 June 2007 and 4 February 2008 sent by the United Kingdom, the Commission, which was still not satisfied with the replies provided by the United Kingdom, issued by letter of 1 December 2008 an additional reasoned opinion in which it clarified its interpretation of Directive 91/271 in relation to the obligations on Member States to control the release of urban waste

waters through storm water overflows. It also confirmed its concerns in relation to the inadequacy of the collecting system put in place around Whitburn, of the collecting systems of Beckton and Crossness, and of the treatment plants at Mogden, Beckton and Crossness.

- 22 However, the Commission decided not to pursue the case further with regard to the collecting systems and the treatment plants in Beddington, Esher, Crawley, Deephams, Hogsmill, Long Reach and Riverside. The Commission thus called upon the United Kingdom to take the necessary measures to comply with the additional reasoned opinion within two months of receipt thereof.
- 23 Exchanges of correspondence and meetings between the Commission and the United Kingdom then ensued, but did not result in a solution.
- 24 Since the Commission was still not satisfied with the response provided by the United Kingdom, it decided to bring the present action.

### **The action**

#### *Arguments of the parties*

- 25 The principal points of disagreement between the Commission and the United Kingdom concern the interpretation of Directive 91/271.
- 26 In the Commission's view, Member States are obliged to ensure that a collecting system is designed and built so as to collect all the urban waste water generated by the agglomeration it serves and that that waste water is conducted for treatment. The capacity of the collecting system must therefore be able to take into account natural climatic conditions (dry weather, wet weather, even stormy weather) as well as seasonal variations, such as non-residential populations, tourists and seasonal economic activities.
- 27 It submits that 'storm water overflows', referred to in Annex I(A) to Directive 91/271, are a part of urban waste water collecting systems and treatment facilities. The directive must be interpreted as providing for an absolute obligation to avoid spills from storm water overflows save for exceptional circumstances. That reasoning is reflected in footnote 1 to Annex I(A) to Directive 91/271 which provides that in practice it is not possible to collect and treat all waste waters 'during situations such as unusually heavy rainfall'.
- 28 The Commission puts forward factors such as the frequency and the volume of the overflows to show that there has been a failure to fulfil obligations under Directive 91/271. Contrary to what the United Kingdom fears, it does not propose a strict 20 spill rule but points out that, the more an overflow spills, particularly during periods when there is only moderate rainfall, the more likely it is that the overflow's operation is not in compliance with Directive 91/271.
- 29 The Commission and the United Kingdom also disagree in relation to the significance that must be attributed to the concept of 'best technical knowledge not entailing excessive costs' ('BTKNEEC') which is prescribed in Annex I(A) to Directive 91/271.
- 30 The Commission submits that that concept must be read in the context of Directive 91/271, of its aims and of its objectives, namely to protect the environment from the adverse effects of waste water discharges.

- 31 It submits that the concept of BTKNEEC allows Member States to choose between several solutions that promote compliance with both the provisions and the objective of Directive 91/271, such as building new or increased storage facilities or diverting rainwater before it can enter the collecting systems.
- 32 In the United Kingdom's view, Directive 91/271 must be interpreted as leaving it to Member States to determine the manner in which urban waste water should be collected and treated in order to realise the directive's objective, which is to protect the environment from the adverse effects of waste water discharges.
- 33 The United Kingdom considers that Directive 91/271 must be interpreted by reference in particular to the environmental impact of discharges on receiving waters.
- 34 So far as concerns the concept of 'unusually heavy rainfall', the United Kingdom considers that the fact that footnote 1 to Annex I(A) to Directive 91/271 expressly acknowledges that it will not be possible to avoid discharges in particular circumstances, notably when there is unusually heavy rainfall, does not impose an absolute obligation to avoid discharges in other circumstances. It considers that whether discharges are appropriate in other circumstances is to be determined by application of the concept of BTKNEEC and an assessment of the environmental impact of the discharges on receiving waters.
- 35 In the view of the United Kingdom, Directive 91/271 does not lay down requirements regarding the circumstances in which or the frequency with which discharges into receiving waters may occur. To evaluate whether collecting systems or treatment plants conform with Directive 91/271, a detailed assessment of the performance of the collecting system or the treatment plant concerned must be carried out by reference to the environmental impact of the discharges on receiving waters.
- 36 The concept of 'sufficient performance' provided for in Article 10 of Directive 91/271 must also be assessed in light of the objective of protection of the environment as set out in Article 1 of the directive and therefore by reference to the impact on receiving waters.
- 37 While the Commission does not take issue with the United Kingdom's methodology for calculating what constitutes a single spill event, that does not, in the United Kingdom's submission, resolve the problem linked to the fact that the definition of a spill event may differ from one Member State to another. There would therefore be no guarantee of consistency of approach across Member States if compliance with Directive 91/271 were to be determined by reference to the occurrence and frequency of spills.
- 38 The United Kingdom also submits that the Commission errs by basing the determination that collecting systems and treatment plants are compliant with Directive 91/271 on the volume of spills.
- 39 So far as concerns, more specifically, the agglomeration of Sunderland (Whitburn), the Commission complains that, at the date of the expiry of the deadline fixed in the additional reasoned opinion, excessive storm water overflows from the Whitburn leg of the Sunderland collecting system were still occurring and that that system was therefore not compliant with Article 3 of, and Annex I(A) to, Directive 91/271.
- 40 While the frequency of the spills has been reduced (in the years 2002 to 2004, between 56 and 91 spills per year and annual volumes of untreated urban waste water discharges of between 359 640 m<sup>3</sup> and 529 290 m<sup>3</sup>), the collecting system is still not compliant with the requirements of Directive 91/271, particularly given the close vicinity of the bathing waters in Whitburn and Seaham and the numerous complaints received by the Commission concerning debris on the beaches around Whitburn.
- 41 The United Kingdom considers that those storm water overflows are compliant with Directive 91/271.



- 42 The United Kingdom also submits that the bathing waters around Whitburn have been found compliant with Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1975 L 31, p. 1) and that they are thus compliant with Directive 91/271. Furthermore, it is unlikely that the debris comes from Whitburn, but rather from the Tyne where the overflow channels were not equipped with screens until the end of March 2010.
- 43 As regards the agglomeration of London, the Commission alleges that the frequency and quantity of discharges of untreated waste water from the Beckton and Crossness collecting systems and the Beckton, Crossness and Mogden treatment plants are of such a magnitude as to constitute a breach of Articles 3 and 4 of, and Annex I(A) to, Directive 91/271, in particular given that those spills occur even during times of moderate rainfall.
- 44 Also, it submits that Article 10 of Directive 91/271 requires urban waste water treatment plants built to comply with the requirements of Article 4 of the directive to be designed, constructed, operated and maintained to ensure sufficient performance under all normal local climatic conditions.
- 45 The United Kingdom considers that those treatment plants satisfy the provisions of Directive 91/271.
- 46 It also notes that the London sewerage network is very old and has been progressively upgraded since 1875. Improvements have been examined and carried out since the adoption of Directive 91/271. Furthermore, the scale and exceptional nature of the works that are being carried out on the River Thames, at a cost of GBP 4.4 billion, mean that they require a lot of time. It submits that it cannot be penalised for implementing, in the long term, an ambitious solution.

### *Findings of the Court*

#### Interpretation of Directive 91/271

- 47 As stated in the second paragraph of Article 1, the objective of Directive 91/271 is to protect the environment from the adverse effects of urban waste water discharges (see, inter alia, Case C-280/02 *Commission v France* [2004] ECR I-8573, paragraph 13).
- 48 The objective pursued by Directive 91/271 goes beyond the mere protection of aquatic ecosystems and seeks to conserve man, fauna, flora, soil, water, air and landscapes from any significant adverse effects of the accelerated growth of algae and higher forms of plant life that results from discharges of urban waste water (*Commission v France*, paragraph 16).
- 49 The concepts of ‘sufficient performance’ appearing in Article 10 of Directive 91/271, ‘unusually heavy rainfall’ mentioned in footnote 1 of Annex I to the directive and ‘best technical knowledge not entailing excessive costs’ (BTKNEEC) referred to in Annex I(A) to the directive should be interpreted in the light of that objective, but also of Article 191 TFEU.
- 50 First, the concept of ‘sufficient performance’, which concerns only treatment plants, does not have its scope defined numerically, as Article 10 of Directive 91/271 provides only that treatment plants must ensure ‘sufficient performance under all normal local climatic conditions’ and taking account of seasonal variations of the load when those plants are designed.
- 51 In this connection, the Court has already found a failure to fulfil obligations in cases where the collection or treatment rate for urban waste water amounted to 80% or even 90% of the existing load (judgments of 7 May 2009 in Case C-530/07 *Commission v Portugal*, paragraphs 28 and 53, and 14 April 2011 in Case C-343/10 *Commission v Spain*, paragraphs 56 and 62).

- 52 Indeed, given the objective pursued by Directive 91/271, recalled in paragraphs 47 and 48 of the present judgment, failure to treat urban waste water cannot be accepted under usual climatic and seasonal conditions, as otherwise Directive 91/271 would be rendered meaningless.
- 53 Thus, it is established that, in order to meet the objective of protecting the environment, the concept of ‘sufficient performance’, although not defined numerically, must be understood as meaning that, under usual climatic conditions and account being taken of seasonal variations, all urban waste water must be collected and treated.
- 54 Consequently, failure to treat urban waste water can be tolerated only where the circumstances are out of the ordinary, and it would run counter to Directive 91/271 if overflows of untreated urban waste water occurred regularly.
- 55 Second, the concept of ‘unusually heavy rainfall’ in footnote 1 of Annex I to Directive 91/271 applies to the collecting systems provided for in Article 3 of the directive and to the treatment plants provided for in Article 4.
- 56 By that footnote, the European Union legislature acknowledged that situations exist in which all the urban waste water will not be capable of being collected or treated. In particular, it stated that ‘it is not possible in practice to construct collecting systems and treatment plants in a way such that all waste water can be treated’ and it provided that failure to collect and treat waste water may be tolerated during ‘situations such as unusually heavy rainfall’. However, in that case, Member States are to decide on ‘measures to limit pollution from storm water overflows’.
- 57 It is clear that the term ‘unusually heavy rainfall’ is mentioned in footnote 1 of Annex I to Directive 91/271 by way of illustration only, since the term is preceded by the words ‘during situations such as’. Thus, failure to collect or treat waste water may also be allowed in other circumstances.
- 58 However, contrary to the United Kingdom’s assertions, the objective pursued by Directive 91/271 does not permit the inference that it is normal and common for those other circumstances to arise, in particular as the word ‘unusually’ clearly indicates that failure to collect or treat waste water cannot occur in normal circumstances.
- 59 The United Kingdom’s line of argument seeking acceptance that discharges might take place even outside exceptional situations cannot therefore be upheld.
- 60 Furthermore, it should be pointed out that, where a Member State is faced with an exceptional situation not allowing it to collect or treat waste water, it remains obliged to adopt appropriate measures to limit pollution under footnote 1 of Annex I to Directive 91/271.
- 61 Also, since the concept of ‘unusually heavy rainfall’ is not defined by Directive 91/271, it is legitimate for the Commission, in carrying out its supervision of compliance with European Union law, to adopt guidelines and, as the Court does not have jurisdiction to define numerically obligations laid down by that directive, the concept of ‘unusually heavy rainfall’ must therefore be assessed in the light of all the criteria and conditions prescribed by the directive, in particular the concept of BTKNEEC.
- 62 Third, the concept of BTKNEEC, which is mentioned in Annex I(A) to Directive 91/271, must, like the other concepts referred to by Directive 91/271 that have already been elaborated upon, be examined in the light of the objective of protecting the environment. Also, it is to be noted that the obligations of that directive which require the collection and treatment of all waste water, except in the case of exceptional or unforeseeable events, must be complied with at the date laid down by the directive.



- 63 Although the concept of BTKNEEC appears in Annex I(A) to Directive 91/271 only in relation to collecting systems, it nevertheless constitutes a concept inherent in all the provisions of Directive 91/271 designed to secure its objective of protecting the environment whilst avoiding too strict an application of the rules laid down. Thus, that concept is also to be extended to treatment plants in so far as in certain cases it allows discharges of untreated waste water even though the latter has adverse effects on the environment.
- 64 The concept of BTKNEEC thus enables compliance with the obligations of Directive 91/271 to be secured without imposing upon the Member States unachievable obligations which they might not be able to fulfil, or only at disproportionate cost.
- 65 However, in order not to undermine the principle set out in paragraph 53 of the present judgment that all waste water must be collected and treated, the Member States must invoke disproportionate costs of that kind by way of exception only.
- 66 In this connection, it should be borne in mind that, in accordance with settled case-law, a Member State may not plead practical or administrative difficulties in order to justify non-compliance with the obligations and time-limits laid down by a directive. The same holds true of financial difficulties, which it is for the Member States to overcome by adopting appropriate measures (judgment of 30 November 2006 in Case C-293/05 *Commission v Italy*, paragraph 35 and the case-law cited).
- 67 The concept of BTKNEEC must be examined by weighing the best technology and the costs envisaged against the benefits that a more effective water collection or treatment system may provide. Within this framework, the costs incurred cannot be disproportionate to the benefits obtained.
- 68 In that context, account will have to be taken, as the United Kingdom submits, of the effects of the discharges of untreated waste water on the environment and in particular on the receiving waters. The consequences that those discharges have for the environment would thus enable examination as to whether or not the costs that must be incurred to carry out the works necessary in order for all urban waste water to be treated are proportionate to the benefit that that would yield for the environment.
- 69 Should it prove impossible or very difficult to collect and treat all the waste water, it will be for the Member State concerned to demonstrate that the conditions for applying the concept of BTKNEEC are met.
- 70 It is true that the Court's case-law provides that in proceedings under Article 258 TFEU for failure to fulfil obligations it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is therefore the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see, inter alia, Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, paragraph 41; *Commission v Portugal*, paragraph 32; Case C-335/07 *Commission v Finland* [2009] ECR I-9459, paragraph 46; and the judgment of 10 December 2009 in Case C-390/07 *Commission v United Kingdom*, paragraph 43).
- 71 The Member States are nevertheless required, under Article 4(3) TEU, to facilitate the achievement of the Commission's tasks, which consist inter alia, pursuant to Article 17(1) TEU, in ensuring that the provisions of the FEU Treaty and the measures taken by the institutions pursuant thereto are applied. In particular, account should be taken of the fact that, where it is a question of checking that the national provisions intended to ensure effective implementation of a directive are applied correctly in practice, the Commission, which does not have investigative powers of its own in the matter, is largely reliant on the information provided by any complainants and by the Member State concerned (see, inter alia, *Commission v Ireland*, paragraphs 42 and 43, and *Commission v United Kingdom*, paragraph 44).

- 72 It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom (see, *inter alia*, *Commission v Ireland*, paragraph 44 and the case-law cited, and *Commission v United Kingdom*, paragraph 45).
- 73 Accordingly, for the purpose of examining the present action, the Court must, first of all, examine whether the discharges from the collecting systems or the treatment plants of the various agglomerations in the United Kingdom are due to circumstances of an exceptional nature, and then, if that is not the case, establish whether the United Kingdom has been able to demonstrate that the conditions for applying the concept of BTKNEEC were met.

#### Whitburn

- 74 With regard to the obligation to have a collecting system as referred to in Article 3(1) of Directive 91/271, it should be recalled first of all, that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, *inter alia*, *Commission v United Kingdom*, paragraph 50, and *Commission v Spain*, paragraph 54).
- 75 The additional reasoned opinion dated 1 December 2008 prescribed a period of two months from receipt thereof for the United Kingdom to comply with its obligations resulting from Directive 91/271. On the date set in the reasoned opinion, untreated urban waste water was still being discharged through storm water overflows. The number of discharges and their volume are not contested by the United Kingdom: it merely submits that, contrary to what is put forward by the Commission, the debris found on the beaches around Whitburn cannot come from the Whitburn collecting system given that the sea outfall used for the discharge of waste water is equipped with 6 mm screens, and the debris is probably from the Tyne where the overflows were not equipped with screens until the end of March 2010.
- 76 In order to establish whether, as the Commission submits in its complaint, the United Kingdom has failed to fulfil its obligations arising from Article 3 of, and Annex I(A) to, Directive 91/271, the examination set out in paragraph 73 of the present judgment should be carried out.
- 77 It must be stated, first, that, in accordance with the letter of 2 March 2005 sent by the United Kingdom to the Commission, the number of waste water discharges indicated for 2001 was 310 with an annual volume of 561 240 m<sup>3</sup> and that, during the period covering the years from 2002 to 2004, that number varied between 56 and 91 with volumes between 359 640 m<sup>3</sup> and 529 290 m<sup>3</sup>. Also, it should be noted that, between 2006 and 2008, the number of waste water discharges per year varied between 25 and 47 with a volume from 248 130 m<sup>3</sup> to 732 150 m<sup>3</sup>, while the volume for 2009 was 762 300 m<sup>3</sup>. The Commission, basing its observations on the frequency of those discharges and their intensity, has clearly demonstrated that, both before and after the expiry of the period laid down by the additional reasoned opinion, they were a normal occurrence, as such a number of discharges cannot be linked to exceptional circumstances. Indeed, the United Kingdom does not contend in its observations that those discharges are exceptional in nature.
- 78 Second, it is to be noted that according to a study carried out in 2010 it would be possible, from a technological point of view, to reduce the number of waste water discharges from the Whitburn collecting system by enlarging the interceptor tunnel that already exists, a fact which has not been contested by the United Kingdom.

- 79 So far as concerns the costs required to be incurred and the benefits obtained, that study shows that an improvement of 0.3% in respect of the quality of the receiving waters could be achieved by the tunnel enlargement works, on the basis of 20 discharges per year.
- 80 Although the improvement in water quality appears marginal and, as the United Kingdom contends, Directive 76/160 is complied with, a fact which can be taken into account in the general examination of the conditions for applying the concept of BTKNEEC, it must be stated that the costs of such an enlargement of the tunnel are not mentioned at any time, either in the observations of the parties or in the reports and studies carried out.
- 81 Thus, the Court is not in a position to examine whether the costs of such works are excessive and disproportionate to the environmental benefit obtained.
- 82 It follows that the United Kingdom has not demonstrated to the required legal standard that the costs of works to increase the capacity of the collecting system were disproportionate to the improvement in the state of the environment.
- 83 Accordingly, the Commission was right in finding that the collecting system put in place in Whitburn does not meet the obligations laid down in Article 3 of, and Annex I(A) to, Directive 91/271.

#### London

- 84 In the case of the agglomeration of London, it is not in dispute, in accordance with the contentions of the United Kingdom itself, that, at the end of the period laid down in the additional reasoned opinion, that agglomeration had neither treatment plants at Beckton, Crossness and Mogden performing the secondary treatment of all the urban waste water entering the collecting system, in accordance with Articles 4(1) and 10 of Directive 91/271, and guaranteeing that the discharges from them satisfied the requirements of Annex I(B) thereto nor collecting systems at Beckton and Crossness with a sufficient capacity, in accordance with Article 3 of the directive.
- 85 The Commission, relying on a TTSS report of February 2005, observes that there were approximately 60 waste water discharges from storm water overflows in London per year, even in periods of moderate rainfall; untreated water having a volume of several million tonnes was thus discharged into the River Thames every year.
- 86 So far as concerns the treatment plants of the collecting system for London, that report shows that their capacity is sufficient in dry weather, but not sufficient in the slightest in the case of rainfall.
- 87 The United Kingdom does not dispute the facts relied upon by the Commission and observes that a project is in fact underway for the construction of a new 30 km long tunnel under the tidal part of the River Thames to intercept collecting system overflow discharges and convey them for treatment at the Beckton treatment plant. Also, it is proposed to construct another tunnel, the Lee Tunnel, with the aim of reducing overflow discharges from the Beckton and Crossness collecting systems. Finally, improvement works are taking place to install extra capacity at the Beckton, Crossness and Mogden treatment plants.
- 88 In order to establish whether, as the Commission submits in its complaint, the United Kingdom has failed to fulfil its obligations arising from Articles 3, 4 and 10 of, and Annex I(A) to, Directive 91/271, the examination envisaged in paragraph 73 of the present judgment should again be carried out.

- 89 It must be stated that the Commission, in reliance upon the TTSS report mentioned in paragraph 85 of the present judgment, which is not disputed by the United Kingdom and which indicates that the frequency and volume of the discharges come about in the case not only of exceptional events but also of moderate rainfall, has demonstrated clearly the normality of the waste water discharges into the River Thames.
- 90 As regards whether it is technologically impossible to reduce the number of waste water discharges from the collecting system for London and whether the costs are disproportionate to the environmental benefit obtained, it is to be noted that the United Kingdom decided, in April 2007, to carry out the works proposed by the TTSS report of November 2005 consisting in particular in the construction of a new underground tunnel. Thus, technological solutions to the problem of the collecting system for London exist and their costs cannot be regarded as disproportionate given that the United Kingdom has already taken the decision to implement them.
- 91 So far as concerns the United Kingdom's argument that it cannot be found to have failed to fulfil its obligations given that projects designed to ensure compliance with Directive 91/271 were examined as soon as the directive entered into force and the works decided upon are costly and achievable only over a number of years, it should be recalled that the question whether the defendant Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the additional reasoned opinion and that a Member State cannot secure dismissal of the action merely because the activities and works which will, in future, cure the failure to fulfil obligations are underway. Unless a directive has been amended by the European Union legislature for the purpose of extending the periods prescribed for implementation, the Member States are required to comply with the periods originally laid down (see the judgment of 8 July 2004 in Case C-27/03 *Commission v Belgium*, paragraph 39).
- 92 It was therefore incumbent upon the United Kingdom to initiate in good time the procedures necessary for implementing Directive 91/271 in the national legal order, so that those procedures were completed within the time-limit prescribed in the first indent of Article 3(1) and the first indent of Article 4(1) of that directive, namely 31 December 2000.
- 93 Accordingly, the Commission was right in finding that the collecting system put in place in London (Beckton and Crossness) does not meet the obligations laid down in Article 3 of, and Annex I(A) to, Directive 91/271 and that, by failing to make urban waste water from the agglomeration of London (Beckton, Crossness and Mogden) subject to secondary treatment or an equivalent treatment, in accordance with Article 4 of that directive, the United Kingdom has failed to fulfil its obligations under the directive.
- 94 It follows from the foregoing that the failure on the part of the United Kingdom to fulfil its obligations that is alleged by the Commission has been established for each agglomeration referred to in the application.
- 95 Consequently, it must be held that, by failing to ensure:
- appropriate collection of the urban waste water of the agglomerations with a p.e. of more than 15 000 of Sunderland (Whitburn) and London (Beckton and Crossness collecting systems), in accordance with Article 3(1) and (2) of, and Annex I(A) to, Directive 91/271, and
  - appropriate treatment of the urban waste water of the agglomeration with a p.e. of more than 15 000 of London (Beckton, Crossness and Mogden treatment plants), in accordance with Article 4(1) and (3) and Article 10 of, and Annex I(B) to, Directive 91/271,

the United Kingdom has failed to fulfil its obligations under that directive.

## Costs

- <sup>96</sup> Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

**1. Declares that, by failing to ensure:**

- **appropriate collection of the urban waste water of the agglomerations, with a population equivalent of more than 15 000, of Sunderland (Whitburn) and London (Beckton and Crossness collecting systems), in accordance with Article 3(1) and (2) of, and Annex I(A) to, Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment, and**
- **appropriate treatment of the urban waste water of the agglomeration, with a population equivalent of more than 15 000, of London (Beckton, Crossness and Mogden treatment plants), in accordance with Article 4(1) and (3) and Article 10 of, and Annex I(B) to, Directive 91/271,**

**the United Kingdom has failed to fulfil its obligations under that directive;**

**2. Orders the United Kingdom to pay the costs.**

[Signatures]