concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.

Mere administrative practices, which are alterable at the will of the administration and are not given adequate publicity, cannot be regarded as constituting adequate compliance with the obligation imposed on Member States to whom a directive is addressed by Article 189 of the EEC Treaty.

2. Directive 80/68 seeks to protect the Community's groundwater fully and effectively by laying down specific and detailed provisions requiring the Member States to adopt a series of prohibitions, authorization schemes and monitoring procedures, which create rights and obligations for individuals, in order to prevent or limit discharges of certain substances. It must therefore be transposed in a manner which satisfies certain requirements as to precision and clarity.

3. Each Member State is free to delegate powers to its domestic authorities as it sees fit and to implement directives by means of measures adopted by regional or local authorities. That division of powers does not, however, release it from the obligation to ensure that the provisions of the directive are properly implemented in national law.

REPORT FOR THE HEARING
in Case C-131/88 *

I — The directive

1. The purpose of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (Official Journal L 20, p. 43, hereinafter referred to as 'the directive') is, according to Article 1 of the directive, to prevent the pollution of groundwater by certain dangerous substances and as far as possible to check or eliminate the consequences of pollution which has already occurred. Article 3 of the directive provides that the Member States are to take the necessary steps to:

(a) *prevent* the introduction into groundwater of a number of substances given in list I, contained in an annex to the directive; and

* Language of the case: German.

(b) *limit* the introduction into groundwater of the substances in list II, also contained in an annex to the directive.

2. The directive lays down different rules for *direct discharge* (the introduction into groundwater of substances in list I or II without percolation through the ground or subsoil) and for *indirect discharge* (the introduction into groundwater of substances in list I or II after percolation through the ground or subsoil) (Article 1(2)(b) and (c)).

3. According to Article 2, the directive does not apply to:

'(a) . . . ;

(b) discharges which are found by the competent authority of the Member State concerned to contain substances in list 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;

(c) . . .'.

4. With regard to substances in *list I*:

— Article 4(1) of the directive prohibits all *direct discharge*;

— it subjects to prior investigation a decision to prohibit or authorize any disposal or tipping for the purpose of disposal of these substances which might lead to *indirect discharge*;

— it provides that all necessary measures must be taken to prevent any *indirect discharge* of the aforementioned substances due to other activities on or in the ground.

5. In those three cases, Article 4(2) of the directive provides for an exception: when prior investigation reveals that the groundwater in question is permanently unsuitable for other uses, discharge may be authorized under less strict conditions.

6. As regards the substances in list II, Article 5(1) of the directive requires the Member States to make subject to prior investigation:

— any authorization of direct discharge, so as to limit such discharges;

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

7. The directive establishes a system of authorizations which can be issued only after prior investigation intended to reveal in the discharge the presence of any substances in list I and II (Article 4(2) and

(3), Article 5(1) and Article 6). The investigations 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 impairment of the quality of the groundwater from the discharge, and establish whether the discharge in question is a satisfactory solution (Article 7). The authorizations may not be issued until it has been checked that the groundwater, and in particular its quality, will undergo the requisite surveillance (Article 8). That is why Articles 9 and 10 of the directive lay down the information to be specified in the authorizations.

8. The authorizations may be granted for a limited period only, and are reviewed at least every four years (Article 11).

9. Moreover, the directive imposes an obligation on the Member States to monitor compliance with the conditions laid down in the authorizations and the effects of discharges on groundwater (Article 13).

10. Those measures must, under Article 21 of the directive, be adopted within two years of the notification of the directive and be communicated immediately to the Commission. In this case, the time-limit for implementing the directive expired on 19 December 1981.

II — The German legislation

11. The Federal Republic of Germany relies on the following measures for the protection of groundwater:

(a) Wasserhaushaltsgesetz of 1976 (the Federal Water Law), as amended on 23 September 1986 (BGBl. 1986 I p. 1529 corr. 1654);

(b) Abfallgesetz (Law on Waste) of 27 August 1986 (BGBl. 1986 I p. 1410 corr. 1501);

(c) the Federal law on administrative procedure;

(d) a number of laws, decrees and administrative measures adopted by the *Länder*.

III — Facts and the pre-litigation stage of the procedure

12. By letters of 24 June 1980 and 25 November 1981, the Commission drew the attention of the Federal Republic of Germany to its obligations under the directive, and requested the Federal Republic to communicate to it the German legislation relating to the implementation of the directive in the national legal order.

13. By a letter of 14 December 1981, accompanied by a summary in the form of a table, the Federal Republic of Germany informed the Commission that five *Länder* had implemented the directive by administrative order, that in two *Länder* the directive was applied directly by provisions of laws already in force and that it would communicate the corresponding provisions of the other *Länder* as soon as they were published.

14. The Commission states in its application that by letter of 8 October 1982 it received a summary of the German legislative provisions on water at federal level. The Commission considered that certain legislative texts that in its view were essential for appraising the implementation of the directive had still to be communicated to it. It states that it therefore sent to the Federal Republic of Germany, on 22 May 1984, a first letter of notice pursuant to Article 169 of the EEC Treaty, to which it received a response from the Federal Republic of Germany by letter of 13 July 1984, communicating to the Commission a new series of texts of laws, decrees and circulars, on the basis of which the Federal Republic considered the directive to have been fully implemented in national law.

15. As a result of that reply, the Commission examined the provisions which had been communicated to it and came to the view that the directive had not been fully implemented in the law of the Federal Republic of Germany. It therefore sent to the Federal Republic of Germany, on 6 May 1986, a new letter of notice pursuant to Article 169 of the EEC Treaty in which it explained the situation in detail. It pointed out in particular that even in its amended version of 23 September 1986 the Wasserhaushaltsgesetz, which was a framework law to be supplemented by the *Länder*, did not entirely cover the provisions of the directive, and that the measures adopted by the *Länder* did not fulfil the requirements of the directive either in form or — in so far as they consisted of published administrative orders — in substance.

16. In its communication of 26 September 1986, the Federal Republic of Germany informed the Commission that, in its opinion, the directive had been implemented in full by the Wasserhaushaltsgesetz and that the communications issued by the *Länder* were intended to make the subordinate administration aware of the content of the directive and to provide it, in the form of administrative orders interpreting the law, with mandatory instructions on the implementation of the Law or instructions guaranteeing that the obligations resulting from the directive were fulfilled.

17. The reply from the Federal Republic of Germany was regarded as unsatisfactory by the Commission, which consequently sent to the Federal Republic, on 6 August 1987, a reasoned opinion in which it stated why it considered that the measures adopted did not in its view comply with the directive, and asked the Federal Republic of Germany to adopt the necessary implementing measures within two months of notification of that opinion.

18. The Federal Republic of Germany replied to the Commission by letters of 25 September 1987, 23 November 1987 and 9 February 1988. To the letter of 9 February 1988 it appended a draft administrative order, drawn up pursuant to Paragraph 4 of the Abfallgesetz, which contained the necessary implementing measures for indirect discharges and a table summarizing the implementing measures adopted by the *Länder*. It also indicated, according to the Commission, that a general administrative measure intended to define more precisely substances posing a danger for water for the purposes of Paragraph 19g, subparagraph 5, of the Wasserhaushaltsgesetz was being prepared.

19. Following that reply and upon expiry of the time-limit for implementation, the Commission brought this action.

IV — Written procedure and the forms of order sought by the parties

20. The Commission's application was lodged at the Court Registry on 6 May 1988.

21. The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

22. The *Commission* claims that the Court should:

(a) declare that the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty by failing to adopt, despite the expiry of the time-limits, all the measures required for the implementation of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances;

(b) order the Federal Republic of Germany to pay the costs.

23. The *Federal Republic of Germany* concludes that the Court should:

(a) dismiss the application;

(b) order the Commission to pay the costs.

V — Pleas in law and arguments of the parties

A — *General*

24. The Commission makes the preliminary observation that the standard of implementation must be strict and rigorous. The replies of the Federal Republic of Germany during the pre-litigation stage of the procedure do not clearly show which German provisions implemented the directive (the decrees, administrative orders and circulars, or the Wasserhaushaltsgesetz and the Abfallgesetz); nor do they identify the provisions with regard to which the Federal Republic of Germany admits that the Commission's claims are well founded or the provisions which are still in dispute. The decisive provisions are, according to the Commission, the Wasserhaushaltsgesetz and, accessorily, the laws of the *Länder*, including the administrative orders.

25. The Commission also makes the preliminary observation in its reply that during the pre-litigation stage of the procedure, on 29 June 1988, the Federal Republic of Germany sent a letter to it giving notice of a draft administrative order, and thus in essence acknowledging its failure to fulfil its obligations. The Commission states that the proceedings for failure to implement the directive were suspended as a result of that letter. It points out that there is a contradiction, inasmuch as the Federal Republic of Germany maintains in its defence statement that the directive is correctly implemented.

26. The Federal Republic of Germany explains that that letter was intended merely to demonstrate its willingness to cooperate. In an annex to its rejoinder it provides a copy of a draft administrative order, but it emphasizes that such an order is not essential in law and that it wished simply to meet the Commission's demands in the matter. Consequently, the Commission cannot, according to the Federal Republic of Germany, consider the announcement of the adoption of that order as an admission of a failure to fulfil obligations.

27. The Federal Republic of Germany makes the preliminary observation that the question of implementation raised by the Commission is somewhat hypothetical since there has been no instance of an infringement of the directive. The Federal Republic considers that the directive is implemented partly by federal laws or laws of the *Länder* and partly by regulations and administrative provisions. It maintains that the standard of implementation of the directive is whether or not the national law effectively ensures the full implementation of a directive in a clear and precise manner, and that the nature of the provisions (federal or *Länder*, laws, regulations, etc.) used for implementation is unimportant.

B — *Discharges of substances in list I*

1. The prohibition of direct discharges

28. The Commission claims, first, that the Federal Republic has not implemented Article 3(a) in conjunction with the first indent of Article 4(1) of the directive, according to which it must prohibit all direct discharge of substances in list I.

29. The Federal Republic of Germany disputes the Commission's claim in two respects: firstly, with regard to the interpretation of the disputed provisions of the directive, and secondly, with regard to the interpretation of the German legislation.

30. The Federal Republic of Germany maintains that both the obligation to prohibit direct discharges altogether and the obligation to restrict indirect discharges of substances in list I are not absolute obligations, as the Commission claims at several points in its application, but are subject to the reservation expressed in the '*de minimis*' rule laid down in Article 2(b), the application of which depends, in every case, on the appraisal of the competent authorities of the Member State in question.

31. Those obligations must be interpreted in conjunction with Article 2(b) of the directive, with the result that the Member States are required to implement in their national laws an absolute prohibition of direct discharges only in so far as the discharges have not been 'found by the competent authority of the Member State concerned to contain substances in (list) I . . . in a quantity and concentration so small as to obviate any present or future danger of deterioration in the quality of the receiving groundwater'.

32. Consequently, the Federal Republic of Germany maintains that it has fully discharged its obligation to implement that limited obligation by adopting Paragraph 1a(1), Paragraph 2(1), Paragraph 3(1)(5) and Paragraph 34 of the Wasserhaushaltsgesetz.

33. According to the Federal Republic of Germany, Paragraph 1a(1) of the Wasserhaushaltsgesetz lays down the general principle that, since water is one component of the ecological system, it must be managed in such a way as to serve the common interest while at the same time having regard to the interest of individuals, and to prevent all preventable damage.

34. The Federal Republic of Germany also maintains that under Paragraph 2(1) of the Wasserhaushaltsgesetz, direct discharges must be authorized by the authorities. Cases in which such authorization may be granted by the authorities must fulfil the conditions laid down in Paragraph 34(1) of the Wasserhaushaltsgesetz, which provides that:

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

35. The Federal Republic maintains that under those provisions, all discharge of substances is prohibited (and not only the discharge of substances in list I of the directive) unless the strict conditions laid down in Paragraph 34(1) of the Wasserhaushaltsgesetz are met. According to the Federal Republic of Germany, the only important question is whether, under the provisions of the Wasserhaushaltsgesetz, the direct introduction of substances in list I may, in theory, be authorized in a given case, even though such introduction is prohibited under the directive. According to the Federal Republic of Germany, such a case can never arise.

36. The Federal Republic of Germany states that it has already drawn attention to the fact that Article 2(b) of the directive lays down an exception to the absolute prohibition of the discharge of substances in list I in so far as it provides that in certain cases the directive, and thus the prohibition, is not applicable at all and, therefore, that administrative authorization is not even necessary. The German legislation, on the other hand, contains an exception to the prohibition of the direct discharge of any substance into groundwater which is subject to the express authorization of the competent authorities under the conditions laid down in Paragraph 34(1) of the Wasserhaushaltsgesetz. Consequently, according to the Federal Republic, in order to decide whether the Commission's claim is justified, the question that must be asked is whether the exceptions laid down in Article 2(b) of the directive and those laid down in Paragraph 34(1) of the Wasserhaushaltsgesetz are the same in scope, as the Federal Republic of Germany believes, or whether Paragraph 34(1) of the Wasserhaushaltsgesetz has, in this regard, a wider scope than Article 2(b) of the directive, which appears to be the view of the Commission.

37. According to the Federal Republic of Germany, it must be pointed out first of all that in both cases the competent authority must appraise the situation in order to determine, in the one case, whether the absolute prohibition laid down by Article 2(b) of the directive is applicable, and in the

other case, whether the exception provided for in Paragraph 34(1) of the Wasserhaushaltsgesetz is applicable.

38. In the opinion of the Federal Republic of Germany, Article 2(b) of the directive requires the competent authority to determine whether the substances are present in a quantity and concentration so small as to '*obviate any* future or present *danger* of deterioration in the quality of the receiving groundwater', whereas under Paragraph 34(1) of the Wasserhaushaltsgesetz what must be determined is whether there is no '*risk of* harmful pollution of the groundwater or any other impairment of its properties'. According to the Federal Republic of Germany, although those two criteria are worded differently, in practice they have the same meaning.

39. According to the Federal Republic of Germany, the Bundesverwaltungsgericht (Federal Administrative Court) has already held in its judgment of 16 July 1965 (ZfW 1965, p. 133 at p. 116) that:

'the expression "there is no risk" must, however, mean that there is no probability, not even the smallest, which is tantamount to saying that, according to human experience, such a probability is excluded. The law is therefore in this case particularly strict'.

40. According to the Federal Republic of Germany, it must be concluded that the conditions for the granting of authorization to discharge substances into groundwater under Paragraph 34(1) are the same as the conditions laid down in Article 2(b) of the directive. That means that, under the German legislation, such authorization can never be granted when the conditions laid down in Paragraph 34(1) of the Wasserhaushaltsgesetz or in Article 2(b) of the directive have not been met and that direct discharges of substances into groundwater are thus in principle prohibited.

41. Consequently, the German legislation fully implements the provisions of Article 4(1) in conjunction with Article 2(b) of the directive and is even more demanding than the directive since the German provisions apply not only to substances in list I but to all substances, and authorization is necessary even if the conditions laid down in Article 2(b) of the directive or in Paragraph 34(1) of the Wasserhaushaltsgesetz have been met, which is not required under the directive.

42. The Federal Republic of Germany was entitled to retain those stricter provisions pursuant to Article 19 of the directive.

43. With regard to the interpretation of the directive, the Commission claims that from a structural point of view, Article 2(b) of the directive contains neither a restriction of the prohibition laid down in Article 4 nor a '*de minimis*' rule. Article 4 prohibits, in particular, the discharge of substances in list I. Article 2(b), on the other hand, concerns discharges of *other, non-toxic, substances that may contain traces* of substances in list I and II, and removes them from the scope of the directive in so far as they have no effect on the quality of the groundwater. Consequently, with regard to anything that can be characterized as a discharge of substances in

list I, the prohibition laid down in Article 4 is without restriction and absolute, irrespective of whether, by reason of the small quantity, for example, there is any reason to fear pollution of the groundwater.

44. The Commission claims that, contrary to the view held by the Federal Republic of Germany, the implementation of the prohibition laid down by the directive does not necessitate any control by the competent authorities. Verification that there is no 'present or future danger of deterioration in the quality of the receiving groundwater' is prescribed only for a discharge *of other substances that may contain traces* of substances in list I. For such cases, it is necessary to establish a procedure guaranteeing that the quantity and the concentration do not reach such proportions as to entail the application of the directive and, as a consequence, of the prohibition laid down in Article 4.

45. In that regard, the Federal Republic of Germany replies that Article 2(b) of the directive nowhere mentions 'other substances' or 'traces' of such substances. Article 2(b) does not concern the introduction of harmless substances, but makes the absolute prohibition of the introduction of substances in list I conditional on the establishment of thresholds of significance. Those thresholds are not fixed in the directive and must, consequently, be appraised and fixed by the water authorities of the Member States. That is precisely what Paragraph 34(1) of the Wasserhaushaltsgesetz does. However, according to the Federal Republic of Germany, with regard to substances in list I, such a case can never arise in practice since the introduction of such substances always reduces the quality of the groundwater. That is why authorization of the introduction of substances in list I must always be prohibited by the authorities.

46. With regard to the German legislation, the Commission considers that the provisions of the directive and of the Wasserhaushaltsgesetz are not equivalent, either in form or in content.

47. According to the Commission, the Wasserhaushaltsgesetz does not comply with the requirements of the directive because it permits, in principle, discharges of substances in list I to be authorized, so that it is possible, at least in theory, to authorize a discharge which is unreservedly prohibited under the directive. Whether the criteria laid down in Paragraph 34 of the Wasserhaushaltsgesetz are applied sufficiently rigorously in administrative practice to rule out the possibility of such authorization is hardly verifiable and has little to do with the correct implementation of the directive; in the Commission's opinion, a provision which permits, in a general way, the authorization of the discharge of substances into groundwater provided that there is 'no reason to fear harmful pollution of groundwater or any other detrimental effect on its properties' does not fulfil the conditions of the directive.

48. The Commission also considers the argument of the Federal Republic of Germany that the relevant conditions of Paragraph 34 of the Wasserhaushaltsgesetz and of Article 2(b) are equivalent. The Commission refers to the argument of the Federal Republic of Germany which, relying

on the case-law of the Bundesverwaltungsgericht, states that the expression 'there is no risk' is stricter than the concept of 'danger' and that it is even necessary to rule out categorically a certain probability, although of course, as the Bundesverwaltungsgericht states, 'mere possibilities ... cannot, however, always be entirely ruled out'. According to the Commission, it is precisely the exclusion of any possibility that the directive seeks to achieve in requiring, in Article 2(b), the exclusion of 'any present or future danger'. It is necessary not only that the detrimental effect should be 'improbable in the light of human experience', but also that all possibility (= danger) of deterioration should be ruled out.

2. *Indirect discharges of substances in list I*

49. The Commission maintains that the Federal Republic of Germany has not implemented the second indent of Article 4(1) of the directive, which 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'.

50. The Federal Republic of Germany first refers to its arguments relating to Article 2(b) of the directive, claiming that that provision is also applicable for the purpose of regulating indirect discharges with a view to disposal or tipping for the purpose of disposal of those substances and that, consequently, the application of the second indent of Article 4(1) is subject to the condition that the quantities and concentrations in question must be small enough to rule out risk.

51. Secondly, the Federal Republic claims that it has fully implemented the second indent of Article 4(1) by means of Paragraph 3(1)(5) and (2)(2), Paragraph 19a et seq., Paragraph 19g et seq. and Paragraph 34(2) of the Wasserhaushaltsgesetz and by means of the Abfallgesetz, and it also points out that in certain areas the German provisions are even stricter than those of the directive. It illustrates that last point by highlighting the possibilities for direct discharge under the German legislation, namely (a) conveyance by pipeline (b) use of other facilities (c) use of neither pipelines nor other facilities and (d) final burial.

(a) Conveyance by pipeline

52. With regard to the conveyance of the substances by pipeline, the Federal Republic of Germany contends that Paragraphs 19a et seq. of the Wasserhaushaltsgesetz implement the second indent of Article 4(1) of the directive. According to the Federal Republic, under those provisions authorization must be obtained for the installation and operation of equipment for conveying dangerous substances by pipeline. Under Paragraph 19b(2) of the Wasserhaushaltsgesetz such authorization is refused if there is any risk of either pollution of the water or any other detrimental effect on its properties that cannot be prevented or compensated for by the imposition of controls, such controls concerning in particular technical precautions in the event of a pipeline's leaking. The condition on which authorization is granted is, according to the Federal Republic, the same condition as is found in Paragraph 34(1) of the Wasserhaushaltsgesetz, which corresponds to the condition laid down for derogations in Article 2(b) of the directive. The terms 'Verhinderung' used in the directive and 'Verhütung' used in the Wasserhaushalts-

gesetz are semantically identical and are equivalent to 'prevention'.

53. According to the Commission, Paragraphs 19a et seq. of the Wasserhaushaltsgesetz concern only authorizations relating to equipment for the conveyance by pipeline of substances that are harmful to water, and are, at best, a secondary concern of the measures referred to in the second indent of Article 4(1) of the directive.

54. The Commission also contends that the authorization to use pipelines can be refused only if, pursuant to Paragraph 19b(2) of the Wasserhaushaltsgesetz, 'there is a risk of pollution of the water . . . that even the imposition of obligations could not prevent or make good'. The crucial condition is obviously not to 'prohibit' the discharge, but simply to prevent or even 'make good' the pollution. That condition allows authorization to be granted in cases in which it would never be under the directive. In that regard too, implementation is, according to the Commission, inadequate.

55. The Commission claims, in addition, that the definition of substances that pose a danger to water, contained in Paragraph 19a(2) of the Wasserhaushaltsgesetz, in conjunction with the regulation of 19 December 1973 on substances harmful to water which are conveyed by pipeline (Bundesgesetzblatt I, p. 1946) does not cover all the substances in list I. The Commission quotes organotin compounds, mercury and mercury compounds as examples of substances that do not appear in the regulation.

56. The Federal Republic of Germany contends that Paragraph 19a(2) of the Wasserhaushaltsgesetz and the regulation of 19 December 1973 on substances harmful to water cover all the substances in list I. The Commission's examples of organotin compounds and mercury are not relevant because those substances are not conveyed by pipeline.

(b) Use of other equipment

57. The Federal Republic of Germany contends that Paragraphs 19g et seq. implement the second indent of Article 4(1) of the directive. Those paragraphs concern the facilities used for the disposal or storage for the purpose of disposal of substances in list I. According to the Federal Republic of Germany, the term 'facilities' covers both fixed (e.g. tanks) and movable facilities (e.g. storage drums). The term 'storage' means the keeping of a substance with a view to later use or re-use or for the purpose of subsequent ultimate disposal.

58. All such facilities must, according to the Federal Republic, fulfil the conditions laid down by Paragraph 19g of the Wasserhaushaltsgesetz and are authorized only if there is no reason to fear pollution of groundwater or any other impairment of its properties, in other words, only if the conditions laid down in Article 2(b) of the directive have been fulfilled. Moreover, Paragraph 19g(3) of the Wasserhaushaltsgesetz provides that the facilities must be designed, set up, operated and so on in

conformity at least with the generally accepted technical standards, in other words it is necessary to observe all the technical precautions necessary for the purposes of the second indent of Article 4(1) of the directive to prevent discharges in excess of the small quantities authorized by Article 2(b) of the directive.

59. As for listing the dangerous substances, the Federal Republic of Germany points out that the list of substances in Paragraph 19g(5) is preceded by the words 'in particular', which means that those substances are listed by way of example and that in general all the substances in list I are covered

60. With regard to the disposal of substances in waste tips, the Federal Republic contends that such disposal is covered by the Abfallgesetz. Moreover, Paragraph 3(2)(2) and Paragraph 34(2) of the Wasserhaushaltsgesetz are also applicable Paragraph 3(2) of the Wasserhaushaltsgesetz does not require dangerous substances to have been intentionally and actually introduced into the groundwater, as the Commission claims; any action which could pollute groundwater is deemed to be an introduction of a dangerous substance. Consequently, the introduction of substances into a waste tip is covered by Paragraph 34(2) of the Wasserhaushaltsgesetz, which provides that substances must be stored or buried in such a way that there is no risk of either pollution of groundwater or any other impairment of its properties.

61. The Federal Republic points out finally that the draft administrative order contained in an annex to its defence statement contains further details.

62. The Commission offers the following rebuttal of the arguments advanced by the Federal Republic.

63. It points out firstly that the Federal Republic's interpretation of Article 2(b) of the directive is not correct.

64. The Commission claims that the conditions for authorization laid down by Paragraph 19g of the Wasserhaushaltsgesetz are ineffectual because that paragraph covers the authorization of facilities intended for the storage, processing and so forth of substances harmful to water; they do not cover the storage *for the purpose of disposal* provided for by the directive; the term 'storage' within the meaning of the paragraph in question means simply 'to store for the purpose of re-use' and not for the purpose of disposal.

65. Furthermore, according to the Commission, the list of dangerous substances in Paragraph 19g of the Wasserhaushaltsgesetz does not cover all the substances in list I of the directive.

66. According to the Commission, Paragraph 2(3)(2) does not fulfil the obligation to prevent all indirect discharges, but refers to a case subject to authorization pursuant to Paragraph 6 of the Wasserhaushaltsgesetz.

67. According to the Commission, only Paragraph 34(2) of the Wasserhaushaltsgesetz concerns the matter dealt with in the second indent of Article 4(1) of the directive. However, that paragraph does not make provision for a prior investigation or for an obligation to grant authorization subject to conditions intended to ensure the effective protection of groundwater, in accordance with the second indent of Article 4(1) of the directive.

68. With regard to the draft administrative order of which a copy was submitted by the Federal Republic of Germany, the Commission points out firstly that that instrument is not yet in force. The Commission also claims that it essentially meets the requirements of the directive but that it implements the directive only 'in so far as the legislation on waste is applicable'. The Commission considers that implementation will be inadequate when that legislation is not applicable, even after the entry into force of the administrative order.

(c) Indirect discharge without the use of facilities

69. With regard to the provisions applicable to indirect discharge without facilities or pipelines, the Federal Republic of Germany contends that the requirements of the second indent of Article 4(1) are met by Paragraph 34(1) and (2) of the Wasserhaushaltsgesetz, which provides as follows:

'(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 harmful 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.'

70. The Commission claims that, contrary to the second indent of Article 4(1) in conjunction with Article 7 of the directive, Paragraph 34(2) of the Wasserhaushaltsgesetz does not subject the disposal of substances to prior investigation and to special authorization and therefore does not in principle effectively prohibit indirect discharge.

71. The Federal Republic of Germany replies that that is incorrect, because before adopting a decision the authorities carry out an investigation of the situation pursuant to Paragraphs 24 and 26 of the Federal law on administrative procedure and the corresponding provisions of the *Länder*. That investigation complies with the second indent of Article 4(1) of the directive.

72. The Federal Republic of Germany contends that measures to eliminate substances in list I which may give rise to indirect discharges may constitute an 'introduction'; thus the second indent of Article 4(1) of the directive is also covered

by Paragraph 3(1)(5) of the Wasserhaushaltsgesetz because German legislation requires an authorization for any 'introduction'.

73. The Commission doubts that the term 'Einleiten' (introduction) actually covers disposal or tipping for the purpose of disposal. In the Commission's opinion, therefore, that provision is not broad enough to cover the second indent of Article 4(1) of the directive.

74. According to the Federal Republic of Germany, Paragraph 3(2)(2) of the Wasserhaushaltsgesetz, which provides that 'measures which may impair the physical or biological properties of water permanently or significantly shall also be deemed to constitute use', also covers any disposal which may give rise to indirect discharge.

75. According to the Commission, since the criterion laid down in Paragraph 3(2)(2) of the Wasserhaushaltsgesetz is that the properties of the water are 'permanently or significantly' impaired, it is much less strict than the directive which seeks to control all disposals which might lead to indirect discharge.

76. According to the Federal Republic of Germany, the Commission's objection that Paragraph 3(2)(2) of the Wasserhaushaltsgesetz and Paragraph 34(2) of the Wasserhaushaltsgesetz are less strict than the provisions of the directive is not decisive. That is because the principle of risk of pollution (Besorgnisgrundsatz) laid down in Paragraph 34(2) of the Wasserhaushaltsgesetz, which is also applicable, corresponds to the '*de minimis*' rule laid down in Article 2(b) of the directive.

77. Thus the German law is even stricter than the directive because it does not authorize steps that do not meet the *de minimis* rule (Geringfügigkeitsregel) laid down in Paragraph 34(2) of the Wasserhaushaltsgesetz, whereas under the second indent of Article 4(1) such authorization is possible provided that the technical precautions are observed. Consequently, according to the Federal Republic of Germany, the claim that the German legislation does not make authorization a condition cannot be accepted, if only because under Article 19 of the directive it is open to the Member States to adopt stricter provision in that regard.

(d) Indirect discharges by final burial

78. The Federal Republic of Germany contends that the Abfallgesetz of 27 August 1986 applies to the indirect discharge of substances in list I and II due to the tipping or burial of waste.

79. Under that law, waste may be buried only in facilities and establishments licensed for that purpose (waste treatment facilities, Paragraph 4(1) of the Abfallgesetz) which must themselves fulfil a number of conditions (Paragraph 7 of the Abfallgesetz). Under Paragraph 4(5) of the Abfallgesetz, the German authorities are to draw up administrative regulations regulating the evacuation of waste and are to lay

down the procedures for collection, treatment, storage and burial. Thus, the provisions of the second indent of Article 4(1) and the second indent of Article 5(1) of the directive are adequately met by the administrative regulations provided for in Paragraph 4(5) of the Abfallgesetz, which also fill any gaps which might, theoretically, still exist.

80. The Commission points out that the situation has not yet changed since the administrative order provided for is not yet in force and since the directive has still not been fully implemented.

3. *Legislation on other indirect discharges*

81. With regard to the implementation of the third indent of Article 4(1) of the directive, which covers other indirect discharges, the Commission claims that it has not yet been adequately implemented.

82. The Federal Republic of Germany points out that the rule laid down in Article 2(b) of the directive also applies to the third indent of Article 4(1).

83. The Federal Republic of Germany contends that other indirect discharges not caught by Article 19 et seq. of the Wasserhaushaltsgesetz are covered by Paragraph 3(2) and Paragraph 34(2) of the Wasserhaushaltsgesetz.

84. Where the activities referred to in the third indent of Article 4(1) entail the use of pipelines or other facilities, that provision of the directive has been implemented, according to the Federal Republic of Germany, by Paragraph 19a et seq. and Paragraph 19g et seq. of the Wasserhaushaltsgesetz, cited above, and the substances in list I of the directive are covered by the concept of 'substances harmful to water'.

85. Where the activities referred to in the third indent of Article 4(1) do not entail the use of pipelines or other facilities and therefore are not caught by Paragraph 19a et seq. or by Paragraph 19g et seq. of the Wasserhaushaltsgesetz, it is, according to the Federal Republic of Germany, Paragraphs 2, 3(2)(2) and 34 of the Wasserhaushaltsgesetz that apply. The Federal Republic of Germany points out that the principle of risk (Besorgnisgrundsatz) laid down in Paragraph 34 of the Wasserhaushaltsgesetz guarantees the full implementation of the directive.

86. According to the Commission, Paragraphs 19a et seq. and 19g et seq. relied on by the Federal Republic of Germany reflect the content of the third indent of Article 4(1) only partially, and the list of substances harmful to water is incomplete.

87. With regard to pipelines, the Commission points out that the granting of authorization pursuant to Paragraph 19b(1) and the refusal of authorization pursuant to Paragraph 19b(2) of the Wasserhaushaltsgesetz do not comply with the directive, the third indent of Article 4(1) of which goes

further because it prevents all indirect discharge so that there is no risk of pollution.

88. The Commission also claims that the Federal Republic of Germany has no clear legislation for instances where the provisions relating to pipelines do not apply.

89. According to the Commission, the legislative provisions of the *Länder* do not fill the gaps in the German legislation. The Commission cites as examples the regulation on facilities adopted on 24 June 1986 by the *Land* Schleswig-Holstein, the rules adopted by Hamburg (Paragraphs 28 and 28a of the Hamburg Water Law) and the regulation relating to facilities of 11 August 1987, and the provisions communicated by the *Länder* Hesse, Baden-Württemburg, Bavaria, Rhineland-Palatinate and Bremen. According to the Commission, those provisions do not cover the substances in list I in the annex to the directive and do not prohibit the indirect discharge of those substances in the required way.

90. According to the Commission, Paragraph 34(1) does not cover all practices, but only the discharge of substances into groundwater.

91. However, Paragraph 3(2)(2) of the Wasserhaushaltsgesetz does not cover, according to the Commission, discharges (which are referred to separately in Paragraph 3(1)(5)); it concerns other measures.

92. As regards Paragraph 34(2) of the Wasserhaushaltsgesetz, the Commission claims that it refers only to the tipping or burial of substances or to the transport of liquids or gases by pipeline. That is why, even though all the other activities referred to by the third indent of Article 4(1) may be subject, inasmuch as they constitute 'use', to authorization pursuant to Paragraph 2(1) of the Wasserhaushaltsgesetz, the authorization is not subject to any specific prior condition.

93. With regard to Paragraph 3(2)(2) of the Wasserhaushaltsgesetz, in order to achieve the objective of the third indent of Article 4(1) all use must be conditional on a guarantee that all discharge of substances in list I will be prevented, which is not, according to the Commission, guaranteed because Paragraph 3(2)(2) of the Wasserhaushaltsgesetz covers only their deliberate and actual introduction into groundwater.

94. The Federal Republic of Germany replies that Paragraph 3(2)(2) of the Wasserhaushaltsgesetz does not require deliberate and actual introduction into groundwater; the effect of that provision is to assimilate measures which could give rise to pollution of groundwater to introduction. The Federal Republic of Germany considers that in practice there could be no case which would be dealt with differently depending on whether German law was applied or the provisions of the directive.

C — The prevention of discharges of substances in list II

95. The Commission claims that the Federal Republic of Germany has not implemented

Article 5 of the directive, which requires the Member States, with regard to substances in list II, to carry out a prior investigation in order to limit direct discharges into groundwater and to authorize indirect discharges only on condition that all pollution of groundwater is prevented.

96. The Federal Republic of Germany contends that its legislation makes no distinction between substances in list I and those in list II and that, consequently, its legislation is stricter for substances in list II. With regard to direct discharge, Paragraphs 2, 3(1)(5) and Paragraph 34(1) of the Wasserhaushaltsgesetz prohibit absolutely such discharges of both substances in list I and those in list II. With regard to indirect discharge of such substances, the directive is implemented by virtue of the fact that the same rules govern indirect discharge of substances in both lists.

97. According to the Commission, the rules laid down in Article 5 of the directive are not implemented by Paragraphs 1, 2, 3(1)(5) and 34 of the Wasserhaushaltsgesetz. The Commission considers that for direct discharge the principle of risk laid down by Paragraph 34 of the Wasserhaushaltsgesetz does not fulfil the requirements of Article 5(1) of the directive, which, since it is stricter, requires that all the precautions must be observed. With regard to indirect discharge, the Commission claims that no provision has been made for the special authorization procedure required by the directive. Even the implementation by administrative regulation adopted pursuant to paragraph 4(5) of the Abfallgesetz is incomplete.

D — *The procedural provisions of the directive*

(a) General

98. The Commission claims that the legislative provisions of the *Länder* and the circulars and administrative orders do not implement, or implement inadequately, Articles 7 to 11 and 13 of the directive, which concern the special authorizations relating to groundwater.

99. The Federal Republic of Germany maintains that all the Commission's claims relating to the procedural provisions of the directive are unfounded because it is certainly not necessary to introduce, as the Commission suggests, into the national legal order 'special rules' for the authorizations required under the directive and to reproduce literally the text of the directive. The procedural provisions in force both at federal level and at *Länder* level, as well as the administrative implementing provisions adopted by the latter, are mandatory. The Federal Republic also contends that for all the procedural rules of the directive it is the framework provisions relating to administrative procedure which are applicable.

100. The Commission points out that the use of administrative regulations does not fulfil the requirements of the directive and that by virtue of the principle of parallelism the laws in question must be amended. According to the Commission, the directive assumes that the legislator will adopt measures which make the conditions laid down in the directive legally binding. Mere

general indications do not fulfil the requirements of the directive, particularly since the competent authorities do not know whether or not a given substance is affected in the individual case. Moreover, with regard to the *Länder* Hamburg, Berlin and the Saar, the Commission observes that no written instructions were sent with a view to implementation, while the Schleswig-Holstein and Bavarian circulars of 27 October 1981 and 28 October 1981 respectively were not published. Consequently, there was not even a minimum guarantee, in the form of publication, that the directive would be implemented.

101. While the Federal Republic of Germany recognizes that procedural provisions which concern third parties must be enacted in legislation, it considers that the essential rules are to be found in Paragraphs 1a, 3, 4, 5, 7, 8, 19a et seq., 19g et seq., 21 et seq. and 34 of the Wasserhaushaltsgesetz and in the laws on administrative procedure at federal level and at *Länder* level. However, whether and how the control in question is to be carried out and what form the decision to authorize should take are, in the opinion of the Federal Republic of Germany, technical matters which, under the applicable law of the Federal Republic of Germany, may be quite simply dealt with in administrative regulation.

102. With regard to the effectiveness of the administrative regulations adopted in order to implement the directive, the Federal Republic of Germany considers that they are merely internal administrative provisions which do not have the status of fundamental rules; since the fundamental provisions have already been implemented by primary legislation, it is, in the view of the Federal Republic of Germany, quite sufficient to inform the administrative authorities directly that they must comply with the directive. Consequently, publication of the administrative regulations is unnecessary. The Federal Republic of Germany also claims that the directive is implemented by interpreting, in accordance with the directive, Paragraph 34 of the Wasserhaushaltsgesetz as well as the procedural provisions of the Wasserhaushaltsgesetz.

(b) Article 7 of the directive

103. The Federal Republic of Germany contends that Article 7 of the directive, which lays down what the prior investigations are to consist of, is implemented by Articles 24 and 26 of the Federal Law on administrative procedure and by the corresponding provisions in force in the *Länder*. Under those provisions, the competent authorities must automatically investigate the specific circumstances of each case and use all necessary evidence. Those provisions also specify the circumstances which must be considered and the evidence which must be used for that purpose according to the material conditions for authorization, namely those laid down in Paragraphs 1a(1), 4, 5 and 34 of the Wasserhaushaltsgesetz. In order to check whether those conditions have been met, the competent authorities must, according to the Federal Republic of Germany, rely on the investigations provided for in Article 7 of the directive. While it is true that that obligation is not expressly laid down in the provisions mentioned by the Federal Republic of Germany, it is nevertheless explicitly imposed on the administrative authorities by administrative regulations.

104. The Commission claims that Paragraph 24 of the Law on administrative procedure, on which the Federal Republic of Germany relies, does not clearly state the specific content of the inquiry. Moreover, the administrative regulations of the *Länder*, such as those of Bavaria of 29 September 1981, do not contain any provision relating to the investigations provided for in Article 7 of the directive. Furthermore, according to the Commission, the Federal Republic of Germany does not specify the regulations in question and does not state whether such regulations exist in all the *Länder*.

(c) Article 8 of the directive

105. With regard to the implementation of Article 8, cited above (paragraph 7), the Federal Republic of Germany points out that the conditions under which authorizations are granted are to be found in Paragraphs 19a et seq., 19g et seq. and 34 of the Wasserhaushaltsgesetz. The Federal Republic of Germany also points out that Paragraph 4 of the Wasserhaushaltsgesetz permits conditions to be laid down for the granting of such authorizations; those conditions consist, in particular, in the obligation to adopt measures to observe or establish the state of the water before use, or deterioration or pollution due to use (Paragraph 4(2)(1) of the Wasserhaushaltsgesetz) and even in the appointment at undertakings of persons responsible for monitoring (Paragraph 4(2)(2) of the Wasserhaushaltsgesetz). Such measures may also be imposed *a posteriori* for authorizations already granted, pursuant to Paragraph 5(1)(1) and Paragraph 1a of the Wasserhaushaltsgesetz. Finally, the Federal Republic of Germany contends that Paragraph 21 of the Wasserhaushaltsgesetz lays down an express obligation on the applicant to allow the controls exercised by the competent authorities over the facilities, equipment and mechanisms relevant to water use. Those provisions implement, in the opinion of the Federal Republic of Germany, Article 8 of the directive.

106. According to the Commission, Paragraphs 4, 5, 19b(1), 19a and 19i of the Wasserhaushaltsgesetz do not implement Article 8 because Paragraph 19i of the Wasserhaushaltsgesetz does not concern authorizations within the meaning of the directive and the other paragraphs do not provide that the competent authorities are empowered to grant authorizations only if they have positively established that the monitoring and the quality of the groundwater is guaranteed. Finally, according to the Commission, Paragraph 19i of the Wasserhaushaltsgesetz concerns exclusively the control of facilities and not the control of the groundwater. Moreover, while, according to the Commission, Paragraph 34 of the Wasserhaushaltsgesetz provides that authorizations may be subject to conditions and that applicants may be required to permit the administrative supervision of facilities, nowhere does it say that guaranteed monitoring of the groundwater is a prior condition for the grant of authorization to discharge. According to the Commission, the existence of that prior condition is essential not only, as under Article 7, in order to attain the objective of the directive, but also for the legal position of those concerned.

(d) Articles 9 and 10 of the directive

107. According to the Federal Republic of Germany, it follows from the combined effect of Paragraphs 4, 5, 7 and 8 of the Wasserhaushaltsgesetz, under which decisions may be subject to restrictions and reservations, that the competent authorities

in the Federal Republic may fulfil the requirements of Article 9 of the directive in decisions concerning authorizations. In addition, Paragraph 37 of the Law on administrative procedure and the corresponding provisions of the *Länder* provide that administrative acts must in principle be specific, which means, according to the Federal Republic of Germany, that they must contain all the information of importance to the granting of the authorization. Under the applicable legislation in the Federal Republic of Germany it is in principle by means of *Verwaltungsvorschriften* (administrative regulations) that the competent administrative authorities may be required to formulate administrative acts in particular terms. That is sufficient, in the opinion of the Federal Republic of Germany, to bind the administration itself, but in any event has no effect in relation to individuals since individuals are not concerned in law by the form of the administrative act addressed to them but only by the substantive content of that act.

108. The same is true for the obligations laid down in Article 10 of the directive with regard to the content of the authorizations. The essential conditions are to be found, according to the Federal Republic of Germany, in Paragraphs 19a et seq. and 19g et seq. of the Wasserhaushaltsgesetz. In addition, the decision concerning authorization must contain information concerning those essential conditions. That is also guaranteed by Paragraph 37 of the Law on administrative procedure. Moreover, the competent authorities of the Federal Republic of Germany are required by the administrative provisions of the *Länder* to apply Article 10 of the directive.

109. The Commission claims that the provisions relied on by the Federal Republic of Germany make no mention of the precautionary measures to be taken, the maximum authorized quantity of a substance, etc. The same is true of Paragraph 24 of the law on water of the *Land* Nordrheinwestfalen. The function of Articles 9 and 10 of the directive is to prescribe a specific and binding form of authorization. Since individuals are legally concerned, it is not sufficient for those matters to be governed by administrative provisions.

(e) Article 11 of the directive

110. With regard to the implementation of Article 11 of the directive relating to the limits on the periods for which authorizations may be granted and their regular review, the Federal Republic of Germany contends that the Commission's claims are unfounded. Since, under the law applicable in the Federal Republic of Germany, an administration has the power to limit the period of validity of an administrative act and to monitor its implementation, it is at liberty to decide whether or not to avail itself of that power whenever it so chooses. That discretionary power may be legally restricted by decrees and administrative decisions. Since the *Länder* have adopted the decrees and administrative provisions necessary to implement the directive, and consequently Article 11 thereof, they have imposed a legally binding obligation on their administrations entrusted with the implementation of those provisions to limit the period of validity of the authorizations in question and to review them at least every four years.

111. According to the Commission, Article 11 of the directive has not been implemented because the provisions adopted by the *Länder* provide only for monitoring in the sense of a general inspection of the

water; they do not provide for regular monitoring as required by the directive. That authorization and monitoring must, according to the Commission, be expressly provided for. Moreover, no means of controlling the revocation or withdrawal of such authorizations has been established, according to the Commission. The Commission also claims that the obligation to limit the period of validity of the authorization may be established by internal administrative directives only for general cases (in accordance with the principle of equality), but not for all cases.

(f) Article 13 of the directive

112. With regard to the claim concerning the implementation of Article 13 of the directive regarding the monitoring of compliance with the conditions laid down in the authorizations and the effects of discharges on groundwater, the Federal Republic of Germany contends that Paragraph 21 of the Wasserhaushaltsgesetz imposes an obligation on the user and the owner of the land to allow monitoring measures by the authorities. In the legal order of the Federal Republic of Germany those measures are the only ones that need to be adopted by legislation for the implementation of Article 13 of the directive. The question whether, when and how the authorities carry out monitoring must not be governed by legislation, but can be regulated by an internal measure or an administrative provision. The *Länder* have adopted such provisions, so that that claim is also unfounded.

113. The Commission points out that the Federal Republic of Germany does not rely on any specific provision relating to Article 13 of the directive. Paragraph 21 of the Wasserhaushaltsgesetz and the corresponding provisions of the *Länder* in no way guarantee, according to the Commission, that the monitoring required by Article 13 of the directive will be done. The Commission also emphasizes the point that the national authorities have an obligation to carry out monitoring, and not merely the power to do so. It claims that in order to implement the provision in question, express national rules are necessary. Internal directives, which may be amended at any time, do not provide the minimum degree of legal certainty regarding the correct implementation of the directive.

C. N. Kakouris
Judge-Rapporteur