

REPORT FOR THE HEARING
in Case C-360/87 *

I — Legislative background

1. Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (hereinafter referred to as 'the Directive') required Member States to take all the measures necessary to prevent the direct or indirect discharge into groundwater of certain substances (enumerated in list I in the Annex to the Directive) and limit the discharge of certain other substances (enumerated in list II in the Annex).

2. For that purpose the Directive makes a distinction between direct discharges (introduction into groundwater of substances in lists I or II without percolation through the ground or subsoil) and indirect discharges (introduction into groundwater of substances in lists I or II after percolation through the ground or subsoil) (Article 1(2)(b) and (c)).

With regard to the substances in list I:

- (i) the Directive provides for the prohibition of all direct discharge;
- (ii) it requires prior investigation of any disposal or tipping for the purpose of disposal of those substances which might lead to indirect discharge;

(iii) it provides that all appropriate measures must be taken to prevent any indirect discharge of those substances due to any other activities on or in the ground (Article 4(1)).

3. With regard to the substances in list II, the Directive requires the Member States to make subject to prior investigation:

- (i) all direct discharge, so as to limit such discharges;
- (ii) the disposal or tipping for the purpose of disposal of those substances which might lead to indirect discharge (Article 5(1)).

4. Any direct discharge of substances in list I is absolutely prohibited; in other cases, the Directive provides for a system of authorizations which may be issued only after prior investigations intended to detect the presence in discharges of substances in lists I and II (Article 4(2) and (3), Article 5(1) and Article 6). Those 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 alteration of the quality of the groundwater from the discharge and must establish whether the discharge is a satisfactory solution (Article 7). Authorizations may be

* Language of the case: Italian.

issued only after it has been established that the groundwater, and in particular its quality, will undergo the requisite surveillance (Article 8). Articles 9 and 10 of the Directive thus set out the matters which must be specified in authorizations.

5. Authorizations may be granted only for a limited period and must be reviewed at least every four years (Article 11).

6. The Directive also requires the competent authorities of the Member States to monitor compliance with the conditions laid down in the authorizations and the effects of discharges on groundwater (Article 13).

7. Article 15 of the Directive provides that the Member States must keep an inventory of the authorizations which have been issued.

8. Under Article 21(1) of Directive 80/68, the Member States were to bring into force those measures within two years of its notification; according to Article 21(2), they were to communicate to the Commission the texts of the main provisions adopted in the field covered by the Directive. The period for transposition of the Directive expired on 19 December 1981.

II — Facts and procedure

9. Following a complaint submitted to it in 1984 concerning pollution of groundwater

in Campania and Basilicata, by letter of 22 May 1984 the Commission asked the Italian Government to provide it *inter alia* with information on its compliance with the provisions of Directive 80/68.

10. By letter of 14 January 1985 the Italian Republic stated *inter alia* that in Italy water was protected against pollution by Law No 319 of 10 May 1976, entitled 'Norme per la tutela delle acque dall'inquinamento' (the 'Legge Merli I', Official Gazette of the Italian Republic No 141 of 29 May 1976, p. 4125), by Law No 650 of 24 December 1979, entitled 'Integrazioni e modifiche delle leggi 16 aprile 1973, No 171, e 10 maggio 1976, No 319 in materia di tutela delle acque dall'inquinamento' (the 'Legge Merli II', Official Gazette No 352 of 29 December 1979, p. 10533), and by the decision of 4 February 1977 of the Inter-ministerial Committee for the protection of water against pollution (Official Gazette No 48 of 21 February 1977, Ordinary Supplement, p. 2).

11. The Commission considered that the national provisions in question were not entirely in conformity with the Directive, and by letter of 3 April 1986 it initiated the procedure under Article 169 of the EEC Treaty and asked the Italian Republic to submit its observations within two months.

12. The Government of the Italian Republic replied in letters of 18 June and 15 July 1986, stating that the provisions in force in Italy largely ensured full implementation of Directive 80/68, but accepted that certain provisions of the Directive 'should be incorporated more explicitly in Italian law'.

13. After a thorough re-examination of the Italian legislation in the light of the observations submitted in those two letters, the Commission did not change its view. On 20 January 1987 it therefore sent the Italian Republic a reasoned opinion requesting it to take the necessary transposition measures within two months from notification of the opinion.

14. In its reply of 31 March 1987 the Italian Republic repeated the observations which it had already submitted. Following that reply and the expiry of the period within which the Italian Republic was requested to transpose the provisions of the Directive into national law, the Commission brought these proceedings.

III — Written procedure and forms of order sought

15. The Commission's application was lodged at the Court Registry on 2 December 1987.

16. 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. The Italian Republic was requested to reply in writing to a number of questions and the Commission was asked to state its position on the replies. The defendant replied to that request after the expiry, on 8 May 1989, of the period laid down.

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

(1) Declare that by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary for the full and correct transposition into its national law of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances, the Italian Republic has failed to fulfil its obligations under the EEC Treaty;

(2) Order the Italian Republic to pay the costs.

18. The *Italian Republic* claims that the Court should:

Dismiss the action, with the exception of the point concerning the incorrect regulation of certain substances in lists I and II of the Directive.

19. The Italian Republic has made no submissions on costs.

IV — Pleas in law and arguments of the parties

20. The Commission takes note of the statements made by the Italian Republic in the pre-litigation procedure to the effect that under the legislation in force in Italy all direct discharges of waste water into groundwater are prohibited, and considers that the Italian Republic has complied with the requirements laid down in the first indent of Article 4(1) and the first indent of Article 5(1) of the Directive; it maintains,

however, that there remain several points on which the Italian legislation is not consistent with the Directive.

The distinction between substances in list I and substances in list II

21. The Commission argues first of all that the Italian legislation makes no distinction between substances in list I and substances in list II in the Annex to the Directive. According to the Commission, the Italian legislation proceeds on the basis that all discharges of substances are acceptable in so far as they observe the limits laid down in Tables A and C of the Legge Merli I. The importance of that distinction, however, lies in the fact that under Articles 3 and 4 of the Directive the introduction of substances in list I into groundwater must be prevented, not limited. In the Commission's view that legislation runs counter to the objective of the Directive, that is to say to prevent the pollution of groundwater and to check or eliminate the consequences of such pollution (Article 1). According to the Commission, the Italian Republic did not deal with this point in its written pleadings.

Substances omitted by the Italian legislation

22. The Commission maintains that the Italian legislation does not cover several of the substances mentioned in those lists. With regard to substances in list I, the Commission states that 'organotin

compounds' (list I, point 3, of the Directive) do not appear; similarly, with regard to 'organohalogen compounds and substances which may form such compounds in the aquatic environment' and 'organophosphorus compounds' (list I, points 1 and 2) the Italian legislation refers only to chlorine-based pesticides, chlorine-based solvents and phosphor-based pesticides. Most of the substances which 'possess carcinogenic, mutagenic or teratogenic properties in or via the aquatic environment' (list I, point 4) are also missing. With regard to the substances in list II, the Commission observes that the Italian legislation in force takes no account of the following chemical substances: antimony, molybdenum, titanium, beryllium, uranium, vanadium, cobalt, thallium, tellurium and silver. The Commission further maintains that the Italian legislation does not cover several of the compounds which fall under the heading 'biocides and their derivatives not appearing in list I' (for example: carbamates, dithiocarbamates, organosulphide fungicides, quaternary ammonium derivatives, etc.), or the group of 'toxic or persistent organic compounds of silicon and substances which may cause the formation of such compounds in water, excluding those which are biologically harmless or are rapidly converted in water into harmless substances' (points 1, 2 and 4 of list II).

23. With regard to those omissions the Italian Republic states that because there is no precise definition of certain substances it has experienced difficulty in the transposition of the Directive, and the Commission has not provided it with the clarifications it has requested. Furthermore, in the pre-litigation procedure it stated that it had prepared a draft law (No 3832) intended to cure this deficiency.

The procedure for the issue of 'discharge authorizations'

24. The Commission submits that the procedure for the issue of 'discharge authorizations' under the Italian legislation is not in conformity with the Directive, because the Italian system provides for the issue of discharge authorizations without any specific prior investigation, whereas the Directive requires a specific and detailed prior investigation (Article 7) and the surveillance of groundwater (Article 8).

25. The Italian Republic argues that the Commission's complaints disregard Article 2 of Law No 62 of 5 March 1982 (Official Gazette of the Italian Republic No 63 of 5 March 1982, p. 1713), which provides for the preparation by the regions of a plan intended to identify appropriate areas for the discharge on the ground of waste water and sludge, pursuant to the criteria set out in the Interministerial Decision of 4 February 1977, and thus meets the requirements of the Directive because it serves to predefine the conditions governing the discharge of water. With such a plan in place, verification at the time of grant of authorization will be more effective.

26. As regards the 'discharge authorizations', the Commission considers that the provisions of Law No 62 of 5 March 1982 are not in conformity with the Directive, since they are too general, too vague and, consequently, insufficient in relation to the system of specific and detailed prior investigations provided for by the Directive. The Commission does not deny that obligations arising from the Directive may be devolved to the regions but submits that neither the

Italian State nor the regions have adopted the necessary measures to comply with the Directive.

The presumption of provisional authorization

27. The Commission submits that under Article 15 of Law No 319 of 1976 the issue of authorization is subject to no conditions other than the submission by the applicant to the municipal authorities of an application for authorization accompanied by a precise description of the nature and quantity of the discharge. In addition, 'provisional authorization' is presumed to be granted if the application for authorization has not been refused within six months. According to the Commission that system establishes a 'tacit agreement' procedure authorizing discharges which amounts to simple registration of the application with no specific check of conformity with the limits of acceptability provided for in the law, and still less with the conditions laid down in particular in Articles 9 and 10 of the Directive, to which the issue of authorization is subject. The same observations may be made, moreover, as regards the application of Article 12 of the Directive.

28. According to the Italian Republic, the competent authority must in any event, as regards tacit authorization, verify that the area chosen for discharge into the ground (as it appears in the application for authorization) falls within that previously determined by the regional authority. As regards Articles 8, 9 and 10 of the Directive, the Italian Republic submits that the Commission is disregarding the importance of the provisions of Italian law which ensure

effective preventive control of indirect discharges in accordance with the Directive. Furthermore, the Commission is wrong to assert that the provisions of the Directive on the obligatory nature of authorization have not been applied because Italian law envisages the possibility of tacit authorization. Such a procedural rule is not excluded by the Directive and thus falls within the implementing powers of the Member State. According to the Italian Republic it cannot be asserted that the mere fact of providing for tacit authorization is in itself contrary to the objective pursued by the Directive. If that argument was justified, it would follow that tacit agreement was by its nature incompatible with any verification procedure, which is not correct.

The period of validity of authorization

29. According to the Commission, the Italian legislation provides for a system of definitive authorization, whereas Article 11 of the Directive provides that authorizations can be granted only for a limited period and must be reviewed at least every four years. The Commission submits that the Italian law contains no such provision. On the contrary, Article 15 of the Legge Merli I provides for a system of definitive authorization which seems completely contrary to a system of authorization for a limited time. Even though the Italian legislation provides that definitive authorization can be revoked or modified at any time, it does not necessarily follow that it complies with the strict obligation to review the authorizations in question every four years. According to the Commission, the Italian Republic does not appear to have stated its views on this point.

Monitoring of compliance with the conditions laid down in authorizations and the effects of discharges

30. The Commission further maintains that Article 13 of the Directive, which provides for monitoring of compliance with the conditions laid down in authorizations and the effects of discharges on groundwater, does not appear to have been transposed correctly into Italian legislation. The sixth paragraph of Article 15 of the Legge Merli I, as amended by the Legge Merli II, does give councils, inter-regional services and, on a provisional basis, provisional health laboratories the task of 'supervision and monitoring of all discharges'. However, those tasks are too general and vague in nature and appear to be restricted to 'monitoring of discharges' so as to ensure observance of the limits of acceptability laid down by the law.

31. The Italian Republic replies that with regard to supervision of compliance with the conditions laid down in authorizations and the effects of discharges the Commission's complaints are unfounded because the Italian legislation contains appropriate provisions on the matter.

The obligation to keep an inventory of authorizations

32. The Commission further submits that Article 15 of the Directive, which requires Member States to keep an inventory of authorizations, has not been transposed because the Italian system of tacit authorization restricts the effectiveness of that obli-

gation. Even if the fifteenth paragraph in point 2.1 of Annex 5 to the Decision of the Interministerial Committee of 4 February 1977 ('for this purpose a register of all authorized discharges will be established') is to be understood as corresponding to that obligation, such a register (in so far as it is kept) will necessarily have certain omissions, at least as regards tacit authorizations. It follows in particular that where the Commission asks Member States to provide details of the authorizations granted and the results of the inventories provided for in Article 15 (Article 16(1)(b) and (d) of the Directive), the Italian Republic will be incapable, because of its own default, to comply with that obligation. The Commission submits that no inventory of authorizations exists or can exist in Italy in view of the system of authorization which is now in force.

33. The Italian Republic replies that the Commission has expressed a general and unfounded assessment of the practical effectiveness of those measures. Taking into account the fact that in these respects the Directive does not contain detailed binding requirements, the conclusion cannot validly be drawn on this basis that the Directive has not been transposed.

V — Questions put to the Government of the Italian Republic

34. The Court asked the Italian Republic to reply in writing to the following questions, and asked the Commission to comment on the Italian Republic's replies:

'(1) The Commission maintains that under the Italian legislation all discharges are acceptable so long as they comply with certain limits, and makes no distinction between substances in list I and substances in list II in the Annex to the Directive, a distinction which is important since the Directive provides that the introduction into groundwater of substances in list I must be prevented and not limited.

Is the Commission's assertion correct? If not, what are the provisions in Italy which permit the conclusion to be drawn that the Directive in question has been completely transposed into national law in that regard?

(2) The Commission enumerates several substances which appear in the two lists mentioned above that are omitted from the Italian legislation.

Does the Italian Republic confirm the Commission's list of omitted substances?

(3) According to the Italian Republic, the Commission has disregarded the importance of the national provisions which ensure the surveillance of groundwater required by the Directive (Article 8) and verification that the authorization complies with the limits of acceptability laid down by the law and with the conditions set out in Articles 9 and 10 of the Directive.

What are those provisions and what part of the Directive does each of them transpose?

(4) According to the Commission, the Italian legislation provides for a system of definitive authorization, whereas Article 11 of the Directive provides that authorizations may be granted only for a limited period and must be reviewed at least every four years.

Does the Italian Republic dispute that assertion? If so, on the basis of what specific provisions does it do so?

(5) What are the specific provisions which ensure the transposition into national law of Article 13 of the Directive?

(6) Can the tacit authorizations made possible under the legislation of the Italian Republic be included in an inventory, and if so how?

The Commission, to which the replies of the Government of the Italian Republic will be transmitted, is requested to comment on them within one month from such transmission.'

First question

35. In its reply, which was lodged at the Court Registry on 1 August 1989, the Italian Republic refers to point 1 of Annex 5 to the Decision of 4 February 1977 of the Interministerial Committee for the protection of water from pollution. The Italian Republic states that discharges are authorized:

(a) on the ground and in the surface layers of the soil, in respect only of discharges of such a nature as to make natural purification possible;

(b) in the subsoil, solely in respect of discharges into deep geological strata; the discharges must be contained in porous structures of adequate capacity and isolated from groundwater circulation by appropriate impermeable geological barriers.

The Italian Republic submits that in the light of those provisions there can be no direct discharge of the substances enumerated in list I of the Directive. Moreover, the risk that an indirect discharge may result in the discharge into groundwater of those substances is practically eliminated.

36. In its comments the Commission maintains that the Italian Republic's reply confirms that the Italian legislation does not make the distinction, which is a fundamental one in the structure of the Directive, between the substances in list I and those in list II. The Commission adds that the decision relied on by the Italian Republic does not implement the Directive because, by reason of the absence of the distinction between the substances in lists I and II, its provisions are insufficient and have the same general nature as Law No 319, which it interprets and applies. Furthermore, according to the Commission, the concept of 'natural purification' is not sufficient in relation to the distinction between the two lists.

The second question

37. The Italian Republic admits the Commission's criticisms but observes that with regard to substances which possess carcinogenic, mutagenic or teratogenic properties the Commission has not stated what substances having such properties are not provided for in the Italian legislation.

38. The Commission takes note of the Italian Republic's admission in this respect and states that the Directive does not provide any list of this type of substance, since that is related to developments in scientific knowledge, and observes that the Italian legislation makes no reference whatsoever to such substances.

The third question

39. With regard to the transposition of Articles 8, 9 and 10 of the Directive, the Italian Republic states that Annex 5 to the Decision of 4 February 1977 lays down detailed rules concerning the prior verifications which must be carried out in order to assess the compatibility of the discharge with the environment, essentially comprising an examination of the characteristics of the site of the discharge and the characteristics of the water to be discharged. With regard in particular to the surveillance required by Article 8, the Italian Republic submits that that is ensured by point 2.8 of the Decision of the Interministerial Committee (verification of the environmental impact and assessment of the probable future development of the system).

40. The Commission highlights the generality of the Italian Government's reply, in comparison with the precise and detailed requirements of the Directive (Articles 7 to 10); it points out that the Italian Republic no longer refers, as it did in its defence, to Article 2 of Law No 62 and does not deny, as the Commission observed in its reply, that in any event neither the Italian State nor the regions have yet taken any measures to give concrete form to its vague and general programme.

The fourth question

41. With regard to the transposition of Article 11 of the Directive, the Italian Republic states that it did not take a position on this point in its defence because it did not find any express and specific complaint in the Commission's application regarding the temporal effect of authorization. The Italian Republic adds, however, that the provisions in force do not define the duration of authorization.

42. The Commission takes note of the Italian Government's admission that the 'laws in force do not define the duration of authorization' and states that it is incorrect to assert that it did not expressly raise in its application the point concerning the implementation of Article 11 of the Directive. It states that by letter of 7 December 1987 the Commission sent the Court the text of an addendum to the application (paragraph 3 bis, to be inserted on page 9) which deals specifically with the point in question and that by a letter of 9 December 1987 the Court Registry acknowledged receipt of that addendum, which was a continuation of the application lodged on 2 December 1987.

The fifth question

43. The Italian Republic submits that the provisions in force ensure the implementation of Article 13 of the Directive. With regard to the monitoring of the effects of discharges on groundwater, it refers to its observations in reply to the third question, concerning the application of Article 8 of the Directive. In addition, with regard to the monitoring of compliance with the conditions laid down in authorizations, the Italian Republic states that under Article 9 of Law No 650 of 24 December 1979 municipalities and mountain local authorities are required to carry out surveillance of public and private discharges and that Article 22 of Law No 319 of 10 May 1976 imposes criminal penalties, including imprisonment, on any person who carries out or maintains a discharge without complying with all the requirements set out in the authorization. The Italian Republic states that the classification of such conduct as an offence automatically entails a duty of surveillance on the part of all the authorities responsible for investigating offences. It adds that in order to ensure effective public surveillance, prevention and punishment of offences harmful to the environment (including, of course, the offence under discussion) a special environmental unit of *carabinieri* has been established (Article 8(4) of Law No 349 of 8 July 1986, Official Gazette of the Italian Republic No 162 of 15 July 1986).

44. According to the Commission, the information provided in reply to the fifth question once again confirms the soundness of its position. The Commission observes that it is clear that there is no national

provision implementing Article 13, on the monitoring of compliance with the conditions laid down in authorizations and surveillance of the effects of discharges on groundwater. The Commission maintains that the provisions cited by the Italian Republic correspond to the approach taken by the Legge Merli (limits of acceptability) but certainly do not correspond to that of the Directive, which is much more precise and more rigorous. With regard to the penalties provided for in Article 22 of Law No 319 of 10 May 1976, the Commission states that these are entirely insufficient to ensure compliance with the provisions of the Directive, in particular if it is borne in mind that that law falls far short of what would be necessary to comply with the Directive. With regard, finally, to the establishment of the Nucleo operativo ecologico dell'Arma dei Carabinieri (Environmental unit of the *carabinieri*), the Commission asks how that can be presented as a measure even partially implementing Article 13 of the Directive, when the unit presumably consists of some 20 men responsible for policing all environmental offences, in the broadest sense.

The sixth question

45. To the sixth question, the Italian Republic replies that the tacit grant of authorizations presents no obstacle to the inventory required by the Directive, because even tacit authorization necessarily has a documentary basis which consists of the application for authorization received by the office responsible for the issuance of the authorization.

46. The Commission states that so-called 'tacit authorizations' cannot in any event serve as a basis for drawing up the inventory required by Article 15 of the Directive (which refers to a very precise type of authorization) and that it is not disputed that in

Italy there is at present no inventory of authorizations, whether express or tacit.

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