(4)

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 26 January 2012 (1)

Case C-301/10

European Commission
v
United Kingdom of Great Britain and Northern Ireland

(Council Directive 91/271/EEC – Collecting systems – Urban waste-water treatment – 'Sufficient performance' and 'best technical knowledge not entailing excessive costs')

1. The present case has arisen from infringement proceedings brought by the Commission against the United Kingdom in respect of Directive 91/271/EEC (2) concerning urban waste water treatment (also 'the Directive'). That infringement action is one of a number of similar actions brought by the Commission against a great many Member States in relation to various sections of the Directive: the present case differs, however, from the majority of those actions in that the dispute turns not on an assessment of factual circumstances but on the interpretation of certain terms which appear in the legislation but for which no precise definition has been given. As we shall see, it is the meaning which falls to be attributed to those terms which determines the Member States' obligations under the Directive and, accordingly, whether the Commission's action is well founded.

I – Legislative context

2. The provisions of Directive 91/271 which are of relevance for the present case are, in particular, Articles 3, 4 and 10 and Annex I.

3. Article 3 introduces the general rule that Member States must ensure that all urban agglomerations in excess of a certain minimum size (3) are provided with collecting systems for urban waste water. In the case of the localities concerned by the present action, the deadline set under the Directive for complying with Article 3 was 31 December 2000.

4. Article 4 lays down – with procedures and time-frames which are largely the same as those provided for under Article 3 – the obligation that 'urban waste water entering collecting systems shall before discharge be subject to secondary treatment or an equivalent treatment'.

5. It is not in dispute that the obligations under both Article 3 and Article 4 are incumbent upon all the localities to which the present action relates.

6. Article 10 describes the features which the treatment plants referred to in Article 4 must possess and is worded as follows:

'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 sets out some additional technical information. Specifically, Section A of Annex I concerns collecting systems and states as follows:

'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. Section A of Annex I is also accompanied by a footnote, which reads 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. The same footnote applies to Section B of the Annex, which sets out a number of mandatory requirements which the treatment plants must satisfy.

II – Facts and pre-litigation procedure

10. The action brought by the Commission concerns four localities: Whitburn, Beckton, Crossness and Mogden.

11. The first (Whitburn) is situated in North-East England. In relation to Whitburn, the Commission alleges an infringement of Article 3 of Directive 91/271 only, concerning the collecting systems.

12. The other three localities are in the London area and form part of the capital's waste-water collection and treatment system. In the case of Beckton and Crossness, the Commission alleges an infringement both of Article 3, concerning collecting systems, and of Articles 4 and 10, concerning the treatment plants. In the case of Mogden, only Articles 4 and 10 are alleged to have been infringed.

13. In the present case, the pre-litigation stage was particularly lengthy and complex, and it is not necessary to describe it in detail. It may broadly be summarised as follows.

14. On 3 April 2003, acting on a complaint which it had received in 2000, and in the wake of unproductive discussions with the British authorities, the Commission sent the United Kingdom an initial letter of formal notice concerning the situation in Whitburn.

15. Subsequently, after receiving complaints concerning the discharge of large quantities of sewage into the River Thames during the period from 2004 to 2005, the Commission contacted the British authorities in that connection and, on 21 March 2005, it sent a letter of formal notice concerning the situation in the London area.

16. Not being satisfied with the replies received from the UK authorities, the Commission delivered a first reasoned opinion on 10 April 2006, alleging, in relation to Whitburn, infringement of Article 3 of Directive 91/271 and Annex I thereto, and, in relation to London, infringement of Articles 3, 4 and 10 of the Directive, as well as of Annex I.

17. On the basis of information subsequently received from the British authorities, the Commission delivered an additional reasoned opinion on 1 December 2008, in which, inter alia, it narrowed the scope of the allegations made concerning the London area, confining them to Beckton, Crossness and Mogden.

18. Further exchanges of correspondence and discussions between the Commission and the UK authorities followed, but no solution was reached. Accordingly, since it considered the United Kingdom's responses to the reasoned opinions to be unsatisfactory, the Commission brought the present action.

III – Procedure before the Court and forms of order sought

19. The application was received at the Court Registry on 16 June 2010. Once the usual exchange of written pleadings had been completed, the parties presented oral argument at the hearing on 10 November 2011.

20. The Commission claims that the Court should:

– declare that, by failing to ensure that appropriate collecting systems, pursuant to Articles 3(1) and (2) of the Directive, and Section A of Annex I thereto, are in place in Whitburn, and in Beckton and Crossness in London, and that appropriate treatment is provided with regard to waste waters from the Beckton, Crossness and Mogden waste water treatment plants in London, pursuant to Articles 4(1), 4(3) and 10 of the Directive, and Section B of Annex I thereto, the United Kingdom has failed to comply with its obligations under those provisions;.

– order the United Kingdom to pay the costs.

21. The United Kingdom contends that the Court should:

– dismiss the action;

– order the Commission to pay the costs.

IV – The failure to fulfil obligations

A – *Introductory remarks*

22. As I pointed out above, and as the parties themselves have emphasised on several occasions, the facts underlying the present case are almost entirely undisputed, save for one or two aspects of secondary importance. Accordingly, the core of the dispute is essentially legal and turns on the need to define a number of key terms in Directive 91/271.

23. The Commission's complaint against the United Kingdom, in relation to all four localities, is that an excessive quantity of waste water has been discharged without first being treated. More specifically, the source of the problem has been the – in the Commission's view, excessive – use of 'combined sewer overflows' or CSOs. These are devices which make it possible, whenever a collecting system becomes overloaded, to discharge water which has not been previously treated directly into the environment (usually into the sea or a river).

24. As their name suggests, CSOs are an essential component of 'combined systems', through which a single collecting system collects both domestic and/or industrial waste water, produced from domestic housing and industrial activities, as well as run-off rain water. It is not hard to imagine that a collecting system of that kind is particularly susceptible to load variations as a result of rainfall: during periods of heavy rainfall, in fact, there is a significant increase in the quantity of water entering the collecting system. In recently constructed collecting systems, rainfall is often collected separately but, in the case of existing combined plants, it is often impossible to make the requisite adjustments because they are complex and prohibitively expensive. Most of the collecting systems to which the present case relates are combined systems.

B – *The interpretation of Directive 91/271*

25. Before turning to address the individual elements of the Commission's allegation of failure to fulfil obligations, it is necessary to consider a number of fundamental aspects of Directive 91/271.

26. It should above all be borne in mind that, as the Court has already had occasion to point out, the objective of the Directive is broad: it is not confined to the protection of aquatic ecosystems, but is designed generally to protect 'man, fauna, flora, soil, water, air and landscape' from adverse effects. In interpreting the text of the directive, account must always be taken, therefore, of its broad objective. (4)

27. In some areas, the Directive requires Member States to satisfy obligations which are defined in numerical terms, compliance with which can be verified relatively easily: an example would be the definition of 'primary treatment' in Article 2(7) or the requirements which Table 1 of Annex I lays down in respect of treatment plants.

28. In other areas, however, the provisions of Directive 91/271 are not framed in terms of precise numerical or quantitative criteria and, as a consequence, lend themselves to differing interpretations, from

among which it is ultimately for the Courts of the European Union to identify the interpretation which is correct. It is easy to see that, in the present case, it is that second type of situation which confronts us. The Court cannot, of course, arbitrarily create numerical criteria which the legislature wished to avoid. But what it can do is to provide definitions which, by shedding as much light as possible on the meaning of the text, give reasonable guidance as to how it should be interpreted.

29. In that connection, I must point out, moreover, that, in the area concerned by the present case, the absence of specific points of reference is especially problematical. Not only does Directive 91/271 contain a number of general and imprecise terms – in contexts, what is more, which are highly technical – but the Commission itself has not drawn up any related guidelines, even unilateral guidelines, to allow a clear understanding of the way in which the rules will be construed by the various Commission departments. To my mind, it would be highly desirable for at least the Commission, if not the legislature, to provide such clarification by drawing up and publishing appropriate guidance on interpretation.

30. That said, I shall now move on to review the principal terms which will have to be interpreted in the present case.

1. 'Sufficient performance' of treatment plants

31. The term 'sufficient performance' is used in Article 10 of Directive 91/271 and refers exclusively to treatment plants and not to collecting systems. It is a term which has been used ever since the very first proposal for a directive, tabled by the Commission in 1989, (5) and which has remained fundamentally unchanged in the final text. More specifically, as we saw above when quoting Article 10, the Directive refers to 'sufficient performance under all local climatic conditions'.

32. To my way of thinking, there is no doubt that Article 10 must be construed as requiring that the treatment plants should, as a rule, be capable of treating *all* of the waste water produced, in normal conditions, in a given locality. This is also confirmed by the case-law of the Court. The Court has found there to be a breach of an obligation in cases in which collection and/or treatment accounted for 80% or 90% of the waste water produced by an agglomeration. (6) Moreover, a rigorous approach of that nature is consistent with the particularly broad objective of the Directive, which I described above. Furthermore, as the provision itself states, seasonal variations must be taken into account when designing treatment plants. In other words, seasonal climatic variations which are predictable cannot justify a failure to treat waste water. The fact that Directive 91/271 refers to 'seasonal' variations implies that these are, in principle, regular and recurring variations which generally occur on an annual basis. Conversely, a load variation that is wholly unusual and unpredictable may, pursuant to Article 10, justify a failure to treat waste water.

33. The considerations set out in the preceding point should not, however, be too rigidly interpreted, to the effect that a failure to treat waste water may be justified only in the case of events which occur, on average, less than once a year (and which, plainly, can no longer be described as being of a 'seasonal' nature). Article 10 must, in fact, be read in conjunction with the footnote in Annex I – which I shall turn to shortly – which acknowledges that Member States may determine a maximum acceptable number of overflows per year.

34. To put it another way, under Article 10 of Directive 91/271, a failure to treat waste water is permissible only *where circumstances obtain which are out of the ordinary*. It is not possible to define that situation more closely because the legislature deliberately avoided providing more specific numerical clarification. What is beyond doubt, however, is that a treatment plant which is designed in such a way as *regularly* to discharge untreated waste water into the environment is incompatible with the Directive.

35. In that context, since there is a clear obligation of principle but no precise quantification of the possible exceptions to that obligation, it is entirely legitimate, in my view, that in monitoring compliance with European Union law in its role as guardian, the Commission should adopt internal guidelines which translate the legislature's requirements into specific and verifiable figures, on the basis of which the Commission can assess, in each specific case, whether it is appropriate to bring infringement proceedings against a State. It goes without saying that, in any event, the final say in the matter lies with the Court of Justice in its capacity as the court with jurisdiction to hear actions for failure to fulfil obligations: before the Court, all the circumstances of each individual situation can and must be taken into consideration.

36. As I mentioned above, however, the problem in the present case resides in the fact that not only has the Commission published no guidance on the subject, but it does not even seem to have established, internally, a well-defined practice in the field. Obviously, that complicates the task both of the Commission and of the Court.

2. 'Unusually heavy rainfall' and 'storm water'

37. These two terms are used by the legislature in Annex I to Directive 91/271 and, in particular, in footnote 1 to that annex. It is appropriate to quote once again an extract from the text of that footnote (emphasis added):

'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*'.

38. First and foremost, it should be observed that both terms are relevant both to collecting systems and to treatment plants. In both cases, the legislature has borne in mind here that, in reality, it may be impossible to put in place perfect systems which are capable of channelling and treating all waste water without exception. Consequently, Member States are required to put in place procedures to limit the damage which inevitably results where not all of the waste water is collected and/or treated.

39. In its observations, the United Kingdom maintained that the situations in which the directive permits waste water to escape collection or treatment are not confined to situations of an exceptional nature: according to the United Kingdom, footnote 1 to Annex I is illustrative in nature and does not prevent Member States from allowing this even where the circumstances are not exceptional. Conversely, according to the Commission, omitting to collect or to treat the water is permissible only on an extraordinary basis, where exceptional circumstances obtain.

40. Even though the text to be interpreted is not crystal clear, I believe that the Commission's position is correct and that, far from lending support to the interpretation argued for by the United Kingdom, footnote 1 to Annex I to the Directive must be construed as meaning that situations where waste water is not collected or not treated can never be regarded as situations which are 'normal' and compatible with the Directive, save in exceptional circumstances.

41. It is true that, in the different language versions, Directive 91/271 refers to the situation where there is 'unusually heavy rainfall' as an example ('during situations *such as*'). By implication, therefore, the Directive accepts that in *other* situations, too, omitting to collect or to treat waste water may be permissible. No indication is given, however, as to the nature of those other situations.

42. Unlike the United Kingdom, I believe that those other situations must, within the possible range of such situations, be of an exceptional nature. It is out of the question to accept that untreated waste water

may be discharged into the environment in 'normal' circumstances. The following arguments, in particular, confirm this.

43. First, footnote 1 must be read in the light of the general objective of the Directive, which is to ensure a high level of environmental protection. It would be absurd to accept that untreated waste water may be discharged into the environment as a matter of course, in the absence of exceptional circumstances, simply because a collecting system or a treatment plant has been designed with insufficient capacity.

44. Secondly, the fact that unusually heavy rainfall is only one of the situations in which derogations from the principle of the collection/treatment of all waste water are permitted does not mean that the other situations in which such derogations may be permitted do not always have to be of an exceptional nature. On the contrary, the need for circumstances to be exceptional is dictated by the context and the objective of the legislation.

45. Thirdly, the provision to be interpreted goes on to state that Member States must put in place measures to limit pollution from 'storm water overflows'. Although the United Kingdom contends that this expression must be construed as referring to any type of overflow, a reading of the directive shows that this was not what the legislature intended. Even though some language versions of that expression are more neutral and refer generally to overflows resulting from rainfall,(7) in most of the other versions this is not the case, and the exceptional nature of the cause of the overflows is made clear. (8) On the assumption, therefore, that the obligation to limit environmental damage from overflows can be deemed to concern only overflows resulting from exceptional events, if the Member States were permitted, as a general rule, to discharge untreated water even in 'normal' circumstances, the position would be that Directive 91/271 requires damage resulting from overflows linked to exceptional circumstances to be limited but not damage resulting from overflows for which there was no such explanation. That position would be an absurdity and would certainly be incompatible with the objective of the Directive. It is clear, therefore, that the thinking behind footnote 1 is that only in exceptional circumstances may waste water be discharged into the environment without first being collected and treated.

46. I would point out, moreover, that, to my knowledge, there is at least one language version which further confirms the line of reasoning that I have set out above: (9) I am referring to the German version, which states that the situations in which it is impossible to collect and treat waste water are '*extreme* situations, such as unusually heavy rainfall'. (10) The addition of the adjective 'extreme' confirms here that, within the possible range of such situations, those which are permissible for the purposes of footnote 1 must, in any event, be of an exceptional nature.

47. That point being settled, two questions remain. First, when can rainfall be considered to be 'unusually heavy'? Secondly, what other types of exceptional situation, apart from weather events, can justify failure to collect or to treat waste water?

48. So far as the first question is concerned, I can only reiterate here the obvious fact that – as I stated above – the Court cannot lay down numerical values which the legislature considered it appropriate to avoid. Similarly, it may be entirely reasonable for the Commission to draw up quantitative guidelines on which to base its own monitoring activity, although the Court, naturally, remains the final arbiter of the reasonableness of such guidelines. In our case, however, the Commission does not appear to have established entirely clear guidelines. On several occasions, however, both during the pre-litigation stage and before the Court, the Commission did indicate that, as a rule, exceeding the limit of 20 overflows a year would be a cause for concern, suggesting a possible failure to fulfil obligations. Despite all its limitations and without prejudice to the need for a case-by-case assessment, a numerical criterion of that

nature may be reasonable and acceptable, as it has been determined by comparing the practices existing in the various Member States.

49. The problem, however, lies in the fact that the Commission itself does not appear to be entirely certain of the role to be attached to the 20-overflow limit. It has never issued official guidance to that effect, and, in addition, even in the present case, the Commission has seemed to vacillate, to the very end, between perceiving that limit as a threshold which should never in principle be exceeded, save in exceptional circumstances, and a much more relaxed approach, according to which it is merely a suggestion with no immediate effect.

50. The result is that, while, on the one hand, the United Kingdom cannot be criticised for having based a large part of its argument on the 20-overflow rule, which is the only rule to have been set out by the Commission with some measure of clarity during the pre-litigation procedure and, in particular, in its additional reasoned opinion, on the other, the Court is required to assess the alleged breach of an obligation directly in the light of Directive 91/271 and its vague indications. The Commission's position is too fluid to sustain the argument that it based its action on a clearly defined internal practice founded on the 20-overflow rule, a rule which, in those circumstances, would itself undergo assessment by the Court.

51. In any event, it is my view that a more precise interpretation of the expression 'unusually heavy rainfall' must, of necessity, reflect a concept which I shall shortly consider, namely that of the 'best technical knowledge not entailing excessive costs' or BTKNEEC. This is, of course, an entirely separate concept which relates not to atmospheric changes but to human achievement. I believe, however, that, in reality, the only reasonable way of interpreting the obligations under the Directive is to carry out a full analysis of the circumstances in each individual case, combining, in a single assessment, verification of the extraordinary nature of the event and the projected cost of constructing collecting systems and treatment plants capable of preventing any overflow even in such extraordinary situations. In other words, I consider that the concept of 'unusually heavy rainfall' is not static but may vary in the light of other factors.

52. In that context, although formally referred to in Annex I solely in relation to collecting systems, the BTKNEEC concept must, in my view, also be taken into account in relation to treatment plants. It actually appears to be the concept best suited to ensuring attainment of the Directive's ambitious objectives without losing sight of the need to take a realistic approach to what is economically and technically feasible.

53. Lastly, as regards the second question – concerning the other possible situations of an exceptional nature, apart from weather events – here, too, it is necessary to stress the appropriateness of allowing sufficient scope for account to be taken of situations which are not just exceptional but also unpredictable. Purely by way of example, the kind of situation that comes to mind would be, for instance, electricity black-outs on a vast scale which would inevitably put the treatment plants out of action, or natural disasters which, albeit not caused by rainfall (earthquakes, for example), could none the less damage the treatment plants or collecting systems or put them temporarily out of action. In such cases, the Directive would indisputably not be infringed. However, it is equally certain that in cases of that nature Member States would be under an obligation to take measures to limit the pollution, in accordance with footnote 1 to Annex I, even though the untreated waste water was not necessarily caused by rainfall. Any other interpretation would run counter to the obligation to ensure the effectiveness of the Directive and to respect its objectives.

3. 'Best technical knowledge not entailing excessive costs' (BTKNEEC)

54. The definition of BTKNEEC is one of the aspects of the present case which the parties have discussed most intensely and at greatest length, both in the written observations and at the hearing. It is a concept which is referred to in Section A of Annex I and, formally speaking, it relates only to collecting systems and not to treatment plants. However, as I have endeavoured to explain in the preceding points, I consider the BTKNEEC concept to be a key element in Directive 91/271, which is of help in construing all of its provisions, including those which relate to the treatment plants. That concept makes it possible to reconcile appropriately the need to ensure the effectiveness of the Directive and the need to refrain from imposing on the Member States obligations which are impossible to meet. Albeit expressed in different terms, the concept of the 'sufficient performance' of the treatment plants, which appears in Article 10, reflects the same thinking and can itself be regarded as an expression of the BTKNEEC clause.

55. According to the United Kingdom's interpretation, the BTKNEEC concept is the keystone for a rule which, generally, permits Member States to exercise broad discretion in determining, essentially on the basis of an assessment of the cost/benefit ratio, the appropriate level of waste water collection and treatment. In the context of that assessment, in particular, the United Kingdom takes the view that it is vital always to take account of the impact of the discharges of untreated water on the receiving waters: in other words, the principles of the Directive would always be respected, and there would be no infringement, in cases where, even though the water collected and/or treated accounted for only a proportion of the waste water produced, the discharges caused no significant environmental harm.

56. According to the Commission's interpretation, on the other hand, the sole effect in practice of the BTKNEEC concept is to leave the Member States freedom to choose between the possible systems of achieving an objective which, save in exceptional cases, is immutable: that is to say, the objective of ensuring that 100% of the waste water produced is collected and treated. To put it another way, according to the Commission, the provision simply means that Member States may opt for the least costly of the technically feasible possibilities for securing the necessary result.

57. It seems to me, on closer scrutiny, that the interpretations both of the United Kingdom and of the Commission must be rejected. Different as they are, both are in fact characterised by an extreme reading of the provision at issue. On the one hand, were the approach advocated by the United Kingdom to be followed, the end result would be to accord the Member States a margin of discretion so broad as to deprive – or almost deprive – Directive 91/271 as a whole of effectiveness, particularly in so far as that directive requires Member States to provide all agglomerations above a certain minimum size with collecting systems and treatment plants. On the other hand, the Commission's interpretation, although probably closer to the spirit of the provision as envisaged by the legislature, risks depriving of effectiveness, if not the Directive as a whole, then certainly the BTKNEEC clause. (11) It is not in fact reasonable to maintain that, by explicitly stating the need to employ the best techniques which do not involve excessive costs, the legislature merely accorded the Member States freedom to opt for the least costly of the possible technical systems for achieving one and the same end result. Rather, it is clear that, through that clause, the legislature sought to attenuate any 'excessive' effects of too rigid an application of the Directive, and anticipated the possibility that, in certain cases, some adverse effects on the environment would have to be accepted.

58. In my view, the proper interpretation of the BTKNEEC clause lies midway between the two extreme positions which I have just described.

59. In particular, the BTKNEEC clause must be regarded as a sort of 'safety valve' which makes it possible to avoid imposing on the Member States unrealistic obligations or completely disproportionate construction costs. In that connection, however, a number of points must be made very clear.

60. First, the clause constitutes a mechanism which operates by way of exception and which may not be employed in order to undermine the principle, confirmed by the Court's case-law itself, that, as a rule, the collection and treatment processes must cover all waste water. Its exceptional nature must be stressed all the more in the light of the Court's case-law, according to which, specifically with reference to Directive 91/271, the cost of the necessary adjustment work is of itself irrelevant. (12)

61. Secondly, and obviously, the application of the clause cannot, in the abstract, be linked to the recurrence of certain predetermined circumstances. It is not possible, for example, to determine *a priori* a cost level in excess of which the obligation to collect and treat 100% of waste water automatically ceases to apply. The BTKNEEC clause in fact requires, always and in any event, a comprehensive assessment of all the circumstances of each specific case and must necessarily be adjusted to take account of those circumstances.

62. Thirdly, it is also possible to take into account in that context – as has been strongly advocated by the United Kingdom in its written observations and at the hearing – the environmental impact of the untreated waste water. The disproportionate cost of some works, hence the lack of any need to undertake those works in practice, can be more reliably assessed by taking into account also the environmental consequences of leaving those works unaccomplished. It is clear that not carrying out some works, and tolerating in consequence some discharges of untreated water into the environment, will be all the more acceptable the lesser the potential damage which the untreated water could cause.

63. However, the fact that the criterion of the adverse effects on the environment may be taken into consideration does not mean, as the United Kingdom maintains, that it is the sole criterion by reference to which compliance with Directive 91/271 falls to be assessed. As was correctly pointed out by the Commission at the hearing, the Directive does not set out acceptable pollution thresholds: it lays down the fundamental obligation to provide urban agglomerations with collecting systems and treatment plants. In the recent judgments to which I have referred above, (13) once the Court had established that the collecting systems for some agglomerations did not provide 100% coverage, it did not go on to consider whether that produced adverse effects on the environment but, rather, automatically found that the Member States concerned had committed an infringement.

64. Consequently, it is not possible to uphold the United Kingdom's argument according to which, by the deadlines fixed by the Directive for putting in place collecting systems and treatment plants, all that mattered was that the urban agglomerations should in fact possess such systems, regardless of the level of performance that those systems were capable of achieving. Taking that line of argument to its extreme, to install a system capable of treating, let us say, just 50% of a town's waste water would be sufficient to comply with the Directive, and improving the system so as to treat 100% of the waste water would become, instead of a means of meeting the legislative obligation to comply with the Directive by the specified deadlines, merely a means of improving the performance of the system, for which no deadline would be fixed and, in effect, no monitoring permissible. It is clear that a similar interpretation is inconsistent both with the intentions of the legislature and with the related case-law of the Court.

65. Moreover, in order to preserve the effectiveness of Directive 91/271, it is vital that, in cases in which it is impossible or particularly difficult to collect or to treat 100% of the waste water – save, of course, in the case of exceptional events, in relation to which the Commission too accepts the possibility of non-treatment – it is for the Member State concerned to demonstrate that the BTKNEEC clause applies. In situations of that nature, in fact, there is clearly an imbalance between the information available to the Member State and the information available to the Commission: the Commission does not have independent instruments for evaluating the specific situation and must rely on the information with which it is provided by, in particular, the Member State concerned. That position is consistent, moreover, with the Court's case-law to the effect that, although the burden of proof in infringement proceedings

falls on the Commission, once the Commission has provided basic evidence of the facts underlying its action, it is for the Member State, on the basis of the fullest information available to it, to furnish detailed evidence that there is in fact no infringement. (14)

4. Summary

66. To summarise the considerations set out so far as regards the general scope of the obligations laid down in Directive 91/271, it must be pointed out, therefore, that the Directive requires the Member States, in general, to provide urban agglomerations with collecting systems and treatment plants which are capable, save in exceptional circumstances, of ensuring the collection and treatment of *all* the waste water generated. The obligation to collect and treat all waste water does not extend to cases in which this is technically impossible or which involve costs which are wholly disproportionate, also in the light of the limited nature of any adverse effects on the environment.

67. Accordingly, what I propose is a two-stage verification process, in relation both to collecting systems and to treatment plants. During the first stage, it must be established whether the discharges can be regarded as an exceptional event, or, more accurately, as an element in the operation of the collecting system or treatment plant which is not 'normal'. During the second stage, if the first stage has revealed that the events resulting in the discharge of untreated water into the environment were not exceptional, it must be established whether the BTKNEEC clause applies. During this stage, the burden of proof – which, during the first stage, is shared in the usual way between the Commission and the Member State – falls entirely upon the latter. It is for the Member State to prove that securing an improved level of collection or treatment of the water would be technologically impossible, or would involve costs that are wholly disproportionate as compared with the resultant benefits for the environment.

68. Having clarified, by way of a preliminary matter, the obligations incumbent on the Member States, we can now move on to consider the individual complaints made by the Commission against the United Kingdom.

C – *The situation at Whitburn*

1. The facts and the positions of the parties

69. The failure to fulfil obligations alleged by the Commission in relation to Whitburn concerns, as we have seen, only Article 3 of Directive 91/271, concerning collection systems. There are no allegations concerning the lack or inadequacy of treatment plants.

70. Whitburn is part of the agglomeration of Sunderland, which is served by a single primary collecting system of the combined type, into which both urban waste water and rainfall flows. In normal circumstances, the water from Whitburn's collecting systems is transferred, via a number of pumping stations (Seaburn, Roker and, subsequently, St Peters) to the Hendon treatment plant which treats the waste water from the whole of the agglomeration.

71. When the amount of water collected in the Whitburn collecting system exceeds 4.5 times the dry weather flow, (15) the excess waste water is diverted into a storm sewage interceptor tunnel which has an operational capacity of 7 000 m^3. When the amount of water present in the collecting systems subsides, the water stored in the tunnel is returned to the collecting system and pumped to the Hendon plant for final treatment. If, however, the tunnel's operational capacity is exceeded, the excess water is discharged directly into the sea, undergoing only mechanical filtering through a 6 mm mesh screen. That discharge takes place through a sea outfall that is 1.2 km in length.

72. During the years prior to the date set in the reasoned opinion (1 February 2009), the discharges of untreated water at Whitburn were as set out in the table below. The figures were provided by the Commission but are not disputed by the United Kingdom.

Year	Number of discharges	Volume discharged (m^3)
2005	27 (16)	542 070
2006	25	248 130
2007	28	478 620
2008	47	732 150

73. According to the Commission, those figures are indicative of an excessive number of discharges of untreated water into the environment, incompatible with the obligations incumbent on the Member States under the Directive.

74. In order to substantiate its position, the Commission relies extensively on a report submitted on 25 February 2002 by an independent inspector appointed by the UK Secretary of State for the Environment ('the Inspector'), in response to an application, from the company which manages the Whitburn system, for a number of variations to the existing consent. The report contains a number of highly critical comments on the Whitburn collecting system, which it finds to be inadequate sufficiently to limit the discharges of untreated water into the environment. (17) According to the Inspector, the inadequacy of the Whitburn collecting system resulted in frequent discharges of untreated water, including during periods of moderate rainfall and during periods of dry weather. In the years following the Inspector's report, there had been no physical alteration to the Whitburn collecting system. The only change concerned the methods of managing the water interceptor tunnel in the event of overload: as a result of the new procedures, discharge events had become less frequent, but the amount of untreated water discharged into the environment remained essentially the same between 2001 and 2008, varying between a maximum of 732 150 m^3 (in 2008) and a minimum of 248 130 m^3 (in 2006).

75. The Commission points out that such quantities of untreated waste water correspond to the quantities produced by an agglomeration with a population varying in size between in excess of 3 700 (by reference to the quantities for 2006) and in excess of 11 000 (by reference to the quantities for 2008), and in any case above the 2 000 inhabitants equivalent in excess of which Directive 91/271 requires an agglomeration to be equipped with collecting systems and treatment plants. In other words, it is as if there existed a whole agglomeration of such a size which lacked any waste-water collection or treatment system.

76. According to the Commission, the infringement of the Directive is all the more serious because of the proximity to the long sea outfall of a number of beaches on which debris originating, in all probability, from the Whitburn collecting system, has frequently been reported.

77. The United Kingdom does not dispute most of the facts set out by the Commission, save as regards the debris washed up on the beaches. According to the United Kingdom, that debris could not in fact have originated from the Whitburn system, since the long sea outfall used for the discharge is fitted with filter screens; the debris – the presence of which has decreased, moreover, in recent years – must therefore have come from a different source. For the rest, however, the facts concerning Whitburn are common ground, and the defence of the United Kingdom relies, in essence, on the interpretation of the Directive.

78. More specifically, the United Kingdom stresses the fact that the quality of the waters into which the discharges are made has not suffered any adverse effect as a result of the discharges themselves, a fact attested to also by the fact that the waters along the local beaches have always complied with the standards laid down by European Union law for bathing waters. (18)

79. The United Kingdom then refers to a study, carried out in 2010 to review the situation at Whitburn in the light of the Commission's reasoned opinion and additional reasoned opinion. In particular, the study assessed the possible consequences of reducing the number of discharges to below the 20 per annum threshold, as the Commission appeared to require, especially in the additional reasoned opinion. The study found that, in order to maintain the number of discharges at below 20 per annum, the only possible solution would be to upgrade the interceptor tunnel whose capacity would have to be increased to 10 800 m^3. A change of that nature would result, however, in a minimum improvement – equivalent to approximately 0.31% – in the quality of the receiving waters, calculated on the basis of the parameters normally employed to assess bathing waters. For those reasons, the study did not recommend any change to the Whitburn collecting system.

2. Assessment

80. In order to determine whether the United Kingdom has failed to fulfil an obligation in relation to the situation at Whitburn, I shall base my analysis on the two-stage test which I proposed above.

81. As regards, to begin with, the non-exceptional nature of the discharges of untreated water, the Commission has, in my view, provided sufficient evidence of this. As described above and as, moreover, remains undisputed by the United Kingdom, despite an improvement in the situation in recent years, the Whitburn collecting system continues regularly to discharge untreated water into the environment. As I have already pointed out, it is not possible to specify the number of discharges which marks the absolute boundary between exceptional and recurring events: the Commission, as we have seen, frequently refers to the figure of 20 discharges; furthermore, a report commissioned by the UK Government on the situation in London (19) concluded that the reasonable figure was an even lower limit, equivalent to 12 discharges over the course of a year. In any event, regardless of the model adopted, on expiry of the time-limit laid down in the reasoned opinion, the situation at Whitburn was without doubt characterised by discharges the number and intensity of which are indicative of an event which is recurring and certainly not occasional. As shown in the table reproduced in point 72, between 2006 and 2008, there were between 25 and 27 discharges every year. A figure of that nature certainly does not suggest an exceptional event and not even the United Kingdom has argued that the discharges at Whitburn are of an exceptional nature.

82. However, it remains to be seen whether, in the face of this evidence provided by the Commission, the United Kingdom has succeeded in proving that the BTKNEEC clause applies in this case: whether, in other words, reducing the number of discharges requires technologically impossible solutions or involves costs that are wholly disproportionate as compared with the benefits.

83. In my view, the key document here is the study carried out in 2010, which I mentioned in point 79 above. In the light of that study, it is above all clear that substantially reducing the discharges of untreated water at Whitburn does not present particular problems in terms of the technology; it would fundamentally require enlargement of the existing interceptor tunnel, and at no point has the United Kingdom indicated that a solution of that nature would be impracticable.

84. At the same time, however, the study calculated the extent to which the quality of the receiving waters might be improved as a result of enlarging the tunnel and, in consequence, reducing the discharges. The point of reference used was the ceiling of 20 discharges, thus adopting the guidance

provided by the Commission during the pre-litigation procedure. In that context, the study posited an improvement of only 0.3% in water quality and accordingly concluded that the cost/benefit ratio did not justify taking any further measures at Whitburn.

85. In that connection, it should also be recalled that, according to the United Kingdom, which was not challenged on this point by the Commission, the quality of the sea waters off Whitburn is quite high and always meets the criteria laid down by European Union law for bathing waters. Although the bathing water quality of the receiving waters is not directly relevant for the purposes of assessing compliance with Directive 91/271, it may – as I mentioned above – be taken into consideration, in the context of a comprehensive assessment, with a view to the possible application of the BTKNEEC clause. It therefore seems reasonable that, in a situation of that nature, the national authorities should have decided to refrain from requiring costly alteration work which would only have resulted in improvements to the environmental situation which were entirely marginal.

86. In the light of those observations, I find the arguments of the United Kingdom to be sound and it is my view that, in the present case, the Commission has failed to establish the existence of a failure to fulfil an obligation in relation to the Whitburn collecting system. Although the discharges of untreated water in that area have occurred on a regular basis, the United Kingdom has demonstrated that any work to upgrade the collecting system, carried out to comply with the guidelines set out by the Commission during the pre-litigation procedure, would have resulted in minimum benefits, insufficient to justify carrying out the work. The first part of the Commission's action cannot therefore succeed.