OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 25 April 2002 [1]

Introduction

1. In this case, brought by the Commission under Article 226 EC, the Court of Justice is called upon to determine whether Ireland has failed to fulfil its obligations under Articles 7(6), 18 and 19 of Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (referred to below as 'Directive 80/778' or 'the Directive'). [2]

Legislative background

The Community rules on the quality of water intended for human consumption

2. As stated in Article 1 thereof, the Directive lays down the quality requirements for water intended for human consumption. Article 2 then defines 'water intended for human consumption' as:

> 'all water used for that purpose, either in its original state or after treatment, regardless of origin:
>
> — whether supplied for consumption,
>
> or
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> — whether:
>
> — used in a food production undertaking for the manufacture, processing, preservation or marketing of products or substances intended for human consumption

1 — Original language: Italian.

2 — OJ 1980 L 229, p. 11.

and

— affecting the wholesomeness of the foodstuff in its finished form.'

3. In consideration of the importance for public health of water intended for human consumption, Article 7 of the Directive fixes the quality standards which such water must satisfy, requiring Member States to ensure compliance with the values relating to organoleptic, physico-chemical and microbiological quality, in accordance with the requirements set out in a number of tables comprising Annex I to the Directive, to which Article 7 refers. Of these, Table E indicates the microbiological parameters, which include in particular No 57 (total coliform bacteria) and No 58 (faecal coliform bacteria). For such classes of bacteria, the Directive imposes a maximum admissible concentration of zero, save for a certain margin of tolerance in relation to total coliforms; where a sufficient number of samples are examined, it is sufficient for 95% of them to be uncontaminated. For faecal coliforms, by contrast, the absence must be total in 100% of the samples taken.

4. Under Article 7(3) and (6) and Article 16 of the Directive, the parameters in Table E represent minimum standards for harmonisation; in respect of the pollutants referred to therein, Member States are thus required to lay down in their own legislation limits at least as strict as those contained in that table, with liberty to impose concentration limits which are even lower.

5. For the purpose of ensuring compliance with the quality parameters of water intended for human consumption set out in Annex I, Article 12 requires Member States to take all necessary steps to ensure regular monitoring of the quality of such water. Such monitoring is to take place at the point where it is made available to the user.

6. Article 12(4) provides that 'for such monitoring, Member States shall conform with Annex II'. That Annex contains a Table B, concerning the minimum frequency of standard analyses, which indicates that no monitoring is required where the volume of water produced or distributed is less than 100 cubic metres per day, or where the population concerned is less than 500 persons.

7. Article 9 of the Directive allows States to make provision for derogations from the harmonised parameters in order to take account of 'situations arising from the nature and structure of the ground in the area from which the supply in question emanates' or 'exceptional meteorological conditions'. However, the derogations may

not relate to toxic or microbiological factors or constitute a public health hazard. That limitation is not repeated in Article 10, which allows the possibility of temporary derogation 'in the event of emergencies', provided the exceeding of the values thereby permitted 'does not constitute an unacceptable risk to public health and provided that the supply of water for human consumption cannot be maintained in any other way'.

8. Under Article 18, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive and its Annexes within two years following its notification. They are also to communicate to the Commission within the same period the texts of the provisions which they adopt in the field governed by the Directive. The Directive having been notified to Ireland on 18 July 1980, the period for compliance expired on 18 July 1982.

9. Under Article 19, Member States have a longer period, of five years from notification of the Directive, to ensure that the harmonised national parameters actually comply. For Ireland, therefore, that longer period expired on 18 July 1985.

10. Directive 80/778 was subsequently replaced by Council Directive 98/83/EC of 3 November 1998 ('Directive 98/83') on the quality of water intended for human consumption. [3]

11. Article 3(2)(b) of that directive allows Member States the possibility of exempting from its provisions 'water intended for human consumption from an individual supply providing less than 10 m^3 a day as an average or serving fewer than 50 persons, unless the water is supplied as part of a commercial or public activity'.

12. The new directive has also partially modified the relevant microbiological parameters, since there is no longer a rigidly pre-set limit laid down for total coliform bacteria, but rather, as Article 8(6) explains, a simple guide value, above which Member States must assess whether there is a risk for human health and take remedial action to restore the quality of the water 'where that is necessary to protect human health'.

13. Directive 98/83 entered into force on 25 December 1998. By Article 17 thereof,

3 — OJ 1998 L 330, p. 32.

Member States were required to implement the directive by 25 December 2000. Under Article 14, however, the quality of water intended for human consumption must comply with the provisions of the directive by 25 December 2003, given that Article 16 provides for the repeal of Directive 80/778 on that date.

The Irish provisions

14. For the purpose of implementing Directive 80/778, Ireland adopted the 'European Communities (Quality of Water Intended for Human Consumption) Regulations 1988' ('the 1988 Regulations').

15. In particular, Article 4 of the 1988 Regulations gives health authorities the task of ensuring that water intended for human consumption satisfies the requirements determined on the basis of the Community parameters. Under Article 7, those health authorities have the particular task of monitoring the quality of the water at the point where it is made available to users.

16. Article 8 indicates the steps which the health authorities must take where the parameters in the regulations are not complied with. In particular it provides that:

'The health authority shall: (a) take all reasonable steps to warn users of the water supply where there is an unacceptable risk to public health, (b) in the case of a public water supply, prepare an action programme for the improvement of the quality of the water as soon as practicable, (c) in the case of a private water supply, notify the person or persons responsible for the supply as soon as practicable of the measures which should be taken for the improvement of the quality of the water.'

17. Finally, it should be noted that, since 1989, Ireland has published — through the Environmental Protection Agency ('EPA') — an annual report on the quality of water intended for human consumption ('Official Drinking Water Report', referred to hereafter as 'the annual EPA Report').

Facts

18. In order better to understand the subject-matter of this case, it should be recalled at the outset that, in addition to the public

water mains, Ireland has a significant number of private distribution systems, known as *Group Water Schemes*, organised in the form of associations on the initiative of persons interested in water supply; in certain cases, public institutions or bodies are involved on an equal basis. At the same time, the public authorities carry out important external functions, ensuring the necessary controls over the functioning of the schemes, and intervening in appropriate cases to finance investments in them. Such distribution networks serve anything between two and around one thousand dwellings (the average being around 28) and are widespread in Ireland; they have thus made it possible to deal with the inevitable difficulties involved in supplying drinking water in remote and sparsely populated rural areas. The water distributed by the Group Water Schemes is drawn from private sources or directly from the public mains; in the latter case the Group Scheme is limited to organising and managing the distribution network. In Ireland at present, the Group Water Schemes supply water drawn from the public mains to about 90 000 dwellings, while about 55 000 dwellings receive water from private sources via such networks.

19. Turning now to the present case, I note that this arose following a number of complaints received by the Commission through cases of drinking water contamination. Having asked the Irish authorities for a number of clarifications in that regard, the Commission sent Ireland a letter of formal notice on 30 October 1998, citing non-compliance with microbiological parameters 57 and 58 of Annex I to Directive 80/778 in relation to a number of public water mains and Group Water Schemes, and the non-binding nature of the national legislation implementing that directive, in the part concerning Group Water Schemes.

20. On 16 March 1999, the Irish authorities, while disputing that the Directive applied to Group Water Schemes, nevertheless gave notification of their intention to adopt a series of measures aimed at improving the quality of all Irish drinking water. On 14 July 1999, regarding Ireland's observations as inadequate, the Commission sent Ireland a reasoned opinion, fixing a period of two months within which to terminate the infringement.

21. By letter of 11 November 1999, the Irish authorities pointed to the impossibility of achieving a decisive improvement in the quality of water distributed via the Group Water Schemes within a short space of time, while at the same time assuring the Commission of its own commitment to bringing all water intended for human consumption into compliance with the parameters laid down by the Directive. In that letter, and also in a subsequent letter of 18 January 2000 and a press release by the Irish Minister for the Environment of 27 March 2000, the authorities supplied information concerning measures already undertaken for that purpose.

22. Not satisfied by the Irish reply, the Commission brought the present action on 21 August 2000. During these proceedings, however, the Commission has limited its complaints, in the part concerning Group Water Schemes, to those networks supplying water 'as part of a commercial or public activity' and to Group Water Schemes supplying on average more than 10 m^3 or serving more than 50 persons.

Legal analysis

Introduction

23. The Commission makes three complaints. First, it argues that Ireland has not ensured compliance with the parameters of the Directive concerning total and faecal coliforms in relation to the public water mains network and certain parts of that network in particular. It makes a similar complaint, secondly, in relation to certain Group Water Schemes. Finally, the Commission challenges the non-binding nature of the national legislation, in the part in which it applies to Group Water Schemes.

The alleged infringement of the microbiological parameters in public water mains

24. The Commission first asks the Court to declare that, by not ensuring in relation to certain public distribution networks for water that microbiological parameters 57 (total coliforms) and 58 (faecal coliforms), laid down in Annex I to Directive 80/778, were complied with, Ireland has infringed its obligations under the Treaty and under Articles 7(6) and 19 of Directive 80/778.

25. In particular, referring to the 1998 EPA Report on the quality of Irish water, the Commission objects that, in the period from 1992 to 1998, microbiological contamination of drinking water was recorded in several public water mains, due to the presence of total and faecal coliforms. In support of its own arguments, the Commission has supplied a summary table, based on the annual EPA Reports themselves, showing the figures for the presence of total and faecal coliforms in various Irish water mains during the period under consideration. The Commission adds that that table indicates for each water main only the most significant excess values recorded in a year, so that it is only a rough approximation of the problem of bacteriological contamination, which is in reality even more serious.

26. Ireland acknowledges the validity of those figures, and moreover could not in my view have done otherwise, given that it itself drew up and published the figures, even though it was not required to do so by any Community provisions and is thus one of the few (three) Member States which regularly prepares a full, official report on the state of water used for human consumption in the country. The Government merely raises a number of objections, which are not however decisive, to the interpretation which the Commission gives to the figures and the deductions which it draws from them. Effectively, Ireland is above all insisting that the directive does not impose an obligation as to the result to be achieved, but merely an obligation of diligence, to be assessed in the light of the principle of reasonableness and proportionality. In that connection, however, it argues that it devoted huge sums precisely to the financing of projects intended to improve the quality of drinking water, and that it launched a series of initiatives to provide incentives towards virtuous conduct on the part of persons whose agricultural activities might constitute a source of pollution.

27. It seems to me, however, that the Irish Government's assessment of the obligations imposed by the Directive on the point in question conflicts first and foremost with the wording of the Directive itself, and in particular with the combined provisions of Article 7(3) and (6) on the one hand and Annex I thereto on the other. The first two provisions require Member States to adopt the necessary provisions in order to ensure that water intended for human consumption should at least comply with the requirements specified in Annex I. In turn, the latter provides, as indicated in paragraph 3 above, that the concentration of both classes of coliforms, in the control samples taken, should be zero. Whereas for total coliforms that zero value is qualified by the provision of a tolerance threshold, whereby evidence of microbiological pollution in a number of samples less than 5% of the total does not constitute infringement of the parameter in the Directive, there is no provision of that kind for the parameter of faecal coliforms, given the seriousness of the pollution which they indicate. In respect of those coliforms, therefore, Member States are required to ensure that 100% of the water samples are absolutely pure.

28. I should also note in this respect that the Court of Justice has already had occasion to state, in relation to this very directive, that 'the principle of proportionality [may not] be relied on to justify exceeding the maximum admissible concentrations set out in Annex I to the directive', since 'such an interpretation of the directive would be contrary to its objective, namely implementation in the Community of a uniform minimum health standard for water intended for human consumption'. [4]

4 — Case C-237/90 *Commission* v *Germany* [1992] ECR I-5973, paragraph 16.

29. As for the initiatives which the Irish Government states that it has put into operation to promote the improvement of the quality of drinking water in rural areas, I would merely observe that, although appreciable, these initiatives are not capable of satisfying the obligation as to result which arises from the Directive, and nor can they be used in justification for its infringement. As the Court of Justice has already held, a Member State cannot adduce in its defence the fact that it continues to make every effort to implement the obligations arising under the Community directive, since an action under Article 226 EC requires only an objective finding of a failure by a Member State to fulfil its obligations and not proof of any inertia or opposition on its part. [5]

30. I therefore take the view that the Commission's action should be upheld in so far as it seeks a declaration that, by failing to ensure in relation to certain public water distribution networks that microbiological parameters 57 (total coliforms) and 58 (faecal coliforms) laid down in Annex I to Directive 80/778 were complied with, Ireland infringed its obligations under Articles 7(6) and 19 of that directive and under the Treaty.

The alleged infringement of the microbiological parameters in the Group Water Schemes

31. The Commission, referring to the figures contained in the EPA Reports and the correspondence concerning a particular Group Water Scheme, further claims that the maximum concentration parameters for total coliforms and faecal coliforms are not complied with in many Group Water Schemes either. Ireland thus infringed the obligations arising under Articles 7(6) and 19 of the Directive in relation to that form of supply also. As I have said, however, the Commission has limited its claim in these proceedings to those Group Water Schemes the water of which is 'supplied as part of a commercial or public activity' and to those which provide more than 10 m^3 a day on average or serve more than 50 persons, considering that it thereby complies with the *de minimis* clause laid down by Directive 98/83.

32. The Commission argues first that such private distribution networks fall fully within the scope of the Directive. It is true that in *Commission* v *Belgium*, [6] the Court excluded from the scope of the latter water coming from private sources, but it did so only in relation to wells and other sources for private use where the water is drawn and used directly without passing through a network. Group Water Schemes, by contrast, involve bodies constituted by

5 — Case C-215/98 *Commission* v *Greece* [1999] ECR I-4913, paragraph 15.

6 — Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821.

means of complex legal instruments (such as trusts or companies with legal personality) which are thus clearly distinguishable from the water users, and which manage proper water distribution networks in accordance with economic and legal models appropriate to a commercial undertaking. Moreover, many Group Water Schemes do not even use private sources but take water supplies from the public mains for subsequent redistribution to consumers, also including public institutions and bodies which carry on commercial activities. In reality, the Commission concludes, Group Water Schemes are established and managed with the approval and under the control of the public authorities, which on top of everything else finance them, because they can thereby fill the gaps which exist in the public system of water distribution.

33. In Ireland's submission, by contrast, the Directive does not apply to Group Water Schemes. The Government argues that, on a correct reading of the judgment of the Court of Justice in *Commission* v *Belgium* cited above, all water from private networks is excluded from the scope of the Directive.

34. Then, specifically concerning the nature of Group Water Schemes, Ireland challenges the comparison between them and normal commercial undertakings for the distribution of water, inasmuch as the latter supply water exclusively to their own members and not to consumers as a whole, those associated with the undertaking exercise effective control over the trusts or legal persons which manage the networks, and it is the general meeting of members which fixes the annual contribution for the management and maintenance of the network. Moreover, Ireland maintains, it cannot be said that, when supplying water to less than 50 persons, the Group Water Schemes operate 'as part of a commercial or public activity'; they therefore fall within the exemption laid down by Article 3(2) of Directive 98/83, already assimilated into Irish legislation. In reality, the commercial supply of water by Group Water Schemes is a random hypothesis; even if it were shown to be true, however, other provisions of Irish law — in this case those requiring persons managing premises open to the public to take further action where necessary to disinfect the water so as to ensure its suitability for human consumption — guarantee compliance with the standards laid down by the Directive.

Assessment

35. In relation to this complaint also, I note at the outset that the Irish Government does not deny the veracity of the figures adduced by the Commission, so as to deny the pollution of the water used in a number of Group Water Schemes. The problem which it raises in this regard is a different

one, and concerns the application (or, rather, the non-application) of Directive 80/778 to the supply of water by Group Water Schemes. It is therefore appropriate to stop at this point to consider, in particular, whether the particular nature and reduced size of such networks can indeed have an impact on the question just raised.

36. I note in that respect that, unlike Directive 98/83 which followed it, Directive 80/778 defines its material scope only in a very vague manner. That inevitably gave rise to difficulties of interpretation, which brought about an intervention by the Court of Justice in *Commission* v *Belgium*, cited above. On that occasion, the Court had occasion to explain that the directive in question '*applies only to water supplied for human consumption and to water used in foodstuffs by a food production undertaking and that water from private sources of supply is excluded from its scope*'. [7]

37. In accordance with that judgment, the subsequent Directive 98/83 therefore fixed a minimum threshold below which Member States are authorised not to demand the requirements laid down by the directive, providing, as already mentioned, that Member States may exempt 'water intended for human consumption from an individual supply providing less than 10 m^3 a day as an average or serving fewer than 50 persons', provided the water in question is for private use and not for commercial purposes or activities. [8]

38. It therefore needs to be established whether or not, above that threshold, the water used by the Group Water Schemes can be referred to as being for private use. As has been seen, Ireland bases its positive answer to that question on the private ownership of the sources and on the structure of Group Water Schemes as associations or cooperatives. It argues that, on that evidence, what exists here is a private use of water within the small community interested from time to time and not a supply for consumption, there being no real distinction between supplier and those supplied.

39. It seems to me, however, that the Commission is right to regard the ownership structure as irrelevant, once it is established that one is dealing here with real distribution networks, that is to say systems having a distribution structure, even if on a reduced scale, which allows water produced from one or more sources to be supplied to a plurality of users. That

7 — *Commission* v *Belgium*, paragraph 17; emphasis added.

8 — Article 3(2)(b) of Directive 98/83.

such is the case, rather than this being a case of merely private use within the meaning of the judgment in *Commission* v *Belgium*, is, as the Commission points out, further evident from the fact that the supplier, namely the Scheme, is substantially different from the persons using the service, which is further confirmed by the clearly contractual nature of the relationship between the former and the latter concerning the supply of water.

40. In any case, even if the Court should hold that, by reason of their nature and restricted size, the Group Water Schemes should *prima facie* be excluded from the scope of the Directive, that conclusion cannot in my view apply to those Schemes which, far from constituting an independent network, are in reality a mere extension of the normal public network of water mains, from which they 'acquire' the water which they distribute to their own users. It seems obvious to me that any exclusion from the scope of the Directive based on the size of the networks can relate only to independent physico-functional entities, composed of springs or other reserves of water to which distribution infrastructure is attached. In cases of functional connection between numerous interdependent and interconnected networks, such an entity cannot be represented by each interconnected subsection regarded on its own but, precisely, by all those sub-entities as a whole: and thus, in the case of Ireland, either by the public water mains or the Group Water Scheme connected to it. Nor can it be pleaded against that that the various sub-entities in that single network may be managed by different persons, as otherwise it would be easy to avoid the application of the Directive by simply attributing to various persons, formally independent of each other, the responsibility for various sections of one single water mains network.

41. In conclusion, it seems to me that the Commission's action, in so far as it refers to repeated infringements of microbiological parameters 57 and 58 in a number of Group Water Schemes (other than those supplying on average less than 10 m^3 a day or serving less than 50 persons, save where the water is supplied in the context of a commercial or public activity) identified in the official reports on water intended for human consumption and in correspondence concerning the water situation in the Ballycroy area, should be upheld.

The complaint concerning the non-binding nature of the implementing national legislation

42. The Commission further asks the Court to declare that, by the 1988 Regulations,

Ireland has, in the part referring to Group Water Schemes, failed to respect the binding nature of Annex I to the Directive and has therefore failed to fulfil its obligations under Articles 7(6), 18 and 19 of the Directive. In the Commission's view, those Regulations do not provide in a clear and precise manner that compliance with the parameters of the Directive must be guaranteed by all the persons concerned, and nor does it impose on such persons an obligation to that effect. In particular, Article 8 does no more than provide that the health authority is to notify the persons responsible for distribution of the measures to be taken and order them to improve the quality of the water. Similarly inadequate, the Commission argues, are the penalties introduced by the amendments to the Irish legislation of 1999, which were in any event adopted after the expiry of the period specified in the reasoned opinion and are therefore irrelevant in these proceedings.

43. For its part, after reaffirming that Group Water Schemes do not all within the scope of the Directive, Ireland argues that, where there is failure to comply with the Community parameters, the health authorities referred to in the Local Government (Sanitary Services) Act 1962 may acquire the water networks. It is indeed provided that those authorities must acquire the water installations of private water mains if a request to that effect is made by the majority of the owners of the installations and the installations themselves are in a good state of functioning and repair. In fact, many of such private networks are directly managed by the health authorities with territorial jurisdiction.

44. It seems obvious to me that Ireland's arguments are not sufficient to dispel the Commission's concerns. The mere possibility that management of the private networks might pass to the health authorities, if the majority of users so requests, cannot constitute an adequate sanction to ensure compliance with the Directive. It is sufficient to note in that respect that the decision to intervene is a matter not for the health authorities but for the representative body of the Group Water Scheme; in other words, it is the body controlled which requests the intervention of the controller!

45. Concerning, finally, the amendments to the Irish legislation, and irrespective of their merits, I think it is not even necessary to mention that, in accordance with settled case-law of the Court of Justice, after the expiry of the period laid down by the reasoned opinion, such amendments are

entirely irrelevant for the purposes of the judgment under Article 226 EC. [9]

46. In conclusion, I take the view that the Commission's action should be upheld in relation to this complaint also.

The appropriateness of the Commission's action

47. A remark, finally, on the objections brought, this time by Ireland, concerning the appropriateness of the present infringement proceedings, objections based on the fact that, in the final analysis, the standards laid down by the Directive were substantially complied with; on the argument that the Commission's goal of 100% compliance is unrealistic; on the fact that the procedure was initiated nearly 10 years after notification of the relevant national legislation; and on the argument that, specifically concerning Group Water Schemes, the Irish Government has long been committed, on its own initiative, to resolving the problem of insufficient water quality.

48. Without entering into the merits of those observations, which, moreover, the Commission examines and challenges analytically, I would merely refer to the consistent case-law of the Court, according to which 'under the system laid down by Article 169 of the Treaty, the Commission has a discretion to bring an action for failure to fulfil obligations and it is not for the Court to assess whether it was appropriate to exercise that discretion'. [10]

Costs

49. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for Ireland to be ordered to pay the costs, and the latter has been unsuccessful, Ireland must be ordered to pay the costs.

9 — See, inter alia, Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 15; Case C-207/00 *Commission* v *Italy* [2001] ECR I-4571, paragraph 30.

10 — See, inter alia, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 20; Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraph 24; Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22.

Conclusions

50. In the light of the above considerations, I therefore propose that the Court should declare that:

(1) By not ensuring compliance with microbiological parameters 57 (total coliforms) and 58 (faecal coliforms) laid down in Annex I to Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption, in relation to a number of public water distribution networks and certain Group Water Schemes (other than those providing on average less than 10 m^3 a day or serving fewer than 50 persons, save where the water is supplied as part of a commercial or public activity) identified in the official reports on water intended for human consumption and in the correspondence concerning the water situation in the Ballycroy area, Ireland has failed to fulfil its obligations under Articles 7(6) and 19 of Directive 80/778 and under the Treaty.

(2) By failing to take account, when transposing Directive 80/778, of the binding nature of Annex I so far as Group Water Schemes are concerned, Ireland has failed to fulfil its obligations under Article 7(6) and 19 of Directive 80/778 and under the Treaty.

(3) Ireland is ordered to pay the costs.