OPINION OF ADVOCATE GENERAL ELMER

delivered on 15 May 1997 *

Introduction

1. In this case the German Bundesverwaltungsgericht (Federal Administrative Court) has referred to the Court several questions concerning the interpretation of Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters [1] (hereinafter 'the Directive').

The Community law applicable

2. The provisions of the Directive which are relevant in the present case are as follows:

'*Article 1*

1. This Directive concerns waters extracted from the ground of a Member State and recognized by the responsible authority of that Member State as natural mineral waters satisfying the provisions of Annex I, Section I.

...

ANNEX I

I. DEFINITION

1. "Natural mineral water" means microbiologically wholesome water, within the meaning of Article 5, originating in an underground water table or deposit and emerging from a spring tapped at one or more natural or bore exits.

Natural mineral water can be clearly distinguished from ordinary drinking water:

(a) by its nature, which is characterized by its mineral content, trace elements or other constituents and, where appropriate, by certain effects;

* Original language: Danish.

1 — OJ 1980 L 229, p. 1.

(b) by its original state,

both characteristics having been preserved intact because of the underground origin of such water, which has been protected from all risk of pollution.

2. These characteristics, which may give natural mineral water properties favourable to health, must have been assessed: [2]

(a) from the following points of view:

1. geological and hydrological,

2. physical, chemical and physico-chemical,

3. microbiological,

4. if necessary, pharmacological, physiological and clinical;

(b) according to the criteria listed in Section II;

(c) according to scientific methods approved by the responsible authority.

The analyses referred to in (a)(4) may be optional where the water presents the compositional characteristics on the strength of which it was considered a natural mineral water in the Member State of origin prior to the entry into force of this Directive. This is the case in particular when the water in question contains, per kg, both at source and after bottling, a minimum of 1 000 mg of total solids in solution or a minimum of 250 mg of free carbon dioxide.

...

II. REQUIREMENTS AND CRITERIA FOR APPLYING THE DEFINITION

...

1.4. Requirements for clinical and pharmacological analyses

2 — In the other languages which were official languages of the Communities when the Directive was adopted, this sentence is worded as follows:
'Disse karakteristika, der kan give det naturlige mineralvand dets sundhedsbefordrende egenskaber, skal være bedømt: ...'
'Diese Merkmale, die natürlichem Mineralwasser gesundheitsdienliche Eigenschaften verleihen können, müssen überprüft worden sein; ...'
'Ces charactéristiques, qui sont de nature à apporter à l'eau minérale naturelle ses propriétés favorables à la santé, doivent avoir été appréciées: ...'
'Queste caratteristiche, che sono tali da conferire all'acqua minerale naturale le sue proprietà salutari, devono essere state valutate: ...'
'Deze kenmerken, die aan natuurlijk mineraalwater gezondheidbevorderende eigenschappen kunnen verlenen, moeten zijn beoordeeld: ...'
In the languages which became official languages after the Directive was adopted, the sentence is worded as follows:
'Estas características, que son las que confieren al agua mineral natural sus propiedades salutíferas, deberán haber sido apreciadas: ...'
'Αυτά τα χαρακτηριστικά, ικανά να προσδίδουν στο φυσικό μεταλλικό νερό τις ευνοϊκές για την υγεία ιδιότητές του, πρέπει να έχουν εκτιμηθεί: ...'
'Estas características, que são de natureza a conferir à água mineral natural as suas propriedades favoráveis à saúde, devem ter sido avaliadas: ...'
'Nämä ominaisuudet, jotka saattavat antaa luontaiselle kivennäisvedelle terveydelle suotuisia ominaisuuksia, on ollut tutkittava: ...'
'Dessa karakteristika som kan ge naturligt mineralvatten hälsofrämjande egenskaper måste ha blivit bedömda: ...'.

1.4.1. The analyses, which must be carried out in accordance with scientifically recognized methods, should be suited to the particular characteristics of the natural mineral water and its effects on the human organism, such as diuresis, gastric and intestinal functions, compensation for mineral deficiencies.

...'.

Proceedings before the national court and questions submitted for preliminary ruling

3. In the late 1980s, Badische Erfrischungs-Getränke GmbH&Co. KG (hereinafter 'the Company') discovered a new spring. An analysis of the water from the spring showed that it had a content of 617 mg of solids in solution and 34 mg of free carbon dioxide per litre. An evaluation of its physiological and nutritional effects showed that it contained very little sodium and chlorine.

4. The Company then submitted an application for recognition of the water as 'natural mineral water' in accordance with the Directive, but the application was rejected by Land Baden-Württemberg on 28 November 1989 and 2 April 1990 on the ground that water cannot have the 'physiological and nutritional effects' required by the German legislation implementing the Directive unless it contains specified levels of essential substances.

5. By judgment of 8 November 1991 the Verwaltungsgericht (Administrative Court) Karlsruhe dismissed the Company's action for recognition of the water as natural mineral water.

6. That judgment was upheld by the Verwaltungsgerichtshof Baden-Württemberg on 30 November 1993 on the ground that the Company had not demonstrated that the water had physiological and nutritional effects resulting from its constituents, as required by German legislation. According to the appeal court, the absence of certain constituents or low levels thereof were not sufficient for a particular water to be recognised.

7. The Company lodged an appeal on a point of law before the Bundesverwaltungsgericht, which, in an order of 31 August 1995, construed the German implementing legislation to mean that there must be a causal connection between the positive content of certain constituents of the water and its physiological and nutritional effects, and that this causal connection must be estab-

lished scientifically for the purpose of recognizing water with a low mineral and/or carbon dioxide content. However, the Bundesverwaltungsgericht is uncertain whether these requirements arising from the German legislation comply with the Directive and it has referred the following questions to the Court for a preliminary ruling:

'1. Is Article 1(1) of [the Directive], in conjunction with Annex I thereto, to be interpreted as meaning that water — apart from "old water" covered by the second subparagraph of paragraph 2 of Section I. Definition of Annex I — is to be recognized as being natural mineral water only if it has properties favourable to health and, if so, are those provisions to be interpreted as meaning that those properties must be proved?

2. May the properties favourable to health which may be necessary also ensue from the absence or low content of the constituents referred to in paragraph 1(a) of Section I of Annex I (for example, in the case of water with a low sodium content)?

3. How are the expressions "properties favourable to health" in paragraph 2 of Section I of Annex I and "certain effects" in paragraph 1(a) of Section I (see also paragraph 1.4.1 of Section II of Annex I) to be differentiated from one other?'

First question

8. By its first question, the national court wishes to ascertain whether water can be recognized as natural mineral water only if it has properties favourable to health and, if so, whether those properties must be proved.

9. The Company, supported by the United Kingdom and Ireland, contends that natural mineral water may have properties favourable to health because of its characteristics, that is to say, its nature and original purity. However, the recognition of water as natural mineral water is not subject to a condition that it actually possesses properties favourable to health. In that case, the Community legislature would have used the word 'must' instead of the word 'may' in Annex I, Section I, paragraph 2, of the Directive. The properties favourable to health mentioned in Annex I, Section I, paragraph 2, do not form part of the definition given in paragraph 1.

10. Land Baden-Württemberg, supported by the French and Italian Governments, argues that water can be recognized as natural mineral water only if it has properties favourable to health. Natural mineral water is not defined solely by reference to its origin, content and state, but also by reference to the physiological and nutritional effects resulting from its content of minerals, trace elements

and other constituents determining the nature of the water. It is clear from Annex I, Section I, paragraph 2, that the water's properties favourable to health must be proved. Paragraph 2 supplements and clarifies paragraph 1 by requiring an assessment of the characteristics listed in paragraph 1 with a view to providing specific proof of the properties favourable to health.

11. The Commission contends that paragraphs 1 and 2 of Annex I, Section I, must be read together as they both form part of the definition of natural mineral water. The German, English, Dutch and Danish versions of paragraph 2 are similar and are ambiguous as to whether natural mineral water must always have properties favourable to health. The French, Italian and Spanish versions, on the other hand, leave no doubt that it must always have such properties.

12. I should like to point out that Article 1(1) of the Directive provides that the Directive concerns waters extracted from the ground of a Member State and recognized by the responsible authority of that Member State as natural mineral waters satisfying the provisions of Annex I, Section I.

13. Annex I, Section I, paragraph 1, first subparagraph, explains, according to its express wording, what is meant by natural mineral water, which it goes on to define by reference to its underground origin. Paragraph 1, second subparagraph, adds that natural mineral water can be distinguished from ordinary drinking water by two characteristics: first, by its nature, characterized by its mineral content, trace elements or other constituents and, where appropriate, by certain effects and, second, by its original state.

14. The main clause of Annex I, Section I, paragraph 2, provides that 'These characteristics' must have been assessed from certain points of view according to the criteria listed in Section II and according to approved scientific methods. Immediately after the words 'These characteristics', the main clause contains a subordinate clause beginning with the subject of the clause, 'which.' This relative pronoun refers to 'These characteristics' in the main clause. If changed into an independent sentence, the subordinate clause will read as follows: 'These characteristics may give natural mineral water properties favourable to health.'

15. This sentence has slight variations in the different language versions. For example, the Danish, German, English, Dutch, Greek, Finnish and Swedish versions all use the verb 'may' in the present tense, thereby indicating that it is possible that natural mineral water has properties favourable to health.

16. The French, Italian, Spanish and Portuguese versions use the phrases 'qui sont de nature à ...', 'che sono tali da conferire ...', 'que son las que confieren ...' and 'que são de natureza a conferir ...'. However, these phrases do not appear to be regulatory in their content, but seem rather to be a mere descriptive statement referring to the fact that the said characteristics are such as to give the water properties favourable to health.

17. If the Community legislature authority had wished to make recognition of water as natural mineral water subject to the possession of properties favourable to health, it would have been an easy matter to remove all doubt by using the verb 'must' in the present tense in the different language versions. Furthermore, it would have been logical to include this requirement in paragraph 1, which sets out the definition of natural mineral water, and not in a subordinate clause in paragraph 2, which contains rules for the assessment of the criteria specified in paragraph 1. In the Commission's original proposal for the directive, [3] a requirement of properties favourable to health was also included in paragraph 1. Consequently, the final position in paragraph 2 appears to indicate precisely that the Council did not intend the recognition of natural mineral water to be subject to the possession of properties favourable to health.

3 — OJ 1970 C 69 of 11 June 1970, p. 14.

18. This interpretation is further supported by the fact that the Directive does not define the properties favourable to health. The national court is therefore right, in the second and third questions, to ask for guidance on this point, should the Court conclude that the recognition of water as natural mineral water is subject to the possession of properties favourable to health. The national court is also right to ask, in the second part of the first question, for clarification as to how such properties must be proved if that is the case. The Directive does not provide an answer to this. It would have been necessary to include such rules in the Directive if the Council had intended to make the recognition of natural mineral water subject to the possession of properties favourable to health. This becomes particularly clear in view of the otherwise very detailed provisions of the Directive.

19. I accordingly propose that the Court's reply to the first question should be that the combined provisions of Article 1(1) of and Annex I, Section I, paragraphs 1 and 2 to the Directive must be interpreted as meaning that they preclude a Member State from requiring water to possess properties favourable to health in order to be recognized as natural mineral water.

Second and third questions

20. The second question clearly falls to be answered solely if the reply to the first question is that water can be recognized as natural mineral water only if it has properties favourable to health. The third question relates to the exact meaning of 'properties favourable to health' in Annex I, Section I, paragraph 2. It follows from my proposed reply to the first question that water may be recognized as natural mineral water regardless of whether it has 'properties favourable to health.' Therefore it is of no practical importance to distinguish these properties (see the foregoing observations on the first question).

Consequently it is unnecessary to reply to the second and third questions.

Conclusion

21. I therefore propose that the Court reply to the questions referred by the Bundesverwaltungsgericht as follows:

The combined provisions of Article 1(1) of and Annex I, Section I, paragraphs 1 and 2 to Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters must be interpreted as meaning that they preclude a Member State from requiring water to possess properties favourable to health in order to be recognized as natural mineral water.