OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 14 December 1989 *

Mr President,
Members of the Court,

A — The facts of the case

1. The case on which I deliver this Opinion today concerns proceedings under Article 169 of the EEC Treaty brought against the Kingdom of Belgium (hereinafter referred to as the 'defendant') for failure to fulfil its obligations under that treaty. The case concerns the failure adequately to transpose into national law Directive 80/778/EEC relating to the quality of water intended for human consumption. [1]

2. The Commission has brought an action for a declaration that the defendant has failed to fulfil its obligations under the Treaty by not adopting within the period prescribed all the measures necessary in order to satisfy the requirements of Directive 80/778, and in particular Articles 1, 2, 9, 18, 19 and 20 thereof. The directive was originally transposed into national law by Royal Decree of 27 April 1984. [2] The action for failure to fulfil Treaty obligations was based on the defective nature of that legislative measure. In the course of the proceedings before the Court the Royal Decree was annulled by the Belgian Conseil d'État.

3. Under the Belgian constitution this matter now falls within the competence of the Regions. Referring to a letter from the defendant dated 24 November 1989 in which notice was given of the transposition of Directive 80/778 by the Flanders, Brussels and Walloon Regions, the Commission withdrew its action in part. It is maintaining its action in so far as the following alleged infringements are concerned:

(i) the measure adopted by the Brussels Region for transposing the directive is contrary to the Treaty in so far as water drawn by private persons for household use is excluded from the scope of the measure;

(ii) the measure adopted by the Walloon Region for transposing the directive suffers from the same defects as the previously applicable Royal Decree of 27 April 1984;

(iii) the Verviers water supply, in so far as it is obtained from the Gileppe barrage lake, does not accord with the parameters of the directive on account of its excessive lead content and no application for a derogation was made either in good time or in due form.

4. For the practical details and the arguments of the parties I refer to the Report for the Hearing. The facts are stated

* Original language: German.

1 — Council Directive of 15 July 1980 (OJ 1980 L 229, p. 11).

2 — *Moniteur belge* of 6.7.1984, p. 9860.

only in so far as they are essential for the reasoning.

B — Opinion

I — *Admissibility*

5. It has been consistently held by the Court that the subject-matter of the action in Treaty-infringement proceedings is delimited by the subject-matter of the pre-litigation procedure. In that procedure in the present case the complaint raised against the defendant concerned belated transposition, the fact that the transposition by the Royal Decree of 27 April 1984 was not in conformity with the terms of the directive and the problems arising in connection with the inadequate water supply in Verviers.

6. As far as the belated transposition of the directive into national law is concerned the defendant has expressly acknowledged its default. The lateness of the transposition is no longer an issue.

7. In so far as the incorrect transposition of the directive by the Royal Decree of 27 April 1984 is at issue, the annulment of that legal measure by the Belgian Conseil d'État might have brought the matter to a close during the proceedings. However, in so far as the claims in the application are directed to the matter of the correct transposition of the directive, they are not satisfied by the mere fact that the Royal Decree has been invalidated. So long as there was no effective transposition measure, the application lacked in that respect the substantive basis required for it to be considered. The legal measures adopted by the Regions, which superseded the Royal Decree of 27 April 1984 during the course of the proceedings, could, however, come within the compass of the subject-matter of the action. As far as the transposition measure in respect of the Flanders Region is concerned, the question does not arise, since in that respect the action has been withdrawn. The situation is different, however, in regard to the transposition measures taken by the Brussels and Walloon Regions since, in so far as these are concerned, the claims concerning incorrect transposition have in part been maintained.

8. In view of the fact that the subject-matter of the dispute has remained the same to the extent to which, *in abstracto*, it is the transposition of Directive 80/778 that is in issue, the substantive alteration in the matters to be reviewed must be regarded as admissible; reasons of procedural economy also militate in favour of that conclusion. If the action currently pending were inadmissible in part, the Commission would have to bring fresh proceedings in order to establish the irregularities in the transposition measures which have since become applicable.

II — *The substance of the case*

1. *The transposition measure adopted by the Brussels Region*

9. The allegation against the defendant is to the effect that water drawn by private persons for household use ought not to have been excluded from the provisions relating to the quality of water for human consumption, as prescribed by the directive.

10. It is true that in Directive 80/778 mention is made in general terms both in the title and in the recitals (first recital) of 'water for human consumption'. In that general context all water used by persons in whatever manner falls within the scope of the directive. Article 1 of Directive 80/778 is also framed in general terms; it reads: 'This directive concerns standards for water intended for human consumption'.

11. However, both in the recitals to and in Article 4 of the directive, the sphere of application of the directive is from the outset restricted. Natural mineral waters, medicinal waters and certain waters used in the food industry are excluded from the application of the directive. However, Article 2 of the directive is equivocal. It reads: 'For the purposes of this directive, water intended for human consumption shall mean all water used for that purpose, either in its original state or after treatment, regardless of origin,

(i) whether supplied for consumption, or

(ii) whether

(a) used in a food production undertaking for the manufacture, processing, preservation or marketing of products or substances intended for human consumption, and

(b) affecting the wholesomeness of the foodstuff in its finished form.'

12. The distinction between the first and second indents may signify that the provision contains an exhaustive enumeration of alternatives, so that water drawn by private persons for household use falls into neither of the two categories. It is neither supplied for consumption nor used in the manufacture of products, within the meaning of the provision, whose wholesomeness may be affected thereby. However, it would also be possible to regard the two alternatives contained in Article 2 of the directive as a non-exhaustive enumeration so that the legality of the contested measure could not be assessed solely by means of an interpretation of Article 2.

13. Nor may it be inferred from Article 12, which provides the legal basis for the monitoring, that water drawn for household use falls within the sphere of application of the directive. However, Article 12(4) makes express reference to Annex II to the directive which, moreover, even without that reference, forms part of the directive.

14. Table B of Annex II contains figures relating to the minimum frequency of standard analyses. In that connection it is striking that the table only starts at a volume of 100 m^3 of water produced or distributed per day for 500 persons concerned. Smaller quantities of water intended for consumption and smaller numbers of persons are not covered at all. Even for the category from 100 to 1 000 m^3 of water per day for 500 to 10 000 persons concerned not one of the monitoring analyses listed in Table A of Annex II to the directive is compulsorily prescribed. It is merely indicated in a footnote that their frequency is to be determined by the competent national authorities. Only as

from 2 000 m³ per day and 10 000 persons is provision made for 12 samples per year by way of minimum frequency and three samples for the purpose of continuing analysis.

15. It may therefore be inferred from Annex II to the directive that for quantities of water drawn for private purposes and for the categories of persons concerned thereby not only is frequency of monitoring at the discretion of the competent authorities but in fact no analyses at all are provided for. If therefore the categories of persons who draw water for their households fall, both in fact and in law, outside the analysis provisions, the fact that a Member State, drawing the inference from this, has incorporated that legal consequence in the actual text of the transposing provision cannot constitute an infringement of the Treaty.

16. The argument to the effect that monitoring, in whatever form it takes, is possible, even if not 'at the point where it is made available to the user' (Article 12), does not invalidate the conclusion at which I have just arrived. It is of course possible for the authorities of the Member States to carry out monitoring analyses, of whatever form, of water from private wells. All I am saying is that it does not constitute an infringement of the directive for this form of supply to be excluded from the sphere of application of the transposition measure. The abstract postulate of the applicability of the provisions of the directive also to water drawn by private persons for household purposes would not have any legal consequences that could give rise to sanctions.

2. *The transposition measure for the Walloon Region*

17. (a) In so far as as it is objected, with regard to the legal measure by which the Walloon Region transposed Directive 80/778, that it excludes from the scope of the directive water drawn by private individuals for household use, the same considerations as those set out above in regard to the measure adopted for Brussels apply.

18. (b) In addition, the applicant maintains its objection, already directed against the Royal Decree of 27 April 1984, that the possibility provided by Article 9 of the directive for derogating from its provisions was transposed into national law subject to less stringent conditions than those laid down in the directive. The condition laid down in Article 9(3) of the directive that the derogations should in no case relate to toxic or microbiological factors was not reproduced in the national legal measure.

19. In so far as the substantive restriction of the possibilities for derogation to the factors listed in Article 9(1) of the directive has not been reproduced in the implementing measure adopted at national level, and the derogations from the substantive content of the directive are therefore subject to less strict conditions, the application for a declaration of infringement of the Treaty should be allowed. It must be possible to ascertain from the derogating provision that a derogation from the parameters contained in Annex 1(D) and (E) to the directive is not permissible, even under the circumstances mentioned in Article 9(1).

3. *The Verviers water supply*

20. It is not disputed that water intended for human consumption in Verviers supplied from the la Gileppe barrage lake contains an excessively high lead content, as calculated according to the values laid down in Directive 80/778. Even if the population now receives part of its water supplies from other sources, about 10 000 persons remain potentially at risk.

21. A water treatment station is currently under construction which should be ready by the end of 1990, so that by the beginning of 1991 it will be possible to supply Verviers with water which conforms to the provisions of the directive. The financial outlay for the project amounts to about BFR 1 500 000 000 (1.5 billion). Tendering procedures for the constructions works were begun on 25 October 1983 and the actual work was started on 5 April 1984.

22. Article 19 of Directive 80/778 provides that, within five years of its notification, the Member States are to take the necessary measures to ensure that the quality of water intended for human consumption complies with the directive. Since it was notified on 18 July 1980, this period expired on 18 July 1985.

23. According to Article 20 of the directive, an additional period for complying with the parameters may be requested. In a letter to the Commission from the Permanent Representation of Belgium dated 15 November 1985 mention was made of an application for a longer period and notice was given that the competent (Belgian?) authorities were examining it. In a letter of 25 February 1988 from the Belgian Permanent Representation a special request was for the first time made to the Commission for an extension of the period, a request which, in a letter of 17 January 1989 from the Secretary of State for Environment and Social Emancipation, was reiterated, and in the letter of 1 March 1989 put in evidence at the hearing, was substantiated in detail.

24. It now falls to be considered whether an infringement of the Treaty is to be seen in the fact that the Verviers water supply, at least in part, did not satisfy the requirements of the directive within the period laid down in Article 19 of the directive or whether a special request within the meaning of Article 20 was made, the effect of which in law was to extend the period.

25. (a) In that connection it must first be clarified whether it is possible at any time to make a special request under Article 20. It may be seen from its content and its position in the directive that Article 20 is in the nature of a transitional provision. Article 18 sets a two-year period within which the Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the directive and its annexes. Article 19 on the other hand contains an obligation as to the result to be achieved. Within five years not only legal transposition but also the actual values laid down in the directive must be achieved. Only in exceptional cases may the Commission grant an additional period on special request. The spirit and purpose of the provision suggest that the application

must be made within the period laid down in Article 19, that is to say when it is foreseeable that it will not be possible to comply with the period. In its judgment in Case 228/87 [3] the Court even stated *obiter* that an application under Article 20 had to be made within the two-year period laid down in Article 18.

26. The fact that derogations from the directive are also possible under Articles 9 and 10 supports the view that Article 20 is in the nature of a transitional provision. If one takes the view that the request under Article 20 must be made within the periods laid down in Articles 18 and 19, it does not matter whether the two-year period laid down in Article 18 or the five-year period laid down in Article 19 is considered to be decisive, since the request in February 1988 was in any event made too late. Even the announcement that such a request would be made in November 1985 did not occur until after expiry of the period laid down in Article 19 of the directive. My view is therefore that the special request was not made in good time and that the period cannot legally be extended.

27. (b) If, leaving aside the formal argument, and having regard to the fact that the problems concerning the supply of water to Verviers were also known to the Commission and that the work, which was substantial in nature and entailed considerable expense, was begun during the period laid down in Article 19, one was disposed to regard the request as having been made in good time, it remains to examine whether the request also satisfies the requirements of Article 20(2) of the directive. In accordance with that provision a request must contain

(i) an account of the difficulties experienced,

(ii) an action programme, and

(iii) a timetable for the improvement of the quality of the water.

28. The difficulties did not in this case need to be set out down to the last detail, since the excessive lead content of the water in Verviers was a known fact and had been the subject of lively correspondence between the parties.

29. The action programme was constituted by the realization of a substantial project, the construction of a water treatment plant.

30. The timetable was also determined in advance, inasmuch as at no time was it counted on completing the project before the end of 1990. Moreover, in its letter of 1 March 1989, which was produced at the hearing, the defendant gave a detailed timetable setting out which financial resources in which financial year would be available for completion of the works, and would be employed.

31. In view of the fact that the project to be implemented was known about since the beginning of the 1980s and that work had actually started on it, which meant that considerable sums had to be made available, the request submitted satisfies, in my opinion, the substantive requirements of Article 20(2) of the directive.

3 — Judgment in Case 228/87 *Criminal proceedings against X* [1988] ECR 5099, paragraph 11

32. If, therefore, there is no infringement of the Treaty on account of the delay in making the request under Article 20 and consequently no breach of the obligation under Article 19, the request was made in a form satisfying the requirements of Article 20(2) and therefore the period was extended. The claims formulated by the Commission are therefore to that extent unfounded.

Costs

33. On account of the partial withdrawal of the action, Article 69(4) of the Rules of Procedure applies. Since it follows from my view on the matters which still remain to be decided that the parties both succeed and fail in part, it is appropriate to apply Article 69(3) of the Rules of Procedure. Under the first subparagraph of Article 69(3) and Article 69(4) the parties are to bear their own costs.

C — Conclusion

34. I propose that the Court should decide as follows:

'(1) The Kingdom of Belgium has infringed Articles 9, 19 and 20 of Directive 80/778, inasmuch as

(a) in the measure adopted by the Walloon Region for implementing the directive the derogating provisions are subject to conditions which are less stringent than is required by the directive,

(b) the Verviers water supply did not conform to the requirements of the directive within the prescribed periods.

(2) The remainder of the application is dismissed.

(3) The parties shall bear their own costs.'