OPINION OF ADVOCATE GENERAL MISCHO

delivered on 17 October 2002 [1]

1. The Commission is seeking a declaration by the Court that by failing to take all necessary measures to ensure that the quality of bathing water conformed to the limit values set in accordance with Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water [2] ('the directive'), and by failing to comply with the minimum frequency of sampling operations, as required under that directive, the Kingdom of Denmark has failed to fulfil its obligations under the directive.

2. The Kingdom of Denmark is asking the Court to dismiss the infringement application. It relies in particular on the *de minimis* principle, the absolute impossibility of preventing accidental deviations from the limit values caused by animals, and the need to assess the quality of the water over a period of several years.

Legal background

3. Article 1(2)(a) of the directive defines bathing water as follows:

'all running or still fresh waters or parts thereof and sea water, in which:

— bathing is explicitly authorised by the competent authorities of each Member State,

or

— bathing is not prohibited and is traditionally practised by a large number of bathers'.

4. Article 3(1) of the directive provides 'Member States shall set, for all bathing areas or for each individual bathing area, the values applicable to bathing water for the parameters given in the annex'.

5. Article 3(2) provides that those values may not be less stringent than those given in column I of the annex. Under Article 3(3) Member States must endeavour to observe

1 — Original language: French.
2 — OJ 1976 L 31, p. 1.

the values appearing in column G as guidelines.

6. Article 4(1) of the directive imposes on Member States the obligation to take all necessary measures to ensure that, within 10 years following the notification of the directive, the quality of bathing water conforms to the limit values set in accordance with Article 3.

7. Article 5(1) provides that for the purposes of Article 4, bathing water shall be deemed to conform to the relevant parameters if samples of that water, taken at the same sampling point and at the intervals specified in the annex, show that it conforms to the parametric values for the quality of the water concerned, in the case of 95%, 90% or 80% of the samples in the cases described in that provision, and if, in the case of the 5%, 10% or 20% of the samples which do not comply with the parametric values, they meet certain conditions laid down in the third and fourth indents of Article 5(1).

8. It is clear, moreover, from Article 5(2) that deviations from the parametric values are not to be taken into consideration in the calculation of the abovementioned percentages when they are the result of floods, other natural disasters or abnormal weather conditions.

9. Article 6(1) in conjunction with the annex requires the competent authorities of the Member States to carry out a minimum of two sampling operations per month in order to check for the presence of 8 types of substances. For 13 other substances, compliance with the parameters need be checked only where an investigation carried out in the bathing area reveals their possible presence or gives reason to believe that there is deterioration in water quality.

10. Article 8 contains the legal basis for possible waivers of the directive, namely:

(1) in the case of certain parameters marked (0) in the annex, because of exceptional weather or geographical conditions; and

(2) when bathing water undergoes natural enrichment in certain substances causing a deviation from the values prescribed in the annex.

11. The third paragraph of Article 8 provides that in no case may those exceptions disregard the requirements essential for public health protection. Where a Member State waives the provisions of the directive it must notify the Commission thereof, stating its reasons and the periods anticipated.

12. Article 13 of the directive, as amended by Article 3 of Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain directives relating to the environment, [3] provides that every year the Member States are to send to the Commission a report on the implementation of the directive in the current year.

13. The directive was notified to the Member States on 10 December 1975.

The Commission's first complaint, concerning the quality of bathing water

14. The Commission complains that Denmark infringed Article 4(1) of the directive, on the grounds that the quality of bathing water did not comply with the limit values laid down in Article 3 of the directive.

15. It states in that regard that the quality of that water did not comply with the requirements of the directive in each of the years 1995 to 2000. The Commission restricts its action, however, to the years 1995 to 1998.

16. In that context the Danish Government claims that in its reasoned opinion the Commission did not specify how the Danish Government could have responded to that action, which related solely to a period in the past. It was unclear whether the Commission intended, through its interpretation of the directive, to require the Danish authorities to close bathing areas, close bathing resorts and issue bans on bathing.

17. The Commission points out, however, that in 1999 and 2000 the quality of bathing water still did not comply with the limit values contained in the directive, which proves the inadequacy of the measures put in place by Denmark. At the time the reasoned opinion was issued the defendant had therefore to take additional measures in order to comply with the directive's provisions in the future.

18. In that regard the Commission is right to state that this case is no different, as regards the factual circumstances and the procedure it followed, from previous cases relating to implementing of the same directive. [4]

19. The following table, provided by the applicant, shows the level of compliance for the years 1995-2000.

3 — OJ 1991 L 377, p. 48.

4 — Case C-56/90 *Commission* v *United Kingdom* [1993] ECR I-4109; Case C-92/96 *Commission* v *Spain* [1998] ECR I-505; Case C-198/97 *Commission* v *Germany* [1999] ECR I-3257; Case C-307/98 *Commission* v *Belgium* [2000] ECR I-3933; Case C-147/00 *Commission* v *France* [2001] ECR I-2387; Case C-368/00 *Commission* v *Sweden* [2001] ECR I-4605 and Case C-427/00 *Commission* v *United Kingdom* [2001] ECR I-8535.

Year	Compliance with the mandatory values, expressed as a percentage	
	Sea water	Fresh water
1995	91.1	82.9
1996	97.2	88.5
1997	95.4	87.5
1998	94.3	90.3
1999	92.7	93.8
2000	95.8	92.2

20. It is important to point out straight away that, as the Commission states in its application, the rates of compliance shown in that table correspond to the percentage for all the bathing areas in the Member State where it was found, with due observance of the minimum sampling frequency, that the mandatory limit values and guide values contained in the directive were satisfied.

21. Under Article 5 of the directive, that is the case where a certain percentage of the samples taken, which range from 80% to 95% depending on the case, is in compliance with the values required by the directive.

22. In other words, contrary to what the defendant implies, the Commission does not require that 100% of the *samples* should comply with those values, which would undoubtedly conflict with the clear terms of Article 5. It is apparent, however, from the Commission's application that 100% of the bathing *areas* must conform, within the meaning of Article 5, to the values laid down in the directive.

23. The fact that that percentage was not reached in Denmark, either for sea water or for fresh water, constitutes an infringement in the Commission's view.

24. The defendant disputes the figures put forward by the Commission and produces its own table showing higher compliance levels than those claimed by the Commission.

Year	Compliance with the mandatory values, expressed as a percentage	
	Sea water	Fresh water
1995	95.6	85.6
1996	99.3	90.3
1997	98.8	91.1
1998	98.8	92.1
1999	98.4	94.7
2000	98.7	94.8

25. The defendant considers that it is necessary to adjust the figures put forward by the Commission in order to take into account three occurrences of deviations which it describes as 'accidental', errors in data transmission and bathing bans introduced during the season.

26. The fact remains, however, that even if we take the figures supplied by the defendant, an infringement still took place. It is clear from the table above that a certain proportion of Danish bathing water does not comply with the requirements of the directive.

Is it possible to apply the de minimis *principle?*

27. The Danish Government argues, however, that the problem is extremely limited, since out of a total of 1 300 bathing resorts results which failed to meet the standards were recorded in only 130 resorts during the period 1995-1998, and of those 130 only 8 resorts recorded more than one deviation during that period, namely six resorts on two years and two resorts on three years.

28. The defendant adds that by requiring compliance with the standards in all bathing areas the Commission makes it impossible in practice to comply with the directive and requires Member States to impose bathing bans in situations in which neither public health requirements nor environmental protection requirements justify them.

29. It is necessary to take into account the fact that the objective of the directive is also to preserve the 'quantitative quality of bathing water'. That would be jeopardised if the directive were interpreted in such a way as to force Member States to reduce considerably the quantity of bathing waters accessible to the population through unjustified banning measures.

30. The directive should therefore be interpreted in the light of the *de minimis* principle. The defendant by no means denies that there is no general *de minimis* principle within the area of secondary legislation and is not seeking a declaration of such a general principle from the Court. It considers however that in the specific case of a directive which it would be impossible to implement without the *de minimis* rule it is necessary to apply that principle.

31. The Danish Government recognises in that connection that under Article 5(1) of the directive it is sufficient that in a given bathing area 95% of samples comply with the parameters. However, if the period during which the samples are taken is five months, as in Denmark, and the Member State takes two samples per month, that is to say, 10 samples in total, as stipulated by the directive, it is sufficient for a single sample not to comply with the standards for the resort to be regarded as being polluted. In that case, the rate of compliance falls to 90% instead of the 95% allowed by Article 5.

32. If it were not possible to apply the *de minimis* rule the Commission's approach would in fact amount to requiring 100% compliance for each bathing area and thus render Article 5(1) redundant.

33. What is to be thought of this view?

34. There is no doubt that the Danish Government's reasoning is correct. However, as the Court noted in paragraph 36 of *Commission* v *Germany*, cited above, the directive only specifies the minimum frequency of sample-taking and does not therefore preclude the Member States from increasing the number of samples, thus reducing the proportion represented by samples not satisfying the stipulated conditions. Thus, if 20 samples are taken a Member State may 'allow itself' one sample that does not comply (5% of 20 = 1). If 30 samples are taken the percentage of 5% is equivalent to 1.5 samples. This means that even in that case only one sample that does not comply is tolerated. As it is hardly

conceivable that a Member State could take more than 30 samples in the same bathing area the result of the directive is in practice that having found that two samples do not comply with the standards the Member State has no need to continue taking samples: it only remains for it to prohibit bathing in the area in question.

35. The regulations are therefore very strict, although it is important not to lose sight of the fact that for certain substances, such as 'faecal coliform', the margin laid down by Article 5 is 20%. At any event, it is undeniably clear from the case-law, and in particular the judgment cited above, that the obligations laid down in the directive are indeed as I have just described.

36. In particular, it is clear that the Court did not intend to allow room for the application of any *de minimis* principle within the framework of the interpretation of the directive.

37. It is clear from the foregoing that the infringement concerning bathing water quality claimed by the Commission is established, since the defendant does not deny that during 1995 to 1998 the water in a certain number of areas did not reach the standards provided for in the directive, as its own figures show.

38. It is solely for the purposes of completeness therefore that I shall consider the remainder of the parties' arguments.

It is apparent that the differences between the figures submitted by the two parties result from divergent understandings of the scope of the obligations imposed by the directive.

Is it necessary to assess the state of the water every year?

39. First, the defendant challenges the way in which the Commission acted, on the grounds that it is necessary to assess the cleanliness of bathing water over several years and not on the basis of figures which are valid for only one year. Such a method of calculation serves to give a distorted statistical picture of the quality of bathing water in Denmark and is by no means supported by the directive.

40. The Commission contends in this regard that it is expressly stated in Article 13 of the directive that it is necess-

ary to check each calendar year whether the requirements of the directive are being complied with. Furthermore, and at any event, the quality of bathing water still does not comply with the directive in 1999 and 2000, which proves the inadequacy of the measures taken by the Danish authorities. Lastly, the Commission adds that it only brings an infringement action where the infringements recorded continue over several years.

41. It is undeniable that the fact that the directive requires Member States to send the Commission a report each year on the implementation of the directive for the current year proves that it is necessary to assess the situation with regard to bathing water every year. That conclusion is confirmed, moreover, by the objective of the directive. Protection of public health is at issue in the present case and that consideration cannot accommodate long periods during which the authorities of the States are entitled to wait before taking action. In particular, it would be unacceptable for several bathing seasons to pass before a Member State, finally convinced that a bathing area did not comply with the directive, took the necessary measures.

42. Consideration of the case-law leads, moreover, to the same conclusion since, in paragraph 34 of *Commission* v *Germany*, cited above, the Court expressly held that if values were exceeded only once in only one season that constituted an infringement of the directive.

Is it possible to exclude accidental deviations?

43. Second, Denmark disputes the Commission's figures on the grounds that they also take into account accidental deviations.

44. In that regard the defendant argues that except for 9 cases all of the deviations from the thresholds laid down by the directive which the Commission took into account are due to unpredictable natural causes. It mentions bird excreta in particular: this may be concentrated in a few litres of bathing water sampled in a given area and occurs suddenly and unpredictably. It is appropriate to stress in particular that such phenomena do not occur regularly in the same areas but are distributed differently each year.

45. Denmark does not rebut the Commission's statement that it is necessary to show caution when designating bathing areas in regions where there is an abundance of wildlife. It states, however, that even such a cautious approach does not necessarily have the effect of reducing the number of accidental deviations.

46. It therefore considers that the Commission should have taken into account the reasons for the deviations and excluded from its table accidental deviations caused by birds and other animals, which do not point to a general deterioration in bathing water quality and which cannot be prevented.

47. The Commission quotes the settled case-law of the Court, [5] which states that the directive requires Member States to take all necessary measures to ensure that bathing water conforms to the limit values laid down in the directive and does not allow them merely to take all reasonable measures possible.

48. In that regard, Denmark does not deny it has an obligation as to the result to be achieved but it contends that that obligation is not absolute. It is entitled to rely on the absolute impossibility of complying with the provisions of the directive.

49. The Commission, however, contends that the directive contains no basis for making adjustments for accidental deviations such as those described by the Danish Government in order to discount deviations due to birds or other animals.

50. In the Commission's view, it is hard to consider pollution due to birds and wildlife in general as a fortuitous event and it should therefore be taken into account in the forecasts. Member States may, in that regard, increase the number of samples in order to reduce the proportion represented by samples which do not comply due to fortuitous circumstances.

51. I share that view.

52. The directive does, however, provide for a certain number of situations in which it is possible to discount samples revealing deviations.

53. The directive provides in Article 8, cited above, that it may be waived under exceptional weather or geographical conditions or when bathing water undergoes natural enrichment in certain substances

5 — See, for example, Case C-56/90 *Commission* v *United Kingdom*, cited above.

coming from the soil causing a deviation from the values prescribed in the annex. Moreover, Article 5(2) provides that deviations are not to be taken into consideration when they are the result of floods, other natural disasters or abnormal weather conditions.

54. It is hardly possible to argue that those provisions are applicable to animal excreta, nor does the defendant claim they are.

55. The directive also provides for the possibility of a deviation in the normal course of events, that is to say, without stipulating any exceptional circumstances. It should be pointed out that Article 5(1) of the directive provides that samples are to be deemed to conform to the requirements of the directive where a certain percentage of the samples, ranging from 95% down to 80% in the case of 'faecal coliform', meet the values laid down in the annex to the directive.

56. It is apparent therefore that the Community legislature took into account the need to make provision for a certain margin for deviations which it regarded as not representing a structural deterioration in water quality.

57. The defendant's arguments, however, raise the question whether it is appropriate to include in the interpretation or application of the directive a further margin in order to take into account the impact of animal excreta.

58. These cannot be described as exceptional circumstances and, one is tempted to say, are more in the natural course of events. It is difficult to see why, on the face of it, samples which are non-representative on those grounds should not come into the margin provided for in Article 5(1) of the directive. There is no discernible reason why they should be treated differently from any other potential sources of distorted results.

59. It must be repeated in this context that the event in question is by no means extraordinary. It follows, first, that it is hardly conceivable that the Council, when it adopted the directive, and in particular Article 5 of the directive, was unaware of the possible implications of that phenomenon.

60. It is true, as I have shown above, that the tolerance threshold is generally 95%, which allows in reality only a single sample that does not comply. The question arises, therefore, whether as part of the revision of the directive, which was mentioned at the hearing, the Community institutions should not consider raising that margin of tolerance in cases where there is no other source of pollution apart from bird excreta. That will depend perhaps on the view one takes of the significance of the dangers to the health of bathers represented by such excreta.

61. Be that as it may, the phenomenon in question cannot be classified as a case of *force majeure*, which according to the case-law [6] is a circumstance which a Member State can plead to justify its failure to comply with its obligations.

62. The fact that samples of bathing water are distorted by animal excreta does not constitute an unpredictable and insurmountable obstacle to compliance with the rules laid down in the directive.

63. It is appropriate to point out in that regard that the defendant itself observes that pollution of animal origin is often detected in areas with particular characteristics, such as shallow water or a lower level of water circulation. The authorities are therefore in a position to determine the areas at risk of that type of pollution and to pay them particular attention without having to resort to a disproportionate number of samples. The Danish Government itself states that in such areas it automatically takes 20 samples a season.

64. Measures can therefore be adopted, once distorted samples have been taken, to prevent the Member State concerned from finding itself in breach of the directive.

65. The defendant however expresses various criticisms of the remedy of increasing the number of samples. It contends that that method cannot be effective because it involves high costs and is out of proportion to the results to be expected from it.

66. According to settled case-law, [7] such arguments do not, however, justify failure on the part of a Member State to comply with the provisions of a directive.

67. The defendant also states that even where the number of samples complying need only be 90% or 80% an increase in the number of samples will not have any

6 — Case 101/84 *Commission* v *Italy* [1985] ECR 2629.

7 — Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, paragraph 24.

impact on water quality and any improvement recorded will be only statistical.

68. Although it is indisputable that the simple fact of increasing the frequency of sampling will not in itself improve water quality, it should be pointed out that, as we have seen, the increase makes it possible to determine the permanence or frequency of the pollution and thus enables the competent authorities to take the necessary decisions more quickly if the pollution has become too frequent to be tolerated.

69. In that case the national authorities should impose bathing bans in the affected areas if pollution caused exclusively by animals persists and it is therefore not possible to take action with regard to the cause of the pollution.

70. The defendant explains in that regard that that is exactly what it did in a certain number of cases. It infers from this that areas which have been the subject of a ban should not be included among those where the requirements of the directive are not met.

71. The Commission disputes that reasoning, arguing that a Member State may not evade its obligations under the directive by imposing a temporary ban on bathing because the bathing water does not comply with the requirements of the directive. If a Member State wants a bathing area not to be subject to the obligations under the directive the exclusion should be definitive and permanent.

Does the breach continue even if a bathing ban is imposed?

72. It is true that the Commission's view appears to follow the case-law of the Court in so far as we read in paragraph 33 of *Commission* v *Germany*, cited above, that the fact that areas have lost their status as bathing areas or that measures have been taken to remedy the infringement does not cure it.

73. However, as the Danish Government rightly observes, 'it is physically impossible to react before a deviation from the limit values is recorded or the sources of the pollution identified. The deciding factor must therefore be whether Member States take all the necessary measures once the deviation is established'.

74. It follows that where a Member State has taken the only measures it is possible for it to take, in this case a ban on bathing, there is no reason to find that it has failed to fulfil its obligations.

75. Moreover, and above all, Article 1 of the directive expressly provides that the directive applies to bathing water, that is to say water in which bathing 'is explicitly authorised by the competent authorities of each Member State or is not prohibited and is traditionally practised by a large number of bathers'. It could not be stated more clearly that it does not apply to water in which bathing is prohibited.

76. The conclusion to be drawn therefore is that where a Member State bans bathing in a specified area, even if it is only during the season, that area is not to be taken into consideration for the purposes of assessing implementation of the directive in that Member State. [8]

77. That conclusion is, moreover, borne out by the objective of the directive. The directive seeks to ensure that Member States take adequate measures to protect the health of bathers, where it may be regarded as being put at risk, and not to penalise them even in situations where they have taken protective measures immediately the dangerous nature of the situation became apparent to them.

78. I do not find anything either in the directive or in case-law to support the Commission's view that only a definitive ban will meet the requirements of the directive. The directive does not draw any distinction between bans, whether definitive or temporary. Moreover, the prospect of the possibility of reopening is likely to encourage the competent authorities to take the necessary measures to ensure the area complies with the requirements. The rule that any ban should be permanent, however, would be a disincentive for the authorities to seek to remedy the deviations that had been established. The Commission is careful to point out, moreover, in what circumstances which are relevant as regards the objectives of the directive such drastic bans should be imposed.

79. Lastly, the argument the Commission seeks to draw from *Commission* v *Belgium* is unconvincing. [9] In that case the Court

8 — The same applies where a source of pollution other than bird excreta has been found and measures to end the pollution have been taken during the season.

9 — Case C-307/98 *Commission* v *Belgium* [2000] ECR I-3933.

ruled that the fact that the number of bathers falls below a certain level in a given area does not permit a Member State to consider that the area falls outside the scope of the directive. The Commission is wrong to infer from this that the fact that bathing is prohibited in an area does not mean that the area no longer falls within the provisions of the directive.

80. Unlike a factual situation in which the number of bathers has fallen, a ban on bathing implies necessarily that the objective of protecting public health, the importance of which was noted by the Court in that case, is no longer at issue since, by definition, no bathers are exposed to any risk

The complaint concerning the frequency of sampling operations

81. The Commission states that in seven bathing areas the minimum sampling frequency, as stipulated in Article 6(1) in conjunction with the annex to the directive, was not met during the period 1995 to 1998.

82. The Danish Government does not deny that statement but submits that the infringement concerns 0.2% of Danish bathing resorts. It adds that the inadequate number of samples did not, at local level, hide a fall in water quality and the Danish authorities dealt with those defects by ensuring they did not recur.

83. The defendant considers therefore that the inadequate number of samples at local level is within the *de minimis* limit and that there has therefore been no breach of the directive if one considers the directive's purpose.

84. It should be pointed out in that regard that implementation of the directive does not, as we have seen, make do with a *de minimis* principle.

85. The Commission's complaint in that regard must therefore be upheld.

86. Since that was essentially the case as regards the first complaint, it must be stated that the defendant has for the most part been unsuccessful in its pleas and must therefore be ordered to pay the costs.

Conclusion

87. In the light of the foregoing I propose that the Court should:

— declare that, by failing to adopt the measures necessary to ensure the quality of bathing water everywhere complies with the limit values laid down in Directive 76/160/EEC concerning the quality of bathing water and by failing to carry out sampling operations in line with the minimum frequency laid down in that directive, the Kingdom of Denmark has failed to fulfil its obligations under Article 4(1) and Article 6(1) of that directive;

— dismiss the application in so far as it concerns bathing areas closed during the season;

— order the Kingdom of Denmark to pay the costs.