OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 31 May 1988 *

Mr President,
Members of the Court,

A — Facts

1. The present case concerns a reference to the Court by the Pretore di Torino (Turin magistrate) for a preliminary ruling on the interpretation of Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption. [1]

2. This directive lays down recommended values and certain maximum values for the concentration of toxic substances in water intended for human consumption. The maximum values fixed in the directive were transposed into national law by the Decree of the President of the Council of Ministers of 8 February 1985.

3. It appeared as the result of laboratory analyses that in certain wells the maximum values for various substances had been exceeded. At the same time however no measures had been taken to prevent the use of the water in question for human consumption and for this reason criminal proceedings were instituted against persons unknown for the offence of failing to fulfil official duties under Article 328 of the Criminal Code. It was in these proceedings that the questions submitted by the Turin magistrate arose. A number of derogations were authorized from the decree fixing the maximum values under several ministerial orders and implementing regulations adopted by the Piedmont regional administration. It is the compatibility of those derogations with the directive which is at issue. If they are lawful, the increased concentrations of toxic substances are within the temporarily authorized limits, so that the constituent elements of a criminal offence are lacking and the investigation procedure which is under way should not be pursued.

4. The Turin magistrate requests the Court of Justice for a preliminary ruling on the following question:

'Must Directive 80/778/EEC, and in particular Article 10 (1) thereof, be understood as authorizing Member States to introduce derogations in the ways and in the circumstances in which the aforementioned orders of the Ministry of Health and of the Region of Piedmont were introduced?'

For a more detailed account of the facts and the submissions of the parties, reference is made to the Report for the Hearing.

* Translated from the German.

1 — OJ L 229, 30.8.1980, p. 11.

B — Opinion

I — *Admissibility*

5. The admissibility of the reference for a preliminary ruling appears questionable in several respects. The doubts arise both as a result of the stage reached in the main proceedings and from the way in which the question submitted to the Court is formulated.

6. Under the second paragraph of Article 177 of the EEC Treaty a 'court or tribunal' of a Member State may refer to the Court a question the resolution of which it considers to be necessary to enable it to give 'judgment'. The question whether the magistrate submitting the question satisfies the requisite criteria to be regarded as a 'court or tribunal' within the meaning of this provision is to be found in the Court's case-law which has interpreted this autonomous legal notion broadly. Thus any independent authority charged with the settlement of disputes constitutes a court or tribunal for this purpose. It must be a permanent body, established by law, endowed with binding jurisdiction and set up to give judgment in adversarial proceedings by applying the rules of law.[2] Since the judgment in Case 162/73,[3] the Court no longer insists on the need for proceedings to be 'adversarial' so that a dispute in which the State is a party — even in the exercise of its sovereign authority — may also give rise to a potential right to refer to the Court.

7. Nevertheless, the procedural position of the Turin magistrate poses a problem in so far as in the investigation procedure he performs two functions of a different legal nature. In seeking and establishing the facts, he carries out the duties of the public prosecutor; on the other hand, both in deciding to close the procedure and pronouncing a verdict, his functions are judicial. Since the Turin magistrate, who has submitted the question to the Court, needs the Court's reply in order to be able to take his decision with regard to the subsequent procedure, namely whether he should pursue the investigation or terminate the proceedings, he must be regarded as a 'court or tribunal' in the broadest sense for the purposes of the second paragraph of Article 177 of the EEC Treaty. Moreover, as recently as June last year (in Case 14/86[4]), the Court found a reference from the Pretore di Salò admissible in similar circumstances from the procedural point of view.

8. By implication, the necessity of the decision of the Court 'to enable [the national court] to give judgment' has been acknowledged, since the determination of whether the conditions therefor is in principle left to the court making the reference.[5] That is why in Case 14/86 the Court confined examination in this respect to the finding that the Pretore exercised judicial functions, although not in a typical manner and not in all his activities. The question referred to the Court arose in the context of the exercise by the Pretore of his general powers, as an authority called upon to act independently and exclusively within the limits of the law. It follows from the abovementioned decision (Case 14/86[6]) that this is sufficient to satisfy the formal requirements laid down in the second paragraph of Article 177.

2 — Judgment of 30 June 1966 in Case 61/65 *Vaassen-Göbbels* [1966] ECR 377.

3 — Judgment of the Court of 21 February 1974 in Case 162/73 *Birra Dreher* v *Amministrazione delle finanze dello Stato* [1974] ECR 201.

4 — Judgment of the Court of 11 June 1987 in Case 14/86 *Pretore di Salò* v *X* [1987] ECR 2545.

5 — Judgment of 16 December 1981 in Case 244/80 *P. Foglia* v *M. Novello* [1981] ECR 3045, paragraphs 15 *et seq.* of the decision.

6 — *Loc. cit.*, paragraph 7 of the judgment.

9. In my view this case is a borderline one as far as the procedural position is concerned. In this respect regard must be had to other circumstances before reaching the conclusion that the reference to the Court is admissible. National courts should not be given the possibility of referring to the Court abstract questions of law because that would alter the character of the preliminary reference procedure — at least as in the form hitherto given to it by the Court.[7] In making this assessment, it is also necessary to take account of the fact that the main proceedings are investigation proceedings against persons unknown, since no one has yet been formally named as accused. This circumstance does not preclude the admissibility of the reference if, as was done in concluding that the magistrate could be regarded as a 'court or tribunal', the problem is addressed from the point of view of the decision to close the proceedings. Indeed it is precisely in order to be able to take that judicial decision that the Turin magistrate needs the Court's reply. Nor, if this decision is taken as the decisive point of reference, may doubt be cast on the possibly premature nature[8] of the reference for a preliminary ruling. It follows that the objection that the procedure under Article 177 of the EEC Treaty is superfluous also becomes irrelevant. It is only a decision of the Court on the substantive legal issues involved which will provide the Pretore with the criteria on the basis of which he will be able to determine whether the constituent elements of a criminal offence exist.

10. The legal position is different if it is seen not in the light of the close of the proceedings, but in that of their continuation. If a specific accused is identified only after the preliminary ruling has been given, the principle of the right to be heard may be affected. With regard to the proceedings pending before the Court this principle is expressed in the second paragraph of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC. This provision accords *inter alia* to the 'parties' the right to submit observations to the Court within two months of the notification of the request for a preliminary ruling.

11. The comment that it is open to the national court to refer the matter to the Court of Justice at a later stage of the proceedings and that the national court is, for its part, bound to observe the principle of the right to be heard, is ultimately not, in my view, capable of dispelling doubts regarding the legal principle laid down by Community law which must be complied with in the proceedings before this court. This is particularly true because the parties to the main proceedings do not have an independent right to bring the matter before the Court.

12. In this case it is necessary to approach the problem from the point of view of the concrete procedural situation prevailing at the time when the proceedings are pending before the court. In this respect it is also necessary to draw a conclusion from the approach that has been adopted from the outset, namely that the main proceedings already constitute at the stage in question a dispute which may give rise to a request for a preliminary ruling. It follows that for the time being there is no accused whose procedural guarantees in accordance with the rule of law could be infringed. The abstract, purely conceptual infringement of a right, which cannot be attached to any concrete legal person or individual does not, in my view, constitute a procedural obstacle. Although this case is borderline, it is possible, in the light of the Court's decision in Case 14/86, to regard the request for a

7 — Case 244/80, *loc. cit.*

8 — See, as regards the stage of the main proceedings in the procedure under Article 177, judgment of 10 March 1981 in Joined Cases 36 and 71/80 *Irish Creamery Milk Suppliers Association and Others* v *Government of Ireland and Others* [1981] ECR 735.

preliminary ruling as admissible as far as the procedural situation of the dispute in the main proceedings is concerned.

13. However there are also doubts in this case concerning the terms in which the question referred to the Court is framed. As formulated by the Turin magistrate, the question concerned the compatibility of the conduct of a Member State with Community law. It is not for the Court to determine this question under the procedure provided for in Article 177. It falls to the Commission to monitor the conformity with Community law of the conduct of the Member States and, in the event of a breach, it is that institution which, by issuing a reasoned opinion, initiates the procedure under Article 169 for a declaration of a failure to fulfil obligations. Nor may the right to bring before the Court the question of the compatibility of the conduct of a Member State with Community law be brought within the jurisdiction of national courts indirectly by means of the preliminary reference procedure. On the contrary, it is for the national courts to examine, on their own responsibility, whether the action of the Member State is compatible with the Community legal order and draw the appropriate inferences from their findings. In this task, the Court provides its assistance only by the interpretation of Community law.

14. However, when a question referred to it for a preliminary ruling is inaccurately formulated, the Court does not simply reject it as inadmissible. As it has consistently stated,[9] it examines, having regard to the circumstances of fact and of law, the relevance of the questions concerning Community law. The Court makes every effort, by reformulating the question and by the reply which it gives to it, to provide the national court with criteria which will help it to decide the specific case before it.[10]

15. As a matter of common sense, the question referred to the Court by the Turin magistrate may be reconstrued as a question concerning the factual requirements under the rules concerning derogation laid down in Article 10 of Directive 80/778/EEC. In substance the question referred to the Court must therefore be understood as seeking to establish under what conditions the national authorities are entitled to authorize, under Article 10 (1) of Directive 80/778/EEC, values in excess of the maximum permitted concentrations listed set out in Annex I. Construed in this light, the request for a preliminary ruling submitted by the Turin magistrate is admissible.

II — *Substance*

16. In order to be able to help the national court to interpret Community law so as to be able to apply it, it is necessary to identify the factual conditions which must be satisfied under the rules concerning derogations laid down provided for in Directive 80/778/EEC. In so doing it is important to bear in mind the general purpose and scheme of the Community instrument.

17. The Commission takes the view that the maximum values set out in the directive must be strictly complied with and that the possibilities of derogation can be used only restrictively. On the other hand, the Italian Government contends that it retains a relatively wide discretion in determining

9 — See judgment of 29 November 1978 in Case 83/78 *Pigs Marketing Board* v *Raymond Redmond* [1978] ECR 2347, and most recently, judgment of 20 April 1988 in Case 204/87 *Bekaert* v *French Republic* [1988] ECR 2029.

10 — Case 204/87, *loc. cit.*, paragraphs 5 *et seq.* of the decision.

whether the conditions justifying derogations exist.

18. The reasons behind the adoption of the directive are the desire to introduce equal conditions of competition throughout the Community, to achieve the harmonious development of economic activities and at the same time the improvement of living conditions (second and third recitals in the preamble). A Community directive on quality standards for the supply of drinking water had already been adopted in June 1975.[11] The scope of Directive 80/778/EEC is wider, but it also covers surface water intended for the supply of drinking water, so that directive introduces additional quality requirements in this sphere.

19. The Member States are now authorized to derogate from the quality standards laid down in the directive. Various situations can justify such derogations: in this respect Article 9 of the directive constitutes the legal basis for derogations in respect of specific geographical or meteorological conditions. Under Article 20 of the directive, the prescribed period for transposing the directive may be extended for certain values in 'exceptional cases' which are not otherwise defined. Article 10 provides *inter alia* for derogation from the values set out in Annex I in the event of 'emergencies'.

20. In the preamble to the directive (11th recital) it is expressly stated that Member States are authorized to make provision for derogations from the directive 'to take account of certain special situations'. This expression already indicates that the directive is to be endowed a certain flexibility so that it can be adapted to exceptional circumstances, which implies that the maximum values are not be applied with absolute strictness, in other words that the factual conditions for derogations are to be interpreted liberally. In addition, this 'flexibility' as regards the application of the directive is expressly referred to in the text thereof in all the Community languages[12] except German and English. In these circumstances the directive must be construed as guaranteeing a degree of adaptability, of flexibility. This is expressly indicated in almost all the language versions; moreover it is not contradicted by the wording of the German and English texts. In the light of this intention thus expressed as regards the implementation of the directive in the Member States, it is therefore possible to depart from the rule of the strict interpretation of the factual conditions which may justify derogations. The declared aim of flexibility can be attained only through a correspondingly liberal application of the rules governing derogations.

21. As regards the transposition of the provisions of the directive into national law, the legal form which the Member States choose for this purpose is immaterial.[13] It is accordingly irrelevant, for the purposes of Community law, that all the provisions of the directive were transposed into the legal system of the Member State by a single instrument, the abovementioned Decree of The President of the Council of Ministers of 8 February 1985, or, on the other hand, that the provisions on derogations were

11 — Council Directive 75/440/EEC of 16 June 1975, OJ 1975, L 194, p. 26.

12 — In Danish: en vis smidighed
In Greek: enilixir
In Spanish: una cierta flexibilidad
In French: une certaine souplesse
In Italian: una certa elasticità
In Dutch: een zekere soepelheid
In Portuguese: uma certa flexibilidade.

13 — Article 189 of the EEC Treaty.

transposed into national law by separate legal instruments.

22. The only provision of the directive relating to derogation which is capable of applying to this case is — and this is common ground between the participants in the proceedings before the Court — Article 10. That article provides for the possibility of derogating from the 'maximum admissible concentration' established by Article 7 of the directive in conjunction with Annex I thereto. The toxic substances, atrazine and molinate, whose presence in appreciable quantities lies at the origin of this case come within that category.

23. The first condition to which recourse to the authorization to derogate under Article 10 (1) of the directive is subject is the existence of an 'emergency'. The very question of what constitutes conditions amounting to such an emergency is the subject of dispute between the participants in the proceedings before the Court. According to the Commission, this implies an unforeseen unexpected event which occurs suddenly. The Italian Government objects that the existence of an emergency does not depend on the manner in which the exceptional situation arises, but that only the fact that it is an exceptional situation is relevant. It considers that if emergencies for the purposes of the directive were to be regarded as being caused only by events not resulting from human conduct, typical emergencies, as for example the poisoning of piped water by terrorist action, would not come within the scope of the provision. [14]

24. The existence of an 'emergency' should be able to be determined irrespective of its cause. It must therefore be possible to contemplate both natural events and human conduct. A restriction solely to events not caused by human conduct would pointlessly restrict the scope of the provision. Article 10 of the directive should in principle be applicable to all emergencies, regardless of their origin.

25. In order to define the other features of an emergency, it is necessary to take into account the content of the legal term in question. The word 'emergency' admittedly suggests the rapid occurrence of an exceptional situation. However, the definition of an emergency cannot be regarded as disassociated from the other factual conditions. In particular it is necessary to take account of the last condition listed in Article 10 (1), namely the impossibility of maintaining the supply of drinking water in any other way.

26. The terminology of this condition nevertheless calls for a preliminary comment. The German and Danish versions of the directive are the only ones to refer in Article 10 (1) to 'the supply of drinking water'. In the official versions in the other Community languages, reference is made, as it is in the title of the directive, to 'water intended for human consumption'. The notion 'water intended for human consumption' is broader than the expression 'supply in drinking water', because it covers means of supply other than the use of surface water. [15] Furthermore, Article 10 (2) lays down separate rules on derogation for the purpose of maintaining the supply of drinking water by recourse to surface water.

14 — See p. 10 of the transcript of the hearing.

15 — See Article 1 of Directive 75/440/EEC.

Both the consideration that Article 10 logically provides in the first place for derogations applying to the entire field of application of the directive and the fact that a specific provision was adopted with regard to the supply of drinking water by recourse to surface water supports the view that the concurring version found in seven official languages also constitutes the authentic text.

27. The inability to maintain supplies of water intended for human consumption is an essential feature of an emergency. Clearly — and on this point it is necessary to concur with what was said by the Italian Government [14] — a Member State cannot rely on an emergency to justify a previous failure on its part to fulfil its obligations. On the other hand, if the Member State is confronted with the problem of not being able to comply with the values prescribed in the directive and if it takes measures to redress this situation, it must, in accordance with the object and purpose of the rules, be able to rely on the rule permitting derogation for a transitional period. Otherwise, where it is not possible to obtain the values set out in the directive immediately, a Member State would find itself in a situation in which its conduct infringed Community law without its being able to establish a situation which was in conformity therewith.

28. It is necessary to examine more closely the circumstances in which the supply of water intended for human consumption is not achieved. In particular it may be asked whether an emergency supply using tankers can constitute a sufficient supply so that recourse may not be had to the rules authorizing derogations.

14 — See p. 10 of the transcript of the hearing.

29. An obligation imposed by a legal instrument to transform the supply of water in order to avoid derogations under Article 10 of the directive could be justified only if it made it possible to improve the quality of such supply. In fact this is far from being the case of the emergency supply to which I have just alluded. It cannot be the aim and the purpose of the factual conditions to which derogation is subject to compel a Member State to organize a supply of water of a lower quality and at a higher cost before being entitled to authorize a derogation.

30. In addition, the Member State must retain a measure of discretion as to the extent to which the use of other sources of supply is justifiable and reasonable in economic terms.

31. A further argument, which is based on the need for a regular supply of water through the distribution network, is drawn from an analysis of the provisions relating to drinking water. Article 1 (2) of Directive 75/440/EEC provides that: 'For the purpose of applying this directive, all surface water intended for human consumption and supplied by distribution networks for public use shall be considered to be drinking water.'

32. The need to give Article 10 (1) a broad interpretation is also apparent from the fact that paragraph (2) thereof provides for the

possibility for derogations in order to guarantee the supply of drinking water by resorting to surface water, and this provision does not contain any express reference to its application being subject to the occurrence of an emergency. The provision merely states: 'when . . . a Member State is obliged . . .'; the other factual conditions in paragraphs (1) and (2) are the same. In any case, in assessing the lawfulness of the national ministerial orders, the national court should take into account the rules laid down in Article 10 (2).

33. The derogations are authorized in principle 'for a limited period of time'. The parties also disagree as to how this 'period of time' should be assessed. In the case before the national court, the derogations were first introduced for six months. At the same time measures intended to eliminate the higher concentrations of toxic substances were introduced in the same legal instrument.[16] Before the expiry of the six-month period, the duration of the validity of the order in its entirety was extended by one year.[17] Thus a maximum value of 1.0 microgram was authorized for atrazine for a period of one-and-a-half years instead of the concentration of 0.1 microgram laid down in the directive. Well before the expiry of the period of validity of the last-mentioned order, new, higher, maximum values were authorized in April 1987 both for atrazine (1.7 micrograms) and, for the first time, for molinate (6.0 micrograms).

34. This new legislative intervention shows that it had not been possible to comply earlier with lower maximum values. Finally, derogations from the values set out in the directive were again authorized — as was stated at the hearing by the representative of the Italian Government — until the end of 1988. In relation to the previous order, however, the permitted values were reduced (1.0 microgram for atrazine, 4.0 micrograms for molinate). Altogether, therefore, derogations were authorized for a period of two-and-a-half years.

35. The Commission considers that this does not satisfy the requirement of a 'limited period of time'. It should be noted in this respect that the directive gives no indication as to the maximum duration of lawfully authorized derogations. The various national legal instruments were of limited duration and even taken together the respective periods amount to an unacceptable period of time. It is not desirable to establish a fixed magnitude for a definitive period to define a 'limited period of time'. On the contrary, in this connection too, it is necessary to make an assessment covering such factors as the aptitude of the measures aimed at remedying the emergency situation, the possibility of alternative measures, and the need to authorize increased maximum values.

36. The fact that the period of validity of a measure authorizing derogation is extended is not in itself sufficient to make it unlawful. However, the unthinking renewal of a derogation once it has been authorized cannot be lawful. When such a measure is extended, as when it is adopted, it is necessary to verify the need which the measure is designed to meet, having regard to the surrounding circumstances.

16 — See decision of the Ministry of Health of 25 June 1986 which provides for a period of validity lasting until 31 December 1986.

17 — See decision of 22 December 1986, in force until 31 December 1987.

37. The various possibilities of derogation provided for under Article 10 can be resorted to only in so far as they do 'not constitute an unacceptable risk to public health'. The question arises as to the conditions which must be satisfied to meet this criterion.

38. The Commission considers[18] that the Member State has to prove the harmlessness of the measures, and so doing must take account not only of the effects of each individual substance in question (atrazine and molinate), but also the effects of other toxic substances and their combined effect (synergy). It takes the view that in the case under discussion a risk to public health could not be 'totally excluded'.[19] The fact that it is possible to infer from the permitted maximum concentrations of toxic substances provided for in the directive that there is a presumption that such substances are harmful above those values militates in favour of this argument.

39. The Italian Government, on the other hand, contests this by arguing that what is concerned here is not the classic question of the distribution of the burden of proof. The following considerations are cited to support this view. The Commission itself did not claim that there was a real risk to human health in the event of the values laid down in the directive being exceeded. The directive does indeed pursue the aim of improving the quality of life. This does not mean however that, above the maximum values listed in the directive, there is an inevitable or even only a potential risk to health. The fact that in principle it is possible to derogate from these values subject to certain conditions suggests that there is no such absolute risk. The wording of the provision, according to which an *unacceptable* risk constitutes a barrier to derogation also indicates that, where necessary, a slight risk must be accepted. The mere potential increase of a risk, which must *always* be presumed where the values of the directive are exceeded, cannot suffice to preclude the authorization of derogations. The possibility of authorizing derogations would be deprived of its meaning and its scope if a theoretical increase in the risk were treated as sufficient to bar the introduction of such measures.

40. It is clear furthermore that the burden of proof should not be distributed in the way suggested by the Commission because otherwise the Member State would have to prove the absence of certain circumstances, although the provision does not provide specific criteria for identifying such circumstances. These imponderables concerning the question of proof cannot justify criticism of the action of a Member State under the rule authorizing derogations pursuant to Article 10 of the directive. The 'unacceptable risk' to public health, required by the directive, must be at least probable for that factor to be able to prevent a derogation. In so far as there is no such probability, the Member State has a measure of discretion. The flexibility sought by the directive can logically be attained only by means of conferring on the Member State a degree of discretion as to the conditions for authorizing the derogation. This assessment must however take into account the synergy of the toxic substances.

41. It is necessary finally to determine to what extent the breach of the obligation to notify the Commission following the adoption of the measure may render it

18 — See p. 17 of the transcript of the hearing.

19 — 'We are therefore faced with a situation in which it is not possible totally to exclude, as the directive does, an unacceptable risk to public health.'

unlawful (Article 10 (3) of Directive 80/778/EEC). Since the information in question is to be given *a posteriori*, this notification cannot constitute a condition for the validity of the measure as for example an authorization which had to be requested would be. Nor, since the Commission is not informed of the derogation until the process of assessment has been completed, even where the Member State acts correctly, it is not possible to argue that the Commission should have the power, via Article 10 (3), to influence the adoption of the specific measure. In failing to notify or in notifying belatedly, the Member State is acting contrary to Community law. This does not however invalidate a derogating provision whose adoption is lawful in other respects.

42. The costs incurred by the Italian Government and the Commission are not recoverable. It is for the national court to rule on the costs of the preliminary ruling procedure (Article 104 (3) of the Rules of Procedure of the Court).

C — Conclusion

I propose that the reply to the national court's question for a preliminary ruling be as follows:

43. Measures authorizing derogation are compatible with Article 10 (1) of Directive 80/778/EEC where all the factual conditions are satisfied; the Member States enjoy a wide discretion in the assessment of the various conditions.