# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 13 September 2001 [1]

1. The Københavns Byret (Copenhagen District Court) has referred three questions to the Court of Justice for a preliminary ruling under Article 234 EC, seeking an interpretation of some of the provisions contained in Directive 94/62/EC on packaging, [2] and of Article 28 EC.

The Danish Court asks whether the abovementioned provisions allow a person in charge of a bar selling cola cans manufactured in France to be fined, and his goods to be confiscated, under Danish legislation.

## I — The facts in the main proceedings

2. The Public Prosecution Department brought criminal proceedings against Tonny Haugsted Hansen under Article 6(1)(1) of Decree No 124 of 27 February 1989 on packaging for beer and soft drinks [3] (hereinafter 'Decree No 124'). The charge is that, on 12 January 1999, he offered 63 cans of cola for sale in his PC-café in Copenhagen S, contrary to the provisions of Article 3(1)(1) of their Decree.

The cans were made of steel with an aluminium coating. The alleged offence is constituted by the marketing of imported soft drinks in metal packaging. The Public Prosecution Department is seeking an order imposing a fine and for the confiscation of the goods, which were impounded by the police.

3. The lawyer acting for the accused asked that a question be referred to this Court for a preliminary ruling in that case, on the ground that Treaty-infringement proceedings have been brought against Denmark [4] in which judgment is pending, and the Københavns Byret acceded to the request.

1 — Original language: Spanish.

2 — European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

3 — As amended by Decree No 583 of 24 June 1996 and Decree No 300 of 30 April 1997.

4 — See my Opinion, also delivered today, in Case C-246/99 *Commission* v *Denmark*.

## II — The questions referred for a preliminary ruling

4. After staying proceedings, the national court referred the following questions to the Court of Justice:

'1. Must Directive 94/62 [...] and, in particular, Article 18, in conjunction with Articles 5, 7 and 9 thereof, be interpreted as precluding national legislation under which a penalty can be imposed on a person who, contrary to certain provisions of national law on the packaging of beer and soft drinks, has marketed imported canned cola?

2. If Question 1 is answered in the affirmative: Do the provisions of the directive, in particular Article 18, in conjunction with Articles 5, 7 and 9 thereof, satisfy the conditions for being directly applicable, so that a person who has been charged with an offence can rely directly on the provisions of the directive before national courts?

3. If Question 1 is answered in the negative: Does Article 28 EC, in conjunction with considerations of environmental protection [...], preclude national legislation under which a penalty can be imposed on a person who, contrary to certain provisions of national law on the packaging of beer and soft drinks, has marketed imported canned cola?'

## III — The Danish legislation

5. Under Article 2(1) of Decree No 124, beer and carbonated drinks may be marketed only in reusable packaging, for example, glass or plastic bottles, defined in Article 1(2) as packaging which forms part of a collection system, in which a large number of empty containers are returned by the consumer to be used again.

6. Under Article 2(2) and (3), the packaging must have been approved by the Environment Agency (Miljøstyrelsen),

which considers, in particular, whether it is, from a technical point of view, appropriate for a collection system and whether the recovery of a significant number of empty containers for reuse may be ensured. When the product is sold, a cash deposit is charged; this is refunded to the consumer when he returns the container to the shop, which has a duty to exchange it for the deposit. This system encourages the consumer to return the container in order to retrieve the deposit, so that a high number of empty containers is returned. [5]

7. It is apparent from Article 3 of the Decree that beer and carbonated drinks may be imported in unapproved packaging, provided that it is integrated into a collection system for reuse or recycling. Single-use packaging is accepted, on condition that it is not made of metal.

8. The Danish legislation in no way impedes the use of aluminium or steel cans for other drinks. Tins and other metal containers are used, *inter alia*, for preserves, coffee and biscuits. Nor does it prevent the use of cans for exporting beer and carbonated soft drinks.

5 — Apparently, there are about 30 containers approved for beer and carbonated soft drinks. Glass bottles are used more than 35 times, and plastic bottles are refilled about 20 times.

## IV — The Community legislation

9. The provisions of Directive 94/62 which the Court is requested to interpret are the following:

'Article 5

Member States may encourage reuse systems of packaging, which can be reused in an environmentally sound manner, in conformity with the Treaty.'

'Article 7

Return, collection and recovery systems

1. Member States shall take the necessary measures to ensure that systems are set up to provide for:

(a) the return and/or collection of used packaging and/or packaging waste from the consumer, other final user, or from the waste stream in order to channel it to the most appropriate waste management alternatives;

(b) the reuse or recovery, including recycling of the packaging and/or packaging waste collected,

in order to meet the objectives laid down in this Directive.

[...]'

'Article 9

Essential requirements

1. Member States shall ensure that three years from the date of entry into force of this Directive,[6] packaging may be placed on the market only if it complies with all the essential requirements defined by this Directive including Annex II.

2. Member States shall [...] presume compliance with all essential requirements set out in this Directive including Annex II in the case of packaging which complies:

(a) with the relevant harmonised standards, the reference numbers of which have been published in the *Official Journal of the European Communities*. Member States shall publish the reference numbers of national standards transposing these harmonised standards;

6 — In accordance with Article 24, the Directive entered into force on the date of its publication in the *Official Journal*, 31 December 1994.

(b) with the relevant national standards referred to in paragraph 3 in so far as, in the areas covered by such standards, no harmonised standards exist.

3. Member States shall communicate to the Commission the text of their national standards, as referred to in paragraph 2(b), which they deem to comply with the requirements referred to in this Article. The Commission shall forward such texts forthwith to the other Member States.

Member States shall publish the references of these standards. The Commission shall ensure that they are published in the *Official Journal of the European Communities*.

...'

'Article 18

Freedom to place on the market

Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive.'

10. The national court also requests an interpretation of Article 28 EC, which is worded as follows:

'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

## V — The proceedings before the Court of Justice

11. Written observations have been submitted in these proceedings, within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice, by the Danish Government, the Netherlands Government, the United Kingdom Government and the Commission.

At the hearing, which was held on 12 June 2001, oral argument was presented by the Agent of the Danish Government, the Agent of the United Kingdom Government and the Agent of the Commission.

## VI — Analysis of the questions referred for a preliminary ruling

### A — *The first question*

12. By this question, the Københavns Byret wishes to know whether Article 18 of Directive 94/62, in conjunction with Articles 5, 7 and 9 thereof, precludes national legislation which imposes a criminal sanction on a person who markets carbonated soft drinks manufactured in another Member State.

13. The Danish Government submits that the Directive does not preclude the prohibition on the marketing in its territory of beer and soft drinks in metal containers, even though export of those drinks in that kind of packaging is authorised. It also allows penalties to be imposed on a person who has infringed the national legislation by marketing an imported canned soft drink.

14. In support of those submissions, the Danish Government puts forward a number of arguments. First, it contends that the actual content of the provisions of the Directive, in particular concerning the essential requirements applicable to packaging laid down in Article 9 and Annex II, is so general and imprecise that, in practice, it is impossible to implement the Directive as if it were a measure establishing full harmonisation. Furthermore, the harmonisation standards which have been announced, and which would help to remedy that lack of specification, have not yet been approved and that fact inevitably means that Member States have a certain margin of discretion.

15. Second, it maintains that the provision on freedom to place on the market, contained in Article 18 of the Directive, is not operative at the moment because Annex II is so broad that, without an approval procedure, it is impossible for Member States to determine: (a) the precise requirements with which packaging must comply; (b) the manner of establishing whether certain packaging conforms to them; and (c) finally, the authority responsible for verifying compliance. It stresses that, in spite of the fact that the Commission's proposal did not establish that procedure, when the text was approved, the minutes included a joint statement by the Council and the Commission worded as follows: '... a suitable procedure must be introduced

for verifying that the packaging conforms to the essential requirements'.

16. Third, it claims that Member States have the power to establish an order of priority between reusable and recoverable packaging, when they establish the detailed rules for implementing the essential requirements, and that the essential requirements are not necessarily the same for a type of packaging irrespective of its use, but that it is necessary to take into account, in each case, the product which it is to contain.

17. Finally, the Danish Government doubts whether steel cans conform to the requirement, contained in Annex II(3)(a), that it must be possible for a certain percentage of their weight to be recycled, since current technology does not enable the aluminium coating to be separated from the rest, before it is melted down.

18. The Governments of the two other Member States which have submitted observations in these proceedings disagree with those assessments, because they consider that the free movement of packaging which fulfils the essential requirements must not be hindered.

19. I have to admit that some of the arguments put forward by the Danish Government, which fights so valiantly to protect the environment, have aroused my sympathy, but I cannot agree with the interpretation which it proposes to give to Directive 94/62, for reasons which I shall now explain.

20. As regards the first argument, I find it difficult to believe that the essential requirements are so lacking in specification as to be inoperative, especially when there are 13 Member States which have transposed them into their domestic law and in which Directive 94/62 is being implemented. Even assuming that they were insufficiently clear, the Member States would still be required to implement them in the best way possible, in compliance with Community law. Also, if the Directive had had defects which invalidated it, Member States were entitled to bring an action for its annulment under Article 230 EC, but none of them has done so and it is, therefore, binding on them all. It should be borne in mind that Directive 94/62 forms part of the series approved following the

new approach to harmonisation and standardisation, [7] characterised by the imposition, on products in certain sectors, of mandatory provisions concerning safety and environmental protection, amongst others. [8] Furthermore, in Annex II(B)(III)(1) to the Council Resolution of 1985, it is provided that the general clause relating to placement on the market applies only if the essential requirements for safety are observed, and the degree of detail of the wording will depend on the subject-matter.

Moreover, as may be seen from the fundamental principles listed in Annex II to the Council Resolution of 1985, the technical specifications, the drawing-up of which is entrusted to organisations competent in the area of industrial standardisation, are not mandatory, but have the status of voluntary standards, and there is only a presumption that products manufactured in accordance with their provisions conform to the essential requirements established by the Directive. Accordingly, the adoption of harmonised standards is not a precondition for the implementation of a directive adopted under the new approach nor does it mean that all products must be manufactured in accordance with its precepts, since Member States will still be required to authorise the marketing of all products which, although not manufactured in accordance with the requirements of the harmonised standard, conform to the essential requirements.

There is no doubt that Member States have a certain margin of discretion when transposing the essential requirements into domestic law, as is clear from Article 9(3). However, in the exercise of that discretion, Member States must bear in mind the Directive's two aims, namely, to provide a high level of environmental protection and to ensure the functioning of the internal market, avoiding obstacles to trade and distortion and restriction of competition within the Community. In Denmark, only the first of those aims seems to have been addressed.

21. As regards the second argument, I believe it is incorrect to state that the clause on freedom to place on the market, contained in Article 18, is not operative at the moment, since no approval procedure has been established. My view on this is based on a number of reasons.

To start with, so far as concerns the precise requirements with which packaging must

7 — Embodied in Council Resolution of 7 May 1985 (OJ 1985 L 136, p. 9).

8 — At the hearing the Commission stated that, to date, about 30 directives have been adopted in accordance with the new approach. See the Guide to the implementation of directives based on the New Approach and the Global Approach, on the following website: http//europa.eu.int/comm/enterprise/newapproach/newapproach.htm

comply, I consider that the requirement, contained in Annex II(3)(a), that the packaging must be manufactured in such a way as to enable the recycling of a certain percentage by weight of the materials used, does not means that that proportion has to be 100% but merely that materials which are not recyclable may not be used. It is also clear from the same provision that the percentage may vary depending on the types of material of which the packaging is composed. As regards the requirement, contained in paragraph 3(b), that, for the purpose of energy recovery, packaging waste shall have a minimum inferior calorific value, I think that this excludes waste which does not make a positive contribution to energy recovery. Also, it may be inferred from the behaviour of the Danish authorities that they consider that packaging which is recoverable in the form of material recycling conforms to the essential requirements, since it is used in Denmark for marketing other drinks and a significant proportion of the national beer production is exported in cans to other Member States. In any event, it cannot seriously be denied that a can meets all the specific requirements regarding manufacture and composition of packaging contained in Annex II(1), or that it also complies with the specific requirements, contained in Annex II(3), applicable to packaging recoverable in the form of material recycling, since a specific percentage by weight of the material used in its manufacture is recyclable.

I must explain that the aim of the approval procedures is to verify whether a particular product complies with the essential requirements established by the Directive, without affecting the content of those requirements, which may still be applied even if those procedures have not been adopted. Until the harmonised standards referred to in Article 9 are introduced, Member States may implement, within the framework of Directive 94/62, the national approval procedures; and, for this purpose, the joint statement of the Council and the Commission, which is not corroborated by the wording of Directive 94/62, is irrelevant since, according to the case-law of this Court, declarations made in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of interpreting that directive, where the content of the declarations finds no expression in the wording of the provision in question and, consequently, such declaration has no significance in law. [9]

As regards the impossibility of establishing who is responsible for carrying out the verification, I should point out that responsibility for ensuring that an article which is intended to be marketed has been designed and produced in accordance with the essential requirements [10] has been assigned to the manufacturer and that that assign-

9 — Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18; Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 51; and Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraph 26.

10 — F. Aubry-Caillaud, *La libre circulation des marchandises. Nouvelle approche et normalisation européenne*, Paris 1998, p. 223: 'Les auteurs des directives "nouvelle approche" doivent par conséquent déterminer les modules à utiliser, afin que le niveau de sécurité nécessaire soit garanti; l'idée étant de laisser au fabriquant le choix le plus large possible.' 'Dans l'esprit de la nouvelle approche, il est souhaitable de restreindre au maximum l'intervention directe des administrations.'

ment of responsibility is one of the features which characterises the directives adopted under the new approach. [11]

22. Nor do I agree with the third of the arguments used by the Danish Government in support of the interpretation of the provisions of Directive 94/62 which it advocates. I find nothing in the preamble to or in the articles of or in Annex II to Directive 94/62 that could provide a basis for the alleged power of the Member States to establish an order of priority between reusable and recoverable packaging, so that a preference for one system may justify the exclusion of the other. We must not lose sight of the fact that this Directive does not have the sole aim of protecting the environment, but is also intended to ensure the functioning of the internal market, to avoid obstacles to trade, and distortion and restriction of competition within the Community, and that the second objective is not subordinate to the first, but that they are on an equal footing. The Directive authorises Member States to introduce or maintain systems which promote both the reuse and recovery of packaging, and requires them to adopt the measures necessary for attaining the objectives established, by means of return, collection, reuse or recovery systems. These are suitable instruments for ensuring a high level of environmental protection without jeopardising the free movement of goods.

In my view, that power cannot be inferred from Article 1(2), which states that a first priority is the prevention of the production of packaging waste, since, to that end, it envisages reuse, recycling and other forms of recovery. Nor can it be based on Article 5, which merely authorises Member States to encourage reuse systems. In so far as concerns the essential requirements in Annex II, in my view, all packaging must comply with the requirements contained in paragraph 1, concerning its manufacture and composition, and must also conform to those in paragraph 2 if it is reusable, or those in paragraph 3 if it is recoverable. Since the Directive does not provide to the contrary, it is for the manufacturers of products to decide to use one or the other kind for packaging, and Member States, on the basis of Articles 5, 7 and 15, may influence the behaviour of the consumer by giving him a reason for preferring the more ecological designs.

23. I also disagree that steel cans do not conform to the essential requirement laid down in Annex II(3)(a). The Commission

11 — See, in the Guide referred to in footnote 8 above, Chapter 3 on responsibility.

maintains that it is possible to separate the aluminium coating before melting down the can. No evidence to this effect, or to the contrary, has been adduced in the proceedings. It is true that the specific requirements applicable to recoverable packaging stipulate that it must be possible to recycle a certain percentage of the materials used in its manufacture, but it cannot be inferred from this wording that it must be possible to recycle a certain percentage of all the components. Also, in accordance with Annex II(3)(a), the establishment of the percentage may vary, depending on the type of material of which the packaging is composed.

24. For all the reasons I have just stated, having regard to the provision, contained in Article 18, concerning the freedom to place on the market, in the Member States, packaging which complies with the provisions of the Directive, and in the light of the fact that Article 5 allows Member States to encourage reuse systems of packaging, that Article 7 prescribes the systems which must be set up in order to achieve the aims of the Directive, that Article 9 excludes from the market packaging which does not conform to the essential requirements, the presumption being that they do conform to them, until such time as the relevant harmonised standards have been adopted, if they comply with the national rules on the matter, and that the essential requirements on the composition and nature of packaging in Annex II are sufficiently precise to be applied in practice, I have to state that Directive 94/62 has brought about full harmonisation of the national measures on packaging management and packaging waste.

Consequently, the Directive precludes national legislation which punishes under criminal law anyone who markets canned carbonated soft drinks manufactured in another Member State.

B — *The second question*

25. By this question, the Københavns Byret wishes to know whether Article 18 of Directive 94/62, in conjunction with Articles 5, 7 and 9 thereof, has direct effect, so that a person who has been charged can rely on it before national courts.

26. The Danish Government maintains that the reply must be in the negative since, although Article 18 contains a specific and unconditional provision, when it is read together with Articles 5, 7 and 9 the obligations of the Member States become vague. Both Article 5 and Article 7 grant the States a wide discretionary power and the essential requirements which must be

satisfied by packaging and which are governed by Article 9 and Annex II, lack precision.

27. However, the Netherlands Government, the United Kingdom Government and the Commission take the opposite view.

28. Since the seventies, the Court has developed the doctrine of the direct effect of directives, which may today be regarded as having assumed its definitive form. In the *Van Duyn* judgment [12] the Court stated that it would be incompatible with the binding effect attributed to a directive by Article 249 EC to exclude the possibility that the obligation which it imposes may be invoked by those concerned; that where the Community authorities have, by a directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such a measure would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law; that Article 234 EC, which empowers national courts to refer to the Court of Justice questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that those acts may be invoked by individuals before the national courts, and that it is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effect on the relations between Member States and individuals.

In the *Ratti* judgment [13] it added that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not rely, as against individuals, on its own failure to perform the obligations which the directive entails; that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive, must grant that request if the obligation in question is unconditional and sufficiently precise; and that, after the expiry of the period prescribed for the implementation of a directive, a Member State may not apply domestic legislation — even if it lays down penal sanctions — which has not yet been adapted so as to comply with that directive to a person who has complied with its provisions.

In the *Becker* judgment, [14] the Court systematised that case-law by stating that, wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the

12 — Case 41/74 *Van Duyn* [1974] ECR 1337 et seq. especially 1348 and 1349.

13 — Case 148/78 *Ratti* [1979] ECR 1629, paragraphs 22 to 24.

14 — Case 8/81 *Becker* [1982] ECR 53, paragraph 25.

absence of implementing measures adopted within the prescribed period, be relied upon as against any provision of domestic law which is incompatible with the directive or in so far as the provisions define rights which individuals may assert as against the State.

In its judgment in *Comitato di Coordinamento per la Difesa della Cava*, [18] the Court pointed out that a provision to Community law is unconditional where it is not subject, in its implementation or effects, to the adoption of any measure either by the institutions of the Community or by the Member States, and in its judgment in *Federatie Nederlandse Vakbeweging* it added that a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms. [19]

29. The question as to the parties against whom a provision in a directive which satisfies the conditions for having direct effect may be invoked was settled by the Court in the *Marshall I* judgment, in which it underlined the fact that, according to Article 249 EC, the binding nature of a directive, which constitutes the basis for the possibility of relying on that instrument before a national court, exists only in relation to each Member State to which it is addressed, from which it follows that a directive may not of itself create obligations imposed on an individual and that a provision of a directive may not be relied upon as such against such a person. [15] That case-law has been confirmed more recently, in the judgments in *Faccini Dori* [16] and *El Corte Inglés*. [17]

30. In order to reply to the question referred to the Court, it is necessary to examine whether the provisions which the national court seeks to have interpreted — Article 18, in conjunction with Articles 5, 7 and 9 of Directive 94/62 — satisfy the requirements established by case-law for them to have direct effect.

31. Article 18 imposes on Member States the obligation not to impede the placing on the market on their territory of packaging which satisfies the provisions of the Directive. Since it is economic operators who put the containers on the market, it can be stated that they are entitled to expect the authorities to refrain from restricting their

15 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 48. See, also, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraphs 7 to 9; Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 40; Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraphs 29 to 31; and Case C-221/88 *Busseni* [1990] ECR I-495, paragraphs 22 and 23.

16 — Case 91/92 *Faccini Dori* [1994] ECR I-3325, paragraphs 20, 22 and 23.

17 — Case 192/94 *El Corte Inglés* [1996] ECR I-1281, paragraphs 16 and 17.

18 — Case 236/92 *Comitato di Coordinamento per la Difesa della Cava* [1994] ECR I-483, paragraphs 9 and 10.

19 — Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 18.

freedom of action if the packaging complies with the provisions of the Directive. It may also be said that the obligation is sufficiently precise, because it is imposed in unequivocal terms.

32. However, the packaging is required to conform to the provisions of the Directive. That is why the Danish court is also asking about Articles 5, 7 and 9.

I agree with the United Kingdom Government that Article 5, which allows Member States to encourage reuse systems of packaging, which can be reused in an environmentally sound manner, in conformity with the Treaty, does not impose any precise and unconditional obligation, and that it is also not clear whether it is intended to grant rights to individuals.

I agree with the Commission in so far as concerns Article 7. The wording of paragraph 1, first subparagraph, makes it impossible, until the Member States have taken the necessary measures, to define the exact scope of the rights which it confers on citizens. However, once those measures have been adopted, the rights governed by the second subparagraph of Article 7(1) are sufficiently precise to be relied upon by an individual before a national court.

Nevertheless, the provisions in the Directive which supplement Article 18 are Article 9 and Annex II. Article 9 imposes on Member States the obligation to ensure that three years from the date of the entry into force of the Directive, packaging may be placed on the market only if it complies with all the essential requirements, and that, from the date of expiry of the period allowed for the transposition of the provisions of the Directive into national law, Member States are to presume compliance with all the essential requirements in the case of packaging which complies with the harmonised standards or, it these do not exist, with the relevant national standards. Annex II(1), for its part, lays down the requirements specific to the manufacturing and composition of packaging, Annex II(2) those specific to reusable packaging and Annex II(3) those which must be fulfilled by packaging which is recoverable in the form of material recycling, by packaging which is recoverable in the form of energy recovery or composting, and by biodegradable packaging.

33. From the combined provisions of Article 18, Article 9 and Annex II, I conclude that the obligation imposed on Member States to allow economic oper-

ators to place on the market on their territory packaging which conforms to the essential requirements is precise, since it is expressed in unequivocal terms. It must also be regarded as unconditional, inasmuch as it is not subject to any condition or, in its implementation or effects, to the adoption of any measure either by the institutions of the Community or by the Member States.

34. The reply to be given to the national court must therefore be that an economic operator is entitled to rely directly on Article 18, in conjunction with Article 9 and with Annex II of Directive 94/62, in order to avoid application of the legislation of a Member State which provides for a penalty under criminal law for the marketing in its territory of carbonated drinks in packaging whose importation is prohibited, even though it complies with the essential requirements.

C — *The third question*

35. By this question, the Københavns Byret wishes to ascertain, should the Court consider that Directive 94/62 does not preclude legislation such as the Danish legislation in point, whether the impediment it constitutes to the free movement of goods is justified by the requirement to protect the environment.

36. The Danish Government, while acknowledging that that legislation constitutes an impediment to trade, maintains that its scope it very limited and that it is justified by environmental considerations. It doubts whether the environment could be protected as effectively if less radical measures were employed. [20]

37. The Netherlands Government, the United Kingdom Government and the Commission acknowledge that the protection of the environment is an overriding reason of general interest which may restrict the application of Article 28 EC, but contend that a national provision which prohibits absolutely the use of cans for carbonated drinks is disproportionate and, therefore, incompatible with Community law.

38. It is settled case-law of the Court that, in the absence of common rules relating to

20 — For the rest, it repeats the arguments it put forward in Case C-246/99, and I therefore refer the reader to the text of my Opinion in that case, in which they are set out in detail.

the marketing of a product, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be recognised as being necessary in order to satisfy imperative requirements recognised by Community law.[21] Such rules must also be proportionate to the aim in view and, if a Member State has a choice between various measures for achieving the same aim, it must choose the means which least restrict freedom of trade.[22]

39. In my view, none of those arguments deployed by the Danish government is of sufficient force to justify the impediment to the free movement of goods represented by the absolute ban on importation to Denmark of drinks which are lawfully packaged and marketed in the other Member States. Although it is true that environmental protection has been recognised by the Court of Justice as an imperative requirement which may restrict the application of Article 28 EC,[23] it is necessary to examine, in each specific case, the means used to ensure that protection and the consequences which they have for other interests that may be protected by law.

40. First, as the Court of Justice has pointed out, Article 28 EC, in defining measures having an effect equivalent to a quantitative restriction on imports, makes no distinction according to the degree to which trade between Member States is affected. If a national measure is capable of hindering imports, it must be regarded as a measure having equivalent effect, even though the hindrance is slight.[24] The Commission contends that the prohibition on the importation of a product in a certain packaging constitutes a radical intervention by the public authorities that adversely affects trade between Member States.

41. Second, I am not convinced that the prohibition on imports of canned beer and carbonated drinks is a measure which is necessary in order to protect the environment, or that it is proportionate to achieving that aim. For the purpose of promoting

21 — Case 120/78 *Rewe* [1979] ECR 649; Case 261/81 *Rau* [1982] ECR 3961; Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 6.

22 — Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 45; and Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 75.

23 — Case 240/83 *Asociación de Defensa de los Quemadores de Aceites Usados* [1985] ECR 531, paragraph 13; *Commission* v *Denmark*, cited in footnote 21 above, paragraph 9; and Case C-389/96 *Aher-Waggon* [1998] ECR I-4473, paragraph 19.

24 — Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraph 13.

the use of reusable packaging, the Danish Government has other means available, which are permitted by Directive 94/62, restrict the movement of goods to a lesser degree and afford the same level of environmental protection, for example, a deposit and collection system for cans, the branding of products, the use of economic instruments such as eco-taxes and the fixing of objectives for the reuse of certain types of containers.

It appears that the ban on using cans and single-use containers for beer and carbonated drinks is based on the results of the Life Cycle Assessment commissioned by the Danish Government. [25] Not withstanding the undeniable quality of that study, the truth of the matter is that it is based on a working hypothesis the materialisation of which, in practice, is, at the very least, uncertain and that, if it had started from a different assumption, modifying the specific weight accorded to each element, the results of the calculations would have been different. The Commission refers to a report drawn up in Germany which shows that, if the transport distance exceeds 1 000 km, the environmental advantages of reusable packaging are reduced, [26] so that cans may represent an attractive alternative from the environmental point of view. The journeys taken into account in the Life Cycle Assessment carried out in Denmark, which are genuine data supplied by the Beer Manufacturers' Federation, are of an average of 170 km; the Commission, on the other hand, rightly points out that the internal market involves the long-distance transportation of goods.

42. For the reasons I have just given, I consider that the prohibition on imports of canned beer and carbonated soft drinks from other Member States, which constitutes an impediment to the free movement of goods, is not justified by the requirement to protect the environment, because it does not observe the principle of proportionality.

43. If the Court considers it necessary to reply to this question, I propose that it should inform the national court that Article 28 EC, even taking into account the requirement to protect the environment, precludes national legislation such as Decree No 124 which imposes a penalty under criminal law on anyone who has marketed canned cola manufactured in another Member State.

25 — Environmental Project No 399, 1998. Life Cycle Assessment of Packaging Systems for Beer and Soft Drinks. Main Report. Ministry of Environment and Energy, Denmark.

26 — Ökobilanz für Getränkeverpackungen, Umweltbundesamt, 1995, for example pp. A 25; A 38; B 24 et seq.; and B 34 et seq.

## VII — Conclusion

44. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the Københavns Byret:

(1) Article 18 of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, which contains a rule that the placing on the market in the Member States of packaging which complies with the provisions of that directive, is not to be impeded, read in conjunction with Article 5, which allows Member States to encourage reuse systems, with Article 7, which lays down the systems to implement the objectives of the Directive, and with Article 9, which excludes from the market packaging which does not conform to the essential requirements, precludes national legislation which imposes a penalty under criminal law on anyone who markets canned carbonated drinks manufactured in another Member State.

(2) An economic operator is entitled to rely directly on Article 18, in conjunction with Article 9 of and Annex II to Directive 94/62, before the national court, in order to avoid application of legislation of a Member State which provides for a penalty under criminal law the marketing in its territory of carbonated soft drinks in packaging whose importation is prohibited, even though it conforms to the essential requirements.

(3) Article 28 EC, even taking in account the requirement to protect the environment, precludes national legislation such as Decree No 124, which imposes a penalty on anyone who has marketed canned cola manufactured in another Member State.