OPINION OF ADVOCATE GENERAL LÉGER

delivered on 23 October 2003 [1]

1. In this action the Commission of the European Communities seeks a declaration that the Portuguese Republic has failed to fulfil its obligations under Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water [2] (hereinafter 'the Directive').

I — Legal background

2. In its application, the Commission claims that the Portuguese Republic has breached several provisions of the Directive in that it has:

— failed to adopt the provisions necessary to ensure that the quality of bathing water conforms with the values set down in Article 3 of the Directive;

— failed to identify all the inland bathing waters in Portugal, and

— failed to collect samples at the minimum frequency.

3. The first recital in the preamble to the Directive provides that its purpose is to protect the environment and public health by reducing the pollution of bathing water and protecting such water against further deterioration.

4. Article 1 of the Directive states that:

'1. This Directive concerns the quality of bathing water, with the exception of bathing water intended for therapeutic purposes and water used in swimming pools.

1 — Original language: French.

2 — OJ 1976 L 31, p. 1.

2. For the purposes of this Directive:

(a) "bathing water" means 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;

(b) "bathing area" means any place where bathing water is found;

(c) "bathing season" means the period during which a large number of bathers can be expected, in the light of local custom, and any local rules which may exist concerning bathing and weather conditions.'

5. An annex to the Directive contains a table which lists a series of microbiological, physical and chemical parameters applicable to bathing water. This table contains indicative and mandatory values with which the bathing water of Member States must conform in terms of Articles 2 and 3 of the Directive. Article 3(2) of the Directive states that the values set by Member States for their bathing water 'may not be less stringent than those given in column I of the Annex', that is to say, the mandatory values.

6. By Article 4(1) of the Directive, Member States are required to take all necessary measures 'to ensure that, within 10 years following the notification of this Directive, the quality of bathing water conforms to the limit values set in accordance with Article 3'. In exceptional circumstances, Member States may grant derogations in respect of this time-limit under Article 4(3).

7. Conformity with the mandatory values is to be assessed by Member States using a sampling procedure which is expressly prescribed in Articles 5 and 6 of the Directive. Article 5(2) states that deviations from the values referred to in Article 3 are not to be taken into consideration where they are the result of natural disasters. The frequency of sampling operations and the parameters of

which Member States must take account are set out in the Annex to the Directive. Article 8 of the Directive contains an exhaustive list of cases in which waivers from compliance with these parameters are permitted. The results of the sampling operations are to be sent at the end of each bathing season to the Commission, on the basis of which it publishes a summary report. [3]

8. The Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties [4] includes a waiver regarding the transposition and implementation of the Directive. Under Article 395 of that Act, the Portuguese Republic was not required to transpose the Directive by the date of its accession but by 31 December 1992.

II — Pre-litigation procedure

9. On the basis of the data supplied by the Portuguese Republic relating to the 1995 bathing season, the Commission sent to that Member State a letter of formal notice on 21 October 1996. The Commission indicated that a number of bathing areas did not conform to the mandatory values set down in the Directive, and had had an insufficient number of samples collected from them. The Commission also alleged that the Portuguese Republic had incorrectly identified the number of inland bathing areas, inasmuch as it did not match that of the riverside beaches qualifying for Community funding.

10. In its reply to the letter of formal notice, the Portuguese Republic recognised that a number of breaches of the Directive had occurred, and mentioned the programmes that were being put in place to remedy them.

11. As it took the view that the measures adopted were inadequate and that the Portuguese authorities had accepted that breaches of the Directive had occurred six years after the expiry of the time-limit allowed to the Portuguese Republic for implementation of the Directive, the Commission sent to that Member State a reasoned opinion on 11 December 1998.

12. In their reply to the reasoned opinion, the Portuguese authorities recognised that there were certain problems, but described the steps taken to remedy them. In support of their position, those authorities referred to

3 — In terms of Article 13 of the Directive, as amended by Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain Directives relating to the environment (OJ 1991 L 377, p. 48). That directive provides for an annual summary report on bathing water to be drawn up by the Commission based on information to be provided by the Member States.

4 — OJ 1985 L 302, p. 23.

the summary report for 1999, [5] which showed that there had been significant improvements. As it was not satisfied with this reply, the Commission brought the present action on 10 July 2001.

III — The action

13. The Commission's application sets out three complaints relating to the Member State. I shall examine them in turn.

14. The Commission considers that the Portuguese Republic has failed to comply with its obligations under the Directive in that it has failed:

— to comply with the quality standards set down in the Directive;

— adequately to identify all bathing areas, and

— to collect samples at the minimum frequency.

A — *The complaint alleging failure to comply with the quality standards set down in the Directive*

1. Arguments of the parties

15. The Commission alleges that the Portuguese Republic has allowed a significant number of bathing areas to exist whose quality standards do not conform to the mandatory values set down in the Directive. That is in breach of Article 4(1), in conjunction with Article 3, of the Directive.

16. During the pre-litigation procedure and the procedure before the Court, the Commission relied on data for the 1995 to 2000 bathing seasons. It claims that the data supplied by the Portuguese Republic for inclusion in the annual summary report for 2000 showed that, for that bathing season, the level of non-conformity of Portuguese bathing water with the quality standards was still 7.8 % for coastal bathing areas and 31 % for fresh-water bathing areas. [6]

5 — See point 7 of this Opinion.

6 — See paragraph 26 of the application.

17. The Portuguese Republic points out that the percentage of non-compliant inland bathing waters for the 1998 bathing season did not stand at 79%, as the Commission's report states, but at 54%. [7] That difference was due to an error in the transmission of the data between the Member State and the Commission's staff, which was notified to, but not corrected by, the latter. It adds that there has been a significant improvement in those values and in the quality of bathing water over several years as a result of the establishment of national programmes.

2. Assessment

18. In order to assess the first complaint, the question should be asked whether, as the Commission claims, the Member State has indeed failed to ensure that all its bathing areas conform to the quality standards set out in the Directive.

19. The Court has consistently held that Article 4(1) of the Directive requires the Member States to ensure that certain results are achieved and not simply to take whatever steps are necessary to ensure the quality of bathing water conforms to the mandatory values set out in the Directive. The Directive therefore imposes an obligation of result and, apart from the derogations provided for, Member States cannot rely on particular circumstances to justify a failure to fulfil that obligation. [8]

20. As mentioned above, the Portuguese Republic was required to comply with the Directive from 1 January 1993. The Member State itself does not deny that, despite the improvements made during subsequent years, the quality standards of its bathing areas did not conform in full to the values set out in the Annex to the Directive during the 1998 bathing season.

21. The Portuguese authorities claim that, although there remain certain areas which fail to comply, there has been an improvement in the results over the course of the bathing seasons and that the extent of the failure to comply is less than the Commission suggests. These arguments simply challenge the extent of the alleged failure, but not the substance of the complaint.

7 — See p. 7 of the defence.

8 — See Case C-56/90 *Commission* v *United Kingdom* [1993] ECR I-4109, paragraphs 42 to 44; Case C-92/96 *Commission* v *Spain* [1998] ECR I-505, paragraph 27 et seq.; Case C-198/97 *Commission* v *Germany* [1999] ECR I-3257, paragraph 35, and Case C-307/98 *Commission* v *Belgium* [2000] ECR I-3933, paragraph 48.

22. Moreover, none of the derogations provided for in the Directive has been invoked to justify the alleged failure. Difficulty in complying with the requirements of the Directive, particularly as far as the quality of inland bathing areas is concerned, does not come within any of the derogations provided for in the Directive.

23. Such statements therefore show that the Member State admits that it was still in breach in 1998. This confirms that the Commission has complied with the procedural requirement incumbent on it to prove the existence of the alleged failure, notwithstanding the submissions of the Portuguese Republic. [9]

24. Thus in my opinion, in failing to adopt all the provisions necessary to ensure that the quality standards of its bathing water conformed with the mandatory values set out in the Directive, the Portuguese Republic was in breach of its obligations under Article 4(1), in conjunction with Article 3, of the Directive.

B — *The complaint alleging failure adequately to identify all inland bathing areas*

1. Arguments of the parties

25. The Commission claims that the Portuguese authorities have not identified all inland bathing areas in terms of Article 1 (2) of the Directive and are therefore in breach of their obligations under Article 4 (1). [10] It states that throughout the prelitigation procedure it asked the Portuguese authorities to explain the difference between the number of inland bathing areas that had been identified and the higher number of riverside beaches which appeared in an operational programme supplied to Commission staff by the Portuguese Republic for the purpose of obtaining Community funding.

26. Thus, in its letter of formal notice, [11] the Commission stated that at the end of 1995 the Portuguese authorities had identified 26 inland bathing areas in their report for the bathing season. At the same time, under its programme of exploitation of riverside beaches, the Portuguese Republic had specified 91 projects that benefited from Community funding. According to the Commission, the discrepancy between the number of inland bathing areas recorded and the

9 — See, in particular, Case C-96/98 *Commission* v *France* [1999] ECR I-8531, paragraph 36, and Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 27.

10 — See paragraph 27 of the application.

11 — See paragraph 4.

number of riverside beaches demonstrates that there has been a failure to comply with the Directive. The Commission notes the Portuguese Republic's acknowledgement that the riverside beaches are subject to the requirements of the Directive. Those beaches should therefore be identified in accordance with the Directive.

27. The Portuguese authorities claim that the law implementing the Directive provides for designated bathing areas where bathing is expressly permitted when the water quality presents no risk to public health. Those areas are covered by the annual report sent to the Commission. That law provides in addition for areas which are not designated as bathing waters but which are used by a large number of bathers and which will, on the basis of a positive outcome during a season, be so designated. [12] If the quality standards recorded do not comply with the values set in the Directive, bathing is expressly prohibited. These areas do not figure in the annual report.

28. Thus, according to the Portuguese authorities, the Portuguese Republic is carrying out health checks on all waters, including riverside beaches, that are used by a large number of bathers. That is a criterion which should not be too rigidly applied. The implementation of the Directive requires an element of discretion on the part of the Member States as regards the designation of water as bathing water. [13] According to the Portuguese Republic, the classification of water as bathing water is tantamount to the giving of express permission by the authorities, or is even an encouragement to bathe.

2. Assessment

29. In order to assess the Commission's second complaint, alleging failure to identify all inland bathing waters, I shall first consider how the concept of inland bathing waters falls to be understood within the meaning of the Directive. It will then be seen that, contrary to the requirements of the Directive, some of these areas have not been identified by the Portuguese Republic, although falling within the scope of the Directive. The Member State has imposed a further condition for identifying bathing areas which is not included in the Directive, and has thereby restricted the application of the Directive.

30. It should be noted at the outset that according to Article 1(2) of the Directive, a bathing area is any place where bathing water is found. To qualify as 'bathing water', two cumulative conditions require to be met. First, there must be waters or parts thereof

12 — See paragraph 5 of the rejoinder.

13 — See paragraph 9 of the rejoinder.

which are fresh, running or still, or sea water, except, as mentioned in Article 1(1) of the Directive, for water intended for therapeutic purposes and water used in swimming pools. Secondly, either bathing must be explicitly authorised in these waters by the competent authorities of each Member State, or it must not be prohibited and must be traditionally practised by a large number of bathers.

31. The identification of bathing areas by Member States is necessary, as the Directive provides that the quality standards of *all* [14] bathing areas of each Member State must conform to the mandatory limit values set out in the Annex. The definition of bathing water is clear and precise. Only the alternative mentioned at the second indent of Article 1(2)(a), namely practice by a *large number* of bathers, gives an element of discretion to Member States. In the national measure implementing the Directive, the Portuguese Republic interpreted a 'large number' as meaning *approximately 100 bathers per day.* [15] The word *approximately* reflects a flexible approach to this expression by the Member State and the Commission does not challenge the interpretation by the national law of the expression used in the Directive. [16]

32. Moreover, the Directive requires Member States to send an annual report giving the results of the sampling operations to the Commission, which prepares an annual summary report on the basis of those results and the monitoring operations carried out in support of them. In failing to identify and to carry out sampling operations in relation to certain bathing areas, the Member State prevents the Commission from monitoring them.

33. The Court has already held that the expression 'bathing water' must be interpreted in the light of the Directive's underlying purpose as set out in the first two recitals in the preamble thereto, which state that 'in order to protect the environment and public health, it is necessary to reduce the pollution of bathing water and to protect such water against further deterioration' and that 'surveillance of bathing water is necessary in order to attain, within the framework of the operation of the common market, the Community's objectives as regards the improvement of living conditions, the harmonious development of economic activities throughout the Community and continuous and balanced expansion'. [17]

34. These objectives would not be attained if riverside beaches where bathing is neither explicitly authorised nor prohibited by the

14 — Article 3(1) of the Directive, emphasis added.

15 — Defence, p. 13.

16 — *Ibidem.*

17 — See Case C-56/90 *Commission* v *United Kingdom*, cited above, paragraph 33 et seq.

Portuguese authorities, and where bathing is practised, were not identified as bathing areas in terms of the Directive and were not the subject of monitoring by the Commission under it.

35. I believe that there are riverside beaches in Portugal that have not been identified as inland bathing areas but which none the less ought also to come within the scope of the Directive.

36. According to the Portuguese authorities, the Portuguese legislation distinguishes between designated and undesignated bathing areas. [18] Designated areas appear in the annual report sent to the Commission and monitoring them does not pose a problem. The same is not true of undesignated areas, which do not appear in the annual report unless they are used by a large number of bathers and the results collected there during a bathing season conform to the quality standards laid down under the Directive.

37. In my opinion, the question should be asked whether the riverside beaches which the Portuguese authorities describe as undesignated fall within the definition of bathing areas under Article 1(2) of the Directive. According to the first part of the definition, these involve running water in which bathing is not prohibited by the national authorities and, as the second indent of Article 1(2)(a) provides, is traditionally practised by a large number of bathers.

38. In my opinion, the Portuguese authorities have introduced a new criterion for the identification of bathing areas which is not specified in the Directive, namely that the results for a season should conform to the standards set out in the Directive. They have therefore restricted the scope of the implementation of the Directive. That is in breach of the obligations of the Portuguese Republic with regard to the Directive, as it undermines its effectiveness. [19]

39. In terms of the wording of the Directive and its underlying purpose, water used for bathing need not be made subject to a requirement that it meets the mandatory limit values set out in the Directive for a period of one year in order for it to be designated as bathing water. Such a requirement would mean that some waters could be

18 — See point 27 of this Opinion.

19 — See in particular, as regards the obligation of a Member State to give practical effect to a directive, Case 48/75 *Royer* [1976] ECR 497, paragraph 73; Case 271/82 *Auer* [1983] ECR 2727, paragraph 19; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 24, and Case C-130/01 *Commission* v *France* [2003] ECR I-5829, paragraph 65.

identified as bathing areas within the meaning of the Directive only if they returned positive results for a season.

40. The Portuguese Republic must identify these riverside beaches as bathing areas solely on the basis of whether or not they fall within the definition set out in the Directive. It must ensure that the mandatory limit values are met in those areas, without waiting for one or even several years to pass until positive results are returned for a whole season.

41. Riverside beaches which are used by a large number of bathers each day are thus by definition bathing waters for the purposes of Article 1 of the Directive. As it has not applied the requirements of the Directive to them, the Portuguese Republic is in breach of its obligations.

42. Accordingly, in making the identification of bathing areas subject to the condition that the results of the samples taken should conform over a whole season with the values set out in the Directive in relation to riverside beaches where bathing is not prohibited and which are traditionally used by a large number of bathers, the Portuguese Republic has failed to meet its obligations under Article 4(1), in conjunction with Article 1(2), of the Directive. The complaint which has been considered should therefore be upheld.

C — *The complaint alleging failure to take samples at the minimum frequency laid down in the Directive*

1. Arguments of the parties

43. In its application, the Commission states that the Portuguese Republic has failed to take samples at the minimum frequency laid down under Article 6(1) and (2) of the Directive. Admittedly, the Commission submits that the sampling rate for identified bathing areas is 100 %. However, as all bathing areas have not been identified, it follows that that frequency has not been observed in relation to unidentified bathing areas. [20]

44. The Portuguese authorities submit that this represents a new complaint on the Commission's part, which does not appear in the reasoned opinion. They therefore did not have the opportunity of mounting a defence at the pre-litigation stage. [21] In support of their contention, they refer to the case-law of the Court which states that the pleas in law contained in the reasoned opinion and in the application must be the same, failing which the complaint will be inadmissible. [22]

20 — See paragraph 29 of the application.

21 — See paragraph 12 of the defence.

22 — See Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraphs 30 and 31.

45. In its reply, the Commission submits that the complaint alleging failure to take samples at the minimum frequency appeared both in the letter of formal notice and in the reasoned opinion, and has therefore existed since the start of the infringement proceedings against the Portuguese Republic. According to the Commission, the subject-matter of the proceedings has not been altered and it accordingly rejects the challenge based on a breach of the rights of the defence.

2. Assessment

46. An assessment of the third complaint raises as a preliminary question whether the Commission has respected the rule that the subject-matter of the dispute must remain unchanged throughout the different procedural stages.

47. It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law and to avail itself of its right to defend itself against the charges made by the Commission. [23] The subject-matter of the dispute is therefore delimited by the pre-litigation procedure and cannot be extended at the stage of the application. To extend the subject-matter of the dispute at the stage of the application would prejudice the rights of the Member State to defend itself. That is why an application may be based only on the complaints raised in the pre-litigation procedure. [24]

48. I would point out that it is necessary that the subject-matter of the complaints should be the same throughout the proceedings in order that the adversarial nature of the proceedings be respected, and at the same time to allow the Member State to defend itself. The Court has made it clear that compliance with this objective constitutes 'an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure under Article 169'. [25]

49. However, the Court has qualified the requirement that the complaints be the same, stating that that requirement 'cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited'. [26]

23 — See, in particular, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23, and Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 10.

24 — See Case 51/83 *Commission* v *Italy* [1984] ECR 2793, paragraph 4; Case C-206/96 *Commission* v *Luxembourg* [1998] ECR I-3401, paragraph 13; Case C-340/96 *Commission* v *United Kingdom* [1999] ECR I-2023, paragraph 36, and Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 51.

25 — See Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 6.

26 — Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 56.

50. In this case, the Commission cannot be accused of having extended the subject-matter of the dispute in the application by comparison with the subject-matter of the pre-litigation procedure.

51. Admittedly, there have been changes of detail to this complaint as it has developed during the different stages of the pre-litigation procedure and the procedure before the Court. In the letter of formal notice and in the reasoned opinion, the Commission referred to a failure to collect samples at the minimum sampling frequency from identified bathing areas. [27] Later, it stated that the failure to take samples related to riverside beaches which had not been identified as inland bathing waters. [28]

52. Nevertheless, I am of the opinion that this change of detail makes no difference to the substance of the matter. The subject-matter of the dispute has not been modified by it and the rights of the defence have been respected.

53. The complaint alleging failure to collect samples at the minimum frequency is inherently linked to the preceding complaint made by the Commission, relating to the failure to identify all bathing areas. In that complaint, the Commission accused the Member State of failing to implement the Directive and the obligations under it in regard to some of its bathing areas, for example by failing to collect the samples required by and set out in the Directive.

54. The obligation to collect samples is the method laid down by Article 6 of the Directive for monitoring bathing water and for ensuring that its quality conforms with the quality standards set out in the Annex to the Directive. This obligation is an absolute one, and the Directive allows for no derogations from it. All Member States are therefore required to comply with that obligation in relation to all of their bathing areas.

55. Accordingly, where a Member State has failed to identify some of its waters as bathing waters in terms of the Directive, there must be a strong presumption that the Member State has also failed to collect the samples required by it. In the present case, the Portuguese Republic has failed to identify some of its bathing waters, the Member State has not applied the Directive to those waters, nor has it collected samples from them.

56. In my opinion, the complaint alleging failure to comply with the minimum frequency of samples from the unidentified bathing areas is a logical and automatic consequence of the Commission's preceding complaint, which alleges that the Member State has failed to identify bathing areas in accordance with the Directive and has therefore failed to apply its requirements to those areas.

27 — See paragraph 2 of the letter of formal notice, set out in Annex 1 to the application.

28 — See paragraph 29 of the application.

57. There are therefore no consequences regarding the respect of the rights of the defence in this case. The Portuguese Republic has already had the opportunity to defend itself throughout the pre-litigation procedure and the proceedings before the Court as regards compliance with the requirements of the Directive, such as the obligation to collect samples from unidentified bathing areas, in the context of the complaint against the Member State that it failed to identify its bathing areas. I am therefore of the view that the procedural safeguards, in particular the requirement that the subject-matter of the dispute remains the same and the rights of the defence, have been complied with in the present case.

58. The Commission's complaint is admissible. In the absence of valid objections on the part of the Member State that complaint should be upheld.

IV — Conclusion

59. In light of the foregoing I propose that the Court should declare as follows:

(1) In failing to adopt all the provisions necessary to ensure that the quality of bathing water conforms to the limit values laid down under Article 3 of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, in failing to identify all inland bathing areas, and in failing to collect samples at the minimum frequency, the Portuguese Republic has failed to fulfil the obligations imposed on it in terms of Article 4(1) of the Directive, in conjunction with Article 3, the Annex and Article 1(2), and also of Article 6(1) and (2) of the Directive.

(2) The Portuguese Republic is ordered to pay the costs.