

OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 6 May 2004¹

1. The Commission has brought an action against Germany under Article 226 EC, in which it asks the Court of Justice to give judgment against the Member State for failing to fulfil some of its obligations under Community law.

Packaging Regulation’) of 21 August 1998,⁴ a system for reusing bottles for natural mineral water, which must be bottled at source.

I — The national legislation applicable at the end of the period laid down in the reasoned opinion⁵

It alleges specifically that Germany has infringed Article 5 of Directive 94/62/EC² and Article 28 EC, and also Article 3 of Directive 80/777/EEC³ in conjunction with Paragraph 2(d) of Annex II thereto, by introducing, by means of Paragraphs 8(1) and 9(2) of the *Verordnung über die Vermeidung und Verwertung von Verpackungsmüll* (Regulation on the Avoidance and Recovery of Packaging Waste; ‘the

2. The German Packaging Regulation lays down various measures for achieving the objective of avoiding or reducing the impact of packaging waste on the environment. That legislation, which replaced the legislation of 12 June 1991,⁶ is intended to incorporate Directive 94/62 into national law; it defines reusable packaging as packaging designed to be used several times for the same purpose.

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). It has been significantly amended by European Parliament and Council Directive 2004/12/EC of 11 February 2004 (OJ 2004 L 47, p. 26), but the amendments have not affected the articles applicable to this case.

3 — Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters (OJ 1980 L 229, p. 1).

4 — BGBl. I, p. 2379.

5 — The Commission explains that the provisions of both Community law and national law were amended during the administrative procedure which preceded the bringing of the action.

6 — BGBl. I, p. 1234. That legislation contained similar provisions concerning the compulsory deposit on non-reusable drinks packaging.

According to its provisions, producers and distributors of mineral water bottled in non-reusable packaging are to charge a deposit on each item at every stage in the chain of distribution, although they may be released from that obligation, which includes the duty to take back and recover the empty bottles, by participating in a comprehensive system for managing packaging and packaging waste. However, if the overall proportion of drinks sold in Germany in reusable packaging falls below 72% and, at the same time, the proportion of reusable packaging achieved in 1991 in the mineral-water sector, which was 91.33%, is not reached, the economic operators lose that option, and must begin to charge a deposit and assume responsibility for recovering the bottles.

3. The obligations under subparagraphs 1 and 2 shall not apply to packaging in respect of which the producer or distributor participates in a system which sufficiently ensures that used sales packaging is regularly collected from the private final consumer or in his vicinity, throughout the whole sales territory of the distributor ... [The] system ... shall recover packaging delivered to it, in accordance with the requirements of point 1 of Annex I, and shall fulfil the requirements in points 3 and 4 of Annex I. Proof of participation in [such] a system shall be provided to the competent authority on request. ... Coordination shall be arranged by the system operator and the public waste management authority in writing. ...

3. Paragraph 6 of the Packaging Regulation provides:

'1. Distributors shall accept the return of used empty sales packaging from final consumers, free of charge, at, or in the immediate vicinity of, the actual point of delivery, recover the packaging in accordance with the requirements of point 1 of Annex I and fulfil the requirements of point 2 of Annex I. ...

4. The competent authority may revoke its determination ... immediately where it establishes that there is a failure to comply with the requirements ... Where the recovery quotas specified in Annex I to this regulation have not been achieved in respect only of packaging made out of particular materials, the revocation shall apply only to such packaging. Subparagraphs 1 and 2 shall apply with effect from the first day of the sixth calendar month following publication of the revocation. ...'

2. Producers and distributors shall accept free of charge at the place of actual delivery packaging returned to distributors under subparagraph 1, recover the packaging ...

4. Paragraph 8(1) of the Packaging Regulation states in the following terms the rule that a deposit is compulsory for non-reusable drinks packaging:

'Distributors who put liquids for consumption into circulation in non-reusable drinks packaging shall charge the purchaser a deposit of at least DEM 0.50 including turnover tax per item of packaging; where the net volume exceeds 1.5 litres, the deposit shall be at least DEM 1 including turnover tax. The deposit shall be charged by each further distributor at every stage in the chain of distribution until delivery to the final consumer. The deposit shall be repaid when the packaging is returned under Paragraph 6(1) and (2).'

5. Paragraph 9 regulates the exemption from the obligation to charge a deposit and the protection afforded to ecologically sound drinks packaging as follows:

fruit syrups, vegetable juices and other non-carbonated drinks) and wine (except pearl wine, sparkling wine, vermouth and dessert wine), the combined proportion of drinks in reusable packaging falls below 72% in the calendar year in the geographical area to which this regulation applies, a new survey of the relevant proportions of reusable packaging shall be carried out for the 12 months following publication of the failure to achieve the required proportions. If this shows that the proportion of reusable packaging in Federal territory is below the proportion laid down under the first sentence, the decision under Paragraph 6(3) shall be deemed to be revoked throughout Federal territory in respect of the drinks categories for which the reusable proportion determined in 1991 is not achieved, with effect from the first day of the sixth calendar month following publication in accordance with subparagraph 3. The first and second sentences shall apply *mutatis mutandis* in respect of pasteurised milk for human consumption when the proportion of reusable packaging and polyethylene bag packaging falls below 20% in the calendar year in the geographical area to which this regulation applies.

'1. Paragraph 8 shall not apply to packaging in respect of which the producer or distributor participates in a [comprehensive] system under Paragraph 6(3). Paragraph 6(4) shall apply *mutatis mutandis*.

2. If, for beer, mineral water (including spring water, table water and spa water), carbonated soft drinks, fruit juices (including

3. Each year, the Federal Government shall publish in the *Bundesanzeiger* [Federal Gazette] the relevant proportions, for the purposes of subparagraph 2, of drinks sold in ecologically sound packaging.

4. Where the relevant proportion, for the purposes of subparagraph 2, of drinks packaged in ecologically sound drinks packaging is achieved again after a revocation, the competent authority shall make a new determination under Paragraph 6(3) on application or on its own initiative.'

the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community.

6. The Commission states that, under those provisions, whenever the overall proportion in Germany of drinks in reusable packaging falls below 72% and the proportion determined in 1991 of reusable packaging in the mineral-water sector is not achieved, distributors of mineral water in non-reusable bottles are required to charge a deposit on each bottle and cannot be released from that obligation by participating in a comprehensive system for managing packaging and packaging waste.

To this end it lays down measures aimed, as a first priority, at preventing the production of packaging waste. It then refers to reuse, and to recycling and other forms of recovering packaging waste.

8. Article 5 provides:

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

II — The Community legislation

7. The aim of Directive 94/62, as stated in Article 1, is to harmonise national measures concerning the management of packaging and packaging waste in order, on the one hand, to prevent any impact thereof on the environment of all Member States as well as of third countries or to reduce such impact, thus providing a high level of environmental protection, and, on the other hand, to ensure

9. Under Article 3 of Directive 80/777, natural mineral water springs may be exploited and their waters bottled only in accordance with Annex II, which also lays down the marketing conditions. Under paragraph 2(d) of the annex, the transport of natural mineral water in containers other than those authorised for distribution to the ultimate consumer is prohibited. This

means, in practice, that the water must be bottled at source in the container in which it is put on the market.

longer applicable; it took the view that the barriers to trade were minimal and that, in any event, the contested measures, the aim of which was to prevent an increase in packaging waste by encouraging the use of reusable packaging, were adopted for environmental reasons.

III — Pre-litigation procedure

10. After receiving several complaints relating to the incompatibility of the German legislation of 1991 with Community law and discussing the matter with the national authorities, the Commission concluded that that legislation was incompatible with Article 28 EC. In December 1995 it therefore sent a letter of formal notice to the Federal Government, pointing out that the obligation to charge a deposit for non-reusable packaging constituted a barrier to intra-Community trade, since it placed that packaging at a disadvantage in relation to reusable packaging, and that the obligation could not be justified on grounds of environmental protection, because it was imposed exclusively on certain packaging and it simply maintained without change the circumstances which had obtained on the domestic market at a certain time.

11. In view of the fact that Directive 94/62 had been adopted and that, in Germany, the 1998 Regulation repealing the 1991 legislation had been enacted to implement its provisions, the Commission sent an additional letter of formal notice in December 1998. In the letter it expressed its doubts as to the compatibility with that directive and with Article 28 EC of Paragraphs 8 and 9 of the new Packaging Regulation, which provide for a mandatory deposit and lay down the applicable percentages for reusable packaging, because they do not observe the principle of proportionality. In its view, those rules adversely affect products which originate far from the points of sale and which, by law, cannot be bottled anywhere else. It gave the example of mineral water, governed by Directive 80/777, which have to be bottled at source. It invited the German Government to suggest ways of making the system more flexible.

Germany replied in May 1996 that Directive 94/62 had effected a complete harmonisation of the matter, so that Article 28 EC was no

In April 1999, the Federal Republic of Germany claimed that Paragraph 9 of the

Packaging Regulation does not constitute a quantitative restriction or a measure having equivalent effect and that, if it did, it would be justified. So far as concerns, specifically, mineral water, it maintained that, according to a study published by the Federal Ministry of the Environment in November 1998, up to a distance of 750 km between the place in which it was packaged and the point of sale, it was more ecologically sound to use reusable packaging than non-reusable packaging.

explained the options available to foreign producers of mineral water for making sales in the country. It submitted that the promotion of reusable bottles was consistent with Article 5 of Directive 94/62 and that, because national producers and foreign producers were treated in the same way, Article 28 EC was not infringed either. It referred to an ecobalance analysis completed in August 2000, which showed that reusable packaging offered advantages over non-reusable packaging, even when it had to be transported to distant places. It added that it intended to amend Paragraphs 8 and 9 of the Packaging Regulation on the basis of the results obtained.

12. In July 2000, after it had evaluated these arguments, the Commission issued a reasoned opinion in which it stated that the infringement had been established. Specifically, it criticised Germany for applying Paragraphs 8(1) and 9(2) of the Packaging Regulation to producers of natural mineral water, which has to be bottled at source. According to the Commission, those provisions create a barrier to trade by imposing a heavy burden on undertakings, requiring them to transport empty reusable packaging long distances, thereby causing particular harm to undertakings established in other Member States. Furthermore, the provisions have no legal basis in Article 5 of Directive 94/62, because they go beyond what is necessary to achieve the aims pursued and because they are inflexible.

13. The Commission was not convinced by these arguments and decided to bring an action before the Court of Justice for failure to fulfil obligations.

IV — Procedure before the Court of Justice

In November 2000 Germany expressed its disagreement with the Commission and

14. The application was received at the Registry on 3 December 2001 and the defence arrived on 14 February 2002. Those two pleadings were supplemented by a reply and a rejoinder.

15. France and the United Kingdom were given leave to intervene in the proceedings by order of the President of the Court of 29 May 2002. After the United Kingdom had examined the pleadings forwarded to it, it decided not to lodge a statement in intervention.

16. At the hearing, which was held on 2 March 2004, oral argument was presented by the agent of the Commission, the agent of the French Government and the agent of the German Government.

V — Assessment of the action

A — Admissibility

17. Without formally raising a plea of inadmissibility, the German Government states, in paragraphs 5 to 7 of the rejoinder, that the action for failure to fulfil obligations cannot succeed because the subject-matter of the dispute has been altered in the application.⁷ It states that, in the letter of formal notice and in the reasoned opinion, the Commission, although it raised numerous objections against the Packaging Regulation, did not mention the pressure which the German quota scheme puts on foreign producers of mineral water. The German

Government was thus prevented from submitting observations on that charge, and also deprived of the opportunity to examine and discuss ways of avoiding the proceedings,⁸ amongst which may be mentioned, for example, that of excluding foreign producers of mineral water from the calculation of the percentages given in Paragraph 9(2) of the Packaging Regulation.

18. It is true that the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.⁹ According to the case-law of the Court of Justice, the Member State must be given an opportunity either to justify its position or, as the case may be, to comply of its own accord with the requirements of Community law. If the attempt to reach a settlement proves unsuccessful, the Member State is requested to comply with its obligations as set out in the reasoned opinion — which marks the end of the pre-litigation stage under Article 226 EC — within the period prescribed therein.¹⁰

8 — After the end of the written procedure, the Court of Justice asked the Commission to express its views on the objections raised in this respect by Germany, which it did in a document lodged at the Court Registry on 16 January 2004.

9 — Order in Case C-266/94 *Commission v Spain* [1995] ECR I-1975, paragraph 17; and judgment in Case C-159/94 *Commission v France* [1997] ECR I-5815, paragraph 15.

10 — Case 74/82 *Commission v Ireland* [1984] ECR 317, paragraph 13; and Case 85/85 *Commission v Belgium* [1986] ECR 1149, paragraph 11.

7 — In fact, the Commission expressly refers to the 'pressure' put by the German legislation on producers of mineral water to use reusable bottles in point 3 of the reply.

19. Nevertheless, after evaluating the documents exchanged between the parties during that administrative stage of the proceedings, I disagree with the German Government's assessment.

so far as to mean that in every case the statement of complaints must be exactly the same, where the subject-matter of the proceedings has not been extended or altered.¹²

20. Both in the first letter of formal notice, which was based on infringement of the Treaty provisions concerning the free movement of goods, and in the additional one, which was sent after the adoption of Directive 94/62, the Commission strongly criticised the fixing of a minimum percentage of reusable drinks packaging, with specific reference to mineral water, which has to be bottled at source.

21. In the reasoned opinion, which defines the subject-matter of the action for failure to fulfil obligations,¹¹ the Commission limited its complaints to the application of the contested legislation, namely Paragraphs 8(1) and 9(2) of the Packaging Regulation, to the placing on the market of mineral water, and ignored the marketing of all the other drinks included in those provisions. The Court of Justice has held that, although under its case-law the complaints in the application must be identical to those in the letter of formal notice and in the reasoned opinion, that requirement cannot be carried

22. To be specific, in paragraph 2(a) of Section IV of the reasoned opinion, the reasons why the contested national rules constitute a barrier to trade are stated: although they apply without distinction to national and imported products, they impose a greater burden on foreign traders, who, if they decide to use reusable bottles, must transport the empty ones great distances, resulting in additional costs and the risk of a greater impact on the environment than if they used non-reusable packaging. Furthermore, although the German legislation leaves a segment of the market for non-reusable packaging before the mechanism which requires a deposit to be charged on each bottle is applied, it contains an incentive to maintain the 1991 level so that, in practice, producers established a long way from the point of sale can increase their market share in Germany only if others situated nearer are prepared to let them have part of their market share.

11 — Case 154/85 *Commission v Italy* [1987] ECR 2717, paragraph 6; Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, paragraph 18; and Case C-1/00 *Commission v France* [2001] ECR I-9989, paragraph 53.

12 — Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 25; and Case C-52/00 *Commission v France* [2002] ECR I-3827, paragraph 44.

That explanation clearly reflects the pressure to which the Commission refers in the reply: the aim of Paragraph 9(2) of the Packaging Regulation is to encourage producers to use reusable packaging, as they otherwise run the risk of failing to achieve the fixed quota and losing the possibility of being exempted from the obligation to charge a deposit, to accept the return of used packaging and to return the deposit by participating in a comprehensive system for managing packaging and packaging waste.

24. If the defendant was indeed prepared to leave foreign producers of mineral water out of the calculation of the percentage, in order to save those using non-reusable bottles the uncertainty that, at any moment, they might be refused permission to make use of the aforementioned comprehensive system, with the consequent burden of having to make arrangements to charge a deposit, it ought to have suggested it at that stage, instead of doing so in the rejoinder.¹³

25. Finally, the charges made by the Commission in the application coincide with those in the reasoned opinion. I have to conclude, therefore, that the rights of the defence of the defendant State have not been infringed and that the Commission's application is admissible.

23. The defence of its legislation in the reply to the reasoned opinion shows that the German Government had correctly interpreted the Commission's complaints, particularly those relating to the adverse consequences which the minimum compulsory percentage of reusable packaging causes for undertakings from other Member States which bottle and market mineral water. In fact, it clearly stated the possible ways in which those undertakings may sell their drinks in Germany: they can use reusable packaging, participating in arrangements to share standardised bottles, and they can use non-reusable packaging on which they charge a deposit, or even without charging a deposit provided that they participate in a comprehensive management system, although this last alternative may be removed when the required proportion of reusable packaging on the national market is not achieved.

26. At the hearing, the agent of the German Government maintained, furthermore, that the Commission no longer had an interest in the action because, on 1 January 2003, the general obligation to charge a deposit had come into force, which lifted the alleged pressure off importers.

27. I also disagree with that assessment. Without analysing at this point whether the German legislation is liable to prompt

¹³ — At the hearing, the agent of the German Government dwelt on that point.

importers of mineral water to behave in a certain way, a matter which I shall consider when I examine the substance, it must be remembered (i) that, when exercising its powers under Articles 211 EC and 226 EC, the Commission does not have to show that there is a specific interest in bringing the action since its function is, in the general interest of the Community, to ensure that Member States comply with the EC Treaty and to obtain a declaration of any failure to fulfil the obligations deriving therefrom¹⁴ and (ii) that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion,¹⁵ so that, even when the default has ceased after the prescribed time-limit, there is still an interest in pursuing the action with a view to establishing the basis of the liability that the Member State could incur in relation to the rights which may have been affected.¹⁶

B — Substance

28. The Commission maintains that the contested German rules, contained in Para-

graphs 8(1) and 9(2) of the Packaging Regulation, are incompatible with Article 5 of Directive 94/62 and Article 28 EC, in so far as they concern the marketing of natural mineral water from other Member States that is bottled at source,¹⁷ because they introduce a barrier to trade which cannot be justified on grounds of environmental protection. The French Government is of the same opinion.

29. The German Government, in a robust defence of its position, maintains that the application is unfounded on three grounds: (1) the aforementioned Paragraphs 8 and 9 are founded on Directive 94/62 which regulates exhaustively the use and promotion of reusable packaging, and there is therefore no need to consider them in the light of Article 28 EC; (2) they do not restrict the free movement of goods since they merely contain selling arrangements and producers and distributors are not required to use reusable bottles; and (3) they are necessary and appropriate in order to protect the environment in Germany.

14 — Case 167/73 *Commission v France* [1974] ECR 359, paragraph 15; Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraph 21; Case C-365/97 *Commission v Italy*, cited above, paragraph 59; and Joined Cases C-418/00 and C-419/00 *Commission v France* [2002] ECR I-3969, paragraph 29.

15 — Case C-394/00 *Commission v Ireland* [2002] ECR I-581, paragraph 12.

16 — *Commission v Italy*, cited in footnote 11, paragraph 6.

17 — In Case C-309/02 *Radlberger and Spitz*, which is pending judgment, a German court has referred for a preliminary ruling four questions in which it seeks the interpretation of Directive 94/62, specifically Article 1(2), Article 7 and Article 18, and also of Article 28 EC, in order to ascertain whether they preclude certain provisions in the Packaging Regulation applicable to the packaging in which practically all soft drinks and wine, as well as mineral water, are marketed.

These grounds should be analysed in the order in which they are put forward by the defendant.

imposes certain burdens on producers and distributors, does not in itself raise problems of compatibility with Community law,¹⁸ because it is provided for in Article 7 of Directive 94/62, a provision which the Member States have had to incorporate into national law. Such a system concerns both reusable and non-reusable packaging. I must therefore partly agree with the defendant State on this point.

1. The scope of the harmonisation effected by Directive 94/62 and the applicability of Article 28 EC to this case

30. The German Government takes the view that the possibility given to Member States in Article 5 of Directive 94/62 to promote systems for reusing packaging encompasses charging a deposit on both reusable packaging and non-reusable packaging. It considers that Directive 94/62 exhaustively regulates that field so that, when the national provisions are examined in the light of Community law, Article 28 EC is applicable only in the alternative in so far as those two sets of provisions are not sufficiently compatible. The European Union has expressly authorised the promotion of reusable packaging and Article 5 of Directive 94/62 would be rendered ineffective if its use and return to the place of production were to compromise the free movement of goods, as the Commission suggests.

32. In the Opinion delivered in Case C-246/99 *Commission v Denmark*,¹⁹ which concerned national legislation prohibiting the importation of beer and carbonated soft drinks in cans, I had the opportunity to express my views on the scope of the harmonisation undertaken by Directive 94/62 in the field. In that case, the packaging satisfied all the basic conditions set out in Annex II to the directive, so that the prohibition was clearly contrary to Article 18, which establishes the freedom to place packaging on the market in any of the Member States. I argued that national measures on the management of packaging and packaging waste had been harmonised when the directive was adopted. In such circumstances, according to the case-law, if the national legislation is compatible with the directive, it cannot be subject to a review of its compatibility with the primary legisla-

31. In my view, the fact that a Member State arranges for the collection of packaging waste and empty packaging under the deposit, return and recovery system, which

18 — It is necessary to examine whether the system causes a compartmentalisation of the market and whether it adversely affects, in particular, producers from other Member States.

19 — [2002] ECR I-6943. See paragraphs 18 to 41. The action was ultimately abandoned.

tion governing the free movement of goods.²⁰

33. However, I disagree with the German Government when it contends that what has been harmonised is the use and promotion of reusable packaging. Article 5 of Directive 94/62, which allows Member States to promote reuse systems, and requires them to do so in accordance with the Treaty, is an imprecise provision, the wording of which gives no indication as to the manner in which the national authorities are empowered to act or the direction that they may take. Reuse, that is to say, any operation by which packaging is refilled and used for the same purpose for which it was conceived, is defined in Article 3(5), a provision which affords no clarification for these purposes, so that it cannot be stated, as the German Government claims, that the directive has harmonised the promotion of the use of reusable packaging.

34. It is therefore necessary — in order to judge these applications — to refer to the primary legislation as a whole, and not only to the principles governing the free movement of goods. When public authorities grant, for example, subsidies or aid to encourage research and the development of

investment for converting or improving packaging plants, for manufacturing reusable packaging or for establishing activities to promote reuse, and when they adopt measures of an economic, financial or fiscal nature, they must observe the rules on State aid and competition, just as they have to comply with the Treaty provisions on tax matters.

Furthermore, if there is evidence that the decisions made by a Member State to promote reuse systems, even if they do not actually prohibit imports, constitute restrictions on the free movement of goods, they must be examined in the light of Articles 28 EC and 30 EC, because it is clear that, under Article 18 of Directive 94/62, Member States are not to impede the placing on the market of packaging which satisfies the essential requirements set out in Annex II to the directive, which have been the subject of harmonisation. There are, however, more subtle ways in which the State may act in order to bring about the same result.

35. In support of its argument that Article 28 EC is not applicable in this case, the German Government also relies on the judgment in *DaimlerChrysler*,²¹ paragraph 44 of which stated that the use in Article

²⁰ — Case C-5/93 *Hedley Lomas* [1996] ECR I-2553, paragraph 18; and Case C-102/96 *Commission v Germany* [1998] ECR I-6871, paragraphs 21 and 22.

²¹ — Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897.

4(3)(a)(i) of Regulation (EEC) No 259/93²² of the expression 'in accordance with the Treaty' could not be construed as meaning that a national measure that satisfied the requirements of that provision had to be subject to a review of its compatibility with the primary legislation on the free movement of goods.

measure in a sphere which has been the subject of exhaustive harmonisation at Community level must be assessed in the light of the harmonising measure and not of the primary legislation,²⁴ even though the power conferred on Member States by Article 14(1) of Directive 97/7²⁵ must be exercised with due regard for the Treaty, as is expressly stated in that provision.²⁶

36. There are various reasons why, in my view, this argument put forward by the defendant is unlikely to succeed. First, the Court of Justice completed that finding in the following paragraph of the judgment, adding that that expression likewise does not mean that all national measures restricting the shipments of waste referred to in Article 4(3)(a)(i) of Regulation No 259/93 must be systematically presumed to be compatible with Community law solely because they are intended to implement one or more of the principles referred to in that provision. Instead, in addition to being compatible with the regulation, such national measures must also comply with the rules or general principles of the Treaty to which no direct reference is made in the legislation adopted in the field of waste shipments. The same assessment appears in the judgment in *Deutscher Apothekerverband eV*,²³ paragraph 64 of which states that a national

37. Secondly, in the *DaimlerChrysler* case the relevant Community legislation was a regulation which, by definition, as well as constituting a measure of general application binding in its entirety and directly applicable within the territory of the Union, is more specific than a directive, whose provisions are incorporated by the Member States into their respective national legal orders. It is true that, as the German Government points out, the wording used in Regulation No 259/93 and in Directive 94/62 to refer to the Treaty is the same. However, there is a great difference between the content of Article 4(3)(a)(i) of the regulation and Article 5 of the directive; whereas the former contains

24 — Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9, and *DaimlerChrysler*, cited above, paragraph 32.

25 — Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).

26 — This provision allows Member States to introduce or maintain, in the area covered by the directive, more stringent provisions, compatible with the Treaty, to ensure a higher level of consumer protection.

22 — Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1).

23 — Case C-322/01 [2003] ECR I-14887.

the principles governing the Member States and the specific measures which they may adopt, the latter merely states that such measures have to favour reusable packaging without harming the environment.

2. Nature of the contested legislation: a measure having an effect equivalent to a quantitative restriction on imports or simply selling arrangements

38. There is no doubt that the Community legislature approves of actions of national authorities favouring packaging-reuse systems which indirectly result in the avoidance of waste, provided that, whether they are of an economic, financial, fiscal or other nature, they do not interfere with the proper functioning of the internal market.

39. I therefore consider that Article 5 of Directive 94/62, in itself, is not specific enough for it to be assessed on the basis of that provision whether provisions adopted by Member States to promote packaging-reuse systems that do not harm the environment are compatible with Community law, and it is not possible to complement it by referring to other provisions in the same legislation. The Commission is right, therefore, to maintain that the reference made by Article 5 to the Treaty as a whole makes it possible to review the compatibility of those national provisions with the primary legislation on the free movement of goods.

40. According to the German Government, the aim of Paragraphs 8 and 9 of the Packaging Regulation is to incorporate Article 5 of Directive 94/62 into the national legal system, so they cannot therefore be incompatible with Article 28 EC or constitute barriers to trade: they do not unilaterally protect the State's national interests and they fulfil the obligations imposed in the general interest of the Community. In its submission, the aforementioned regulation allows drinks distributors to sell drinks in packaging of either type; the obligation to charge a deposit is imposed on those who market mineral water in Germany in non-reusable bottles, irrespective of the place in which they are established. Foreign mineral-water producers are in no way affected, since the rules apply only to the retailer and the consumer. For the latter, the expense is the same whether he buys water in a reusable bottle or in non-reusable packaging. In both cases he must pay a deposit which is returned to him when he returns the empty bottle/packaging. In the rejoinder, the German Government emphasises that Paragraph 8 of the regulation contains the fundamental rule that the sale of drinks in non-reusable packaging is conditional on charging a deposit, whereas Paragraph 9 fixes the date and conditions for the deposit's applicability. It takes the view that it is impossible to

separate, as the Commission seeks to do, the announcement that, from a certain day, the deposit becomes payable, which is allegedly contrary to Community law, from the deposit obligation itself, which, as such, is compatible with Community law.

According to the German Government, foreign mineral-water companies are not under pressure to bottle water in reusable packaging since imports rose from 230 million litres in 1994 to over 680 million litres in 2000. In 2002 they were already charging a deposit on most non-reusable packaging (about 53% of imports) and accepting its return voluntarily. The regulation is not indirectly discriminatory, since it does not apply according to the place of origin of the water or packaging, and places undertakings from other countries in the same position as German undertakings.

41. Referring to Article 3(5), it contends that Directive 94/62 establishes a preference for reusable packaging because it helps to prevent the production of waste, which is the main objective on the list of priorities. It points out that Article 5 does not give the Member States a free hand to promote reuse systems: in order to comply with the

directive packaging must be conceived and designed to carry out a minimum number of trips or rotations, must be refillable without harming the environment and must observe the other general rules and principles.

42. It considers that, if there are barriers to trade, these must be attributed to Directive 80/777 because, before it was enacted, a high proportion of the mineral water sold in the Member States was in reusable bottles. The Community legislation, by introducing bottling at source, accepted that kind of packaging being transported long distances. In practice, those who market such products face greater problems than their competitors in the soft-drinks sector, irrespective of whether they opt for one method of packaging or the other. It submits, finally, that Paragraphs 8 and 9 of the Packaging Regulation contain merely selling arrangements, which do not fall within the scope of Article 28 EC.

43. It is true that, as the German Government claims, the Court of Justice has held that a national rule designed to implement a directive of the Council in the general interest of the Community²⁷ cannot be characterised as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC.

²⁷ — Case 46/76 *Bauhuis* [1977] ECR 5, paragraphs 28 and 29, and Case C-246/98 *Berendse-Koenen* [2000] ECR I-1777, paragraphs 24 and 25.

However, as the Commission rightly points out, the precondition for reliance upon that case-law, namely that the Member State is acting in fulfilment of an obligation imposed by a directive, is not present in this case since, as we have already seen, Article 5 of the directive, far from imposing any obligation, merely states a power.

45. According to Germany, the aim of these provisions is to promote the use of reusable packaging. In my view, the Commission is right when it states that they make it difficult to market in Germany products such as natural mineral water, which, under Directive 80/777, has to be bottled at source. I therefore disagree that it affects only retailers and consumers.

46. The reasons for which I take this view are as follows.

44. The provisions at issue are: Paragraph 8(1) of the Packaging Regulation, according to which a distributor of drinks in non-reusable packaging must charge the customer a deposit and return it to him when he returns the empty packaging; and Paragraph 9(2), which suspends that measure if the undertaking responsible participates in a comprehensive management system and provided that the proportion of reusable packaging in Germany does not fall below 72%. If that threshold is crossed, the deposit, return and recovery obligation comes into effect in respect of drinks for which the percentage of reusable packaging is below that achieved in 1991 which, as the Commission points out in the application, was, for mineral water, 91.33%. Apparently, this method of graduated control was accepted by the economic operators concerned, who were committed to ensuring that the rate of non-polluting reusable drinks packaging did not fall below the level achieved at that time.

47. First, Article 7 of Directive 94/62 requires the Member States to adopt the measures necessary to introduce systems for the return or collection of used packaging and packaging waste, and specifies that the systems have to be open to the participation of the economic operators affected. Under that provision, the national authorities may choose, for non-reusable drinks packaging, between making it subject to deposit, return and recovery or allowing it to be collected, by means of a comprehensive management system, from the consumer's home or near the place in which the distributor operates. However, the fact that in a country the continuation of the second option is made conditional on the overall volume of reusable bottles on the national market not falling below a specific proportion is, without a doubt, a source of legal uncertainty for the economic operators marketing their pro-

ducts in non-reusable packaging because, as long as the rate is kept above the fixed threshold, the undertakings operate year after year with the fear that they will not manage to reach that percentage, in which case, if, in the corresponding sector, the 1991 rate is not achieved either, they will have to arrange, in a very short space of time, to charge a deposit throughout the whole distribution chain.

when the proportion exceeds 72%, to use non-reusable bottles again, with the likely consequence that the percentage will fall again. It seems to me that the decision which undertakings take as to the type of packaging to use is sufficiently important for legislation of that kind not to make it very uncertain for undertakings which choose to enter the German market that the decision will continue to have effect.

This is a rule which, first, creates uncertainty for operators who have opted to participate in a comprehensive system to manage packaging and packaging waste, because they do not know how long they can continue under the same conditions and, second, encourages them, in order to avoid that instability, to abandon that more comfortable alternative and charge a deposit on non-reusable packaging or use reusable packaging. Furthermore, there is the dissuasive effect which the rules are likely to have on those who are thinking of introducing their mineral water in Germany.

49. Secondly, Article 7 of Directive 94/62 puts return and collection systems and reuse and recovery systems, including recycling systems, on an equal footing, the only proviso being that they should make it possible to achieve the objectives laid down. There is therefore no reason, if it is sought to promote one system, to prevent economic operators from participating temporarily in another because the prescribed proportion has not been reached.

48. It must be added that undertakings excluded from the option proposed in Paragraph 9(1) of the Packaging Regulation where the proportion of reusable packaging falls below the prescribed minimum could return to that option if the use of reusable packaging rises again. If the aim of those rules is to promote reusable bottles, it does not make much sense to allow producers,

50. Thirdly, the contested German legislation, although it applies to national operators and foreign operators in the same way, has a detrimental effect on the latter in particular. So far as concerns natural mineral water, which, under Directive 80/777, has to be bottled at source, undertakings which intend to export part of their production tend to bottle it in non-reusable packaging because it

costs less: if the reusable bottles are made of glass, they weigh more, which means higher fuel consumption and greater tonnage for transportation; furthermore, non-reusable packaging does not have to be taken back to its country of origin and the cost is halved, because the capacity of the returning vehicle may be used to carry other goods, and there is also no need to wash and sterilise bottles. The proof lies in the fact that, in practice, producers of mineral water from other Member States use a considerably higher proportion of plastic packaging than German producers. In that regard, the Commission refers to a survey carried out by the Gesellschaft für Verpackungsmarktforschung in June 2001 to show that, in 1999, German producers of natural mineral water bottled 90% of their water in reusable packaging and the remaining 10% in non-reusable bottles, whereas 71% of exports to Germany were in non-reusable packaging.

the distribution points, although they can avoid sending back empty packaging over long distances by participating in a reuse system, if they work with standardised bottles. I do not think it is realistic to suggest to foreign undertakings that they should stop using the packaging that they use in all other countries and adopt that officially approved for German undertakings, particularly bearing in mind that, in some cases, the packaging is of a distinctive nature and its graphic representation has been registered as a trade mark.²⁸

51. There is another point which I think is important: in order to place mineral water on the German market, the distance which water coming from abroad has to be transported is, as a rule, greater than that of water obtained from springs in Germany. It is true that there are exceptions as springs exist in other Member States near the border with Germany; furthermore, some German producers cover many kilometres to reach all

52. Contrary to Germany's claims, the Commission does not criticise it for deciding to provide that a deposit must be charged on non-reusable packaging; this is a legislative option which, as I have already said, is supported by Article 7 of Directive 94/62. The Commission in fact criticises it for the conditions relating to the marketing of drinks in that State, which are linked to percentages fixed arbitrarily, which ultimately depend on the preferences of consumers and which the economic operators can affect only if they agree to abandon non-reusable packaging and use reusable packaging. I do not think that the fact that,

28 — See the judgment in Case C-218/01 *Henkel* [2004] ECR I-1725. The Court of First Instance has given judgment in joined Cases T-146/02 to T-153/02 *Deutsche Süß-Werke v OHIM* [2004] ECR II-147, concerning the refusal to register as a three-dimensional mark a form of drinks packaging consisting in a stand-up pouch.

between 1994 and 2000, imports of mineral water from other States increased is conclusive because, had it not been for those rules, the increase might have been greater.

particular by developing 'clean' products and technology. Article 3(5) describes reuse as any operation by which packaging, which has been conceived and designed to accomplish within its life cycle a minimum number of trips or rotations, is refilled or used for the same purpose for which it was conceived, with or without the support of auxiliary products, the reused packaging subsequently becoming packaging waste.

53. I do not endorse the defendant's argument with regard to the hierarchy established by Directive 94/62 between different kinds of packaging. Article 1(2) gives top priority to preventing the production of packaging waste, while reuse, recycling and other forms of recovering packaging waste, which are mentioned immediately afterwards, are given equal standing. It is true that the eighth recital states that life-cycle assessments should be completed as soon as possible to justify a clear hierarchy between reusable, recyclable and recoverable packaging but, in practice, the studies carried out in certain countries do not appear to have reached final conclusions yet.

55. The basic rule for prevention is found in paragraph 1 of Annex II to Directive 94/62, which contains the requirements specific to the manufacturing and composition of packaging: it is to be so manufactured that the packaging volume and weight is limited to the minimum adequate amount to maintain the necessary level of safety, hygiene and acceptance for the packed product and for the consumer; that is to say, prevention concerns the design of the packaging and its manufacturing process, with the aim of reducing and avoiding at source the creation of waste. As we can see, the measures apply equally to reusable and recoverable packaging.

54. Nor is it possible, as the German Government claims, to equate prevention and reuse, which are concepts defined in Article 3 of Directive 94/62. According to Article 3(4), prevention consists in reducing the quantity and the harmfulness for the environment of materials and substances contained in packaging and packaging waste, and also in reducing packaging at production process level and at the marketing, distribution, utilisation and elimination stages, in

56. I also disagree with the German Government's view that the barriers to trade, if there

are any, come from Directive 80/777, under which the transport of natural mineral water in packaging other than that authorised for distribution to the ultimate consumer is prohibited. This legislation governs the exploitation and marketing of foodstuffs intended for human consumption, and is particularly concerned to protect them against the risks of pollution, because human health is at stake; it also guarantees the rights of the consumer, by ensuring — by means of bottling at source in packaging with suitable closures — that the liquid retain those characteristics which enabled it to be recognised as mineral water. Furthermore, the directive was adopted specifically to remove barriers to trade in those drinks and to facilitate the operation of the common market. It is true that the directive accepted their transport over long distances. However, it gave no indication as to which type of packaging was preferable and did not promote reusable packaging over non-reusable packaging.

the judgment in *Keck and Mithouard*,²⁹ the Court of Justice distinguishes between the provisions relating to the characteristics of the product and those concerning the selling arrangements in order to specify those rules which, while affecting nationals and non-nationals equally, cause barriers which make them measures of equivalent effect prohibited by Article 28 EC.

In that decision, it confirmed that, in the absence of harmonisation of legislation,³⁰ obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect, and that this is so even if those rules apply to all products without distinction, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.³¹

57. Nor do I agree that Paragraphs 8(1) and 9(2) of the German regulation at issue constitute merely selling arrangements, even though they apply without distinction to natural mineral water bottled in Germany and to imported natural mineral water. In

29 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097. See M. López Escudero: 'La jurisprudencia sobre la prohibición de las medidas de efecto equivalente tras la sentencia Keck y Mithouard', in *Gaceta Jurídica de la C.E. y de la Competencia*, D-28, pp. 47 to 94.

30 — This claim by the German Government is, at the very least, inconsistent, since one of the main arguments on which it bases its defence is that Directive 94/62 has effected a complete harmonisation of the use and promotion of reusable packaging.

31 — Case 120/78 *Rewe-Zentral* [1979] ECR 649; '*Cassis de Dijon*'; and *Keck and Mithouard*, cited above, paragraph 15.

58. The Court then stated, contrary to what it had previously decided, that national provisions restricting or prohibiting certain selling arrangements are not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment,³² so long as those provisions apply to all traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

59. It added that, provided that those conditions are fulfilled, rules of that kind are not such as to prevent the access of products from another Member State to the market or to impede access any more than they impede the access of domestic products. Such rules therefore fall outside the scope of Article 28 EC.

60. Since that judgment, in order to decide whether Article 28 EC prevails over legislation which applies without distinction to domestic and imported products, it is necessary to distinguish rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling,

packaging) from those designed to govern the arrangements for selling them.

61. Since giving judgment in 1993 in *Keck and Mithouard*,³³ where it examined the prohibition in France against resale at a loss, the Court of Justice has considered the following, for example, to be selling arrangements: a rule of professional conduct, laid down by a professional body, which prohibits pharmacists from advertising outside the pharmacy quasi-pharmaceutical goods which they are authorised to sell;³⁴ the laying down of a maximum number of opening hours and periods of compulsory closure for shops;³⁵ the obligation not to open retail outlets on Sundays;³⁶ a rule which reserves the sale of processed milk for infants solely to pharmacies;³⁷ a distribution system which reserves the retail sale of tobacco products to outlets authorised by the State;³⁸ a rule prohibiting the broadcasting of televised advertisements for the distribution sector;³⁹ a prohibition against any sale which yields only a very low profit margin;⁴⁰ an outright ban on advertis-

33 — Cited above.

34 — Case C-292/92 *Hünemund and Others* [1993] ECR I-6787.

35 — Joined Cases C-401/92 and C-402/92 *Tankstation't Heukske and Boermans* [1994] ECR I-2199.

36 — Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* [1994] ECR I-2355.

37 — Case C-391/92 *Commission v Greece* [1995] ECR I-1621.

38 — Case C-387/93 *Banchero* [1995] ECR I-4663.

39 — Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179.

40 — Case C-63/94 *Belgapom* [1995] ECR I-2467.

32 — Case 8/74 *Dassonville* [1974] ECR 837.

ing aimed at children less than 12 years of age and on misleading advertising;⁴¹ a prohibition on producers and importers of alcoholic drinks in a State directing any advertising messages at consumers;⁴² and legislation which provides that traders may not make sales on rounds in a given administrative district, unless they also pursue their commercial activity at a permanent establishment situated in that administrative district, where they offer for sale the same goods as they do on rounds.⁴³

3. The protection of the environment in Germany as justification for the contested legislation

62. In the light of these examples, it is difficult to maintain that the German provisions contain merely selling arrangements, since the pressure they put on producers is directly related to the type of packaging in which the goods are marketed and they therefore form part of the measures relating to the characteristics of the products.

63. For the reasons given, I consider that the Commission is right to state that the rules contained in Paragraphs 8(1) and 9(2) of the Packaging Regulation constitute a measure having an equivalent effect to a quantitative restriction, which is prohibited under Article 28 EC.

64. Germany contends that Paragraphs 8 and 9 of the Packaging Regulation are founded on overriding requirements in the general interest, because they pursue three objectives connected with environmental policy, namely the avoidance of waste, the better management of waste and the conservation of the countryside by avoiding littering. It maintains that those provisions are based not only on the results of the ecobalance analyses, so that their effectiveness cannot be assessed only in the light of the journey required in order for empty reusable packaging to return to its country of origin. Those objectives are achieved thanks to a high percentage of returns, irrespective of the distance that the packaging is transported and of whether it is national or foreign in origin. None of the initiatives that the State might take would achieve those results as effectively as the charging of a deposit by traders on each non-reusable item of packaging. It takes the view that the German system could not function if mineral-water packaging from other Member States were exempt from the deposit because that would create distortion of competition between undertakings marketing their products in non-reusable packaging. It adds that the aforementioned provisions are compatible with Community law, in particular with the precautionary principle and the principle of preventive action laid down in Article 174(2) EC, which grant the

41 — Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843.

42 — Case C-405/98 *Gourmet International Products* [2001] ECR I-1795.

43 — Case C-254/98 *TK-Heimdienst* [2000] ECR I-151.

Member States a certain discretion in the interests of environmental policy.⁴⁴

65. According to the settled case-law of the Court of Justice, national legislation which restricts or is liable to restrict intra-Community trade may be justified by considerations of public health and environmental protection of the kind relied upon by the German Government.⁴⁵ However, in that case, it must be proportionate to the objectives pursued and those objectives must not be attainable by measures which are less restrictive of such trade.⁴⁶

66. The German Government has not persuaded me that it is necessary, in order to protect the environment, to impose the rule that, every time the proportion of reusable packaging in Germany falls below 72%,

undertakings lose the possibility of exemption from charging a deposit on non-reusable packaging by participating in a packaging and packaging-waste management system if, in the sector in which they operate, the rate of reusable packaging does not reach the 1991 level.

67. First, it is not stated why 72% of the reusable packaging in circulation in the country is preferable, from an ecological point of view, to 60%, 70% or 80%, for example. Nor do I know the reasons of environmental protection for which the results achieved in 1991 should have been crystallised for the future, without allowing for adjustment factors according to the conduct and preferences of economic operators and consumers. It must be acknowledged that, if in that year the proportion of reusable bottles of mineral water was 91.33%, the margin available to producers bottling in non-reusable containers, in order to free themselves from the obligation to charge a deposit, under a comprehensive management system, is minimal, and it is mainly foreign producers who use bottles of that kind.

44 — In support of that statement, the German Government cites two judgments of the Court of Justice which I do not think are relevant. The first was delivered in Case 174/82 *Sandoz* [1983] ECR 2445 on 14 July 1983, when that provision was not yet included in the Treaty, and concerned prior authorisation for the sale of products intended for human consumption, to which vitamins had been added. The second, in Case C-293/93 *Houtvipper* [1994] ECR I-4249, does indeed grant the Member States a wide discretion but, in that case, a choice had to be made between prior control by an independent body and a prohibition on the sale of articles of precious metal not bearing a hallmark.

45 — Case 240/83 *ADBHU* [1985] ECR 531; and Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 9.

46 — *De Agostini and TV-Shop*, cited above, paragraph 45; Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 75; and Case C-389/96 *Aher-Waggon* [1998] ECR I-4473, paragraphs 18 to 20.

As is well known, the Court of Justice found, in the judgment in Case 302/86 *Commission v Denmark*,⁴⁷ that a restriction of the

47 — Cited above, paragraph 21.

quantity of products which could be marketed by importers was disproportionate to the objective pursued. In that case, the Danish legislation allowed producers to sell up to 3 000 hectolitres of beer and soft drinks a year in non-approved containers, provided that these were reusable and that a deposit was charged on each.

69. Third, in its eagerness to promote reusable bottles in order to protect the environment from the consequences of recycling and other recovery of non-reusable packaging waste, the German Government does not appear to have taken account of other factors (such as the cleansing and sterilisation treatments applicable to the reusable packaging, fuel consumption, emissions into the atmosphere, and the wear and tear of communication routes, if the transport distance is over a certain number of kilometres, with the inevitable increase in traffic density and the risk of accidents) which counterbalance the alleged ecological advantages, so that non-reusable packaging may be an interesting alternative from an environmental point of view.

68. Second, if it really is a question of preventing, albeit indirectly, the production of packaging waste by promoting reusable packaging, I cannot see why it should be necessary, when the 72% rate is achieved again, to resurrect the possibility of exemption from charging a deposit on non-reusable bottles. Certainly, the charging of a deposit achieves a much higher percentage of return of empty packaging by the consumer who, furthermore, soon becomes resigned to paying it. Once that system has been put in place, which is not easy, I wonder about the advantages of going back, with the foreseeable consequence that the use of reusable packaging will go down again, causing fluctuation which may destabilise the habits of users, producers and distributors — not to mention the retrograde step that this entails for management of packaging waste and conservation of the countryside.

70. Fourth, under Article 7 of Directive 94/62, Member States are to ensure that systems are set up to provide for the return or collection, and reuse or recovery, of packaging; these systems are to be open to the participation of the economic operators concerned, they are to apply to imported products under non-discriminatory conditions, and they are to be designed so as to avoid barriers to trade or distortions of competition, in conformity with the Treaty. I consider that there is no justification, once the collection systems are in place in a State, for the public authorities temporarily to prevent certain economic operators from competing, because the nationals of that State have changed their drink consumption habits and prefer to buy them in non-reusable bottles, and to continue to prevent them until the trend is reversed. This constitutes a restriction on the free movement of goods which is not in correct

proportion to the insignificant advantages that it represents for the protection of the environment. In my view, Directive 94/62 contains sufficient devices to allow the German authorities to guarantee that protection by adopting sufficiently stable legislation which permits exporting undertakings to plan in the medium and long term the kind of packaging which is suitable for marketing mineral water in Germany.

would also create perpetual uncertainty in the law.⁴⁸

72. Finally, I do not agree that charging a deposit on non-reusable packaging is a suitable way of promoting the use of reusable packaging. What is certainly achieved is that the buyer or any other person involved returns the empty packaging in order to recover the deposit, which is something, but, when faced with the need to pay for either kind of packaging, the consumer usually opts for the packaging he finds more convenient and not necessarily for the packaging which harms the environment less.

71. Fifth, I do not agree with the claim made by the German Government that the Court of Justice has recognised the need for global regulations, in order that the State and its institutions may take account of the overriding requirement that measures of an economic nature should be viable. Here the German Government seeks — out of context — to extend, to the provisions adopted by the authorities of a country to implement a power conferred by a directive, case-law which states that the Community institutions, in exercising their powers to impose charges on economic operators, must ensure that those amounts are appropriate to the aims pursued, but that it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators, since, given the multiplicity and complexity of economic circumstances, such an evaluation would not only be impossible to achieve, but

73. It is clear from these arguments that the German legislation at issue cannot be justified by protection of the environment as an overriding requirement restricting the application of Article 28 EC, because it does not comply with the principle of proportionality.

74. For the foregoing reasons, I consider that, by applying Paragraphs 8(1) and 9(2) of the Packaging Regulation to mineral water which has to be bottled at source, Germany has failed to fulfil its obligations under

⁴⁸ — Case 5/73 *Balkan Import Export* [1973] ECR 1091, paragraph 22.

Article 5 of Directive 94/62 and Article 28 EC, and under Article 3 of Directive 80/777 in conjunction with paragraph 2(d) of Annex II thereto.

VI — Costs

75. Consequently, the Commission's application is well founded and it must be declared that Germany has failed to comply with its obligations under the Treaty.

76. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I propose that the Commission's application be allowed, and since the Commission has applied for costs to be awarded against Germany, the latter should be ordered to pay the costs of the proceedings.

VII — Conclusion

77. In the light of the foregoing considerations, I propose that the Court of Justice should:

- (1) declare that, by applying Paragraphs 8(1) and 9(2) of the Packaging Regulation of 21 August 1998 to mineral water which has to be bottled at source, the Federal Republic of Germany has failed to fulfil its obligations under Article 5 of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, Article 28 EC, and Article 3 of Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters, in conjunction with paragraph 2(d) of Annex II thereto;
- (2) order the Federal Republic of Germany to pay the costs.