OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 10 October 2002 [1]

1. By order of 1 June 2001, lodged at the Court Registry on 11 June, the Unabhängiger Verwaltungssenat im Land Niederösterreich (Independent Administrative Chamber in the Land of Niederösterreich (Austria) — hereinafter 'the Verwaltungssenat') referred a question to the Court for a preliminary ruling concerning the interpretation of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (hereinafter 'Directive 79/112') [2] and of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (hereinafter 'Directive 2000/13' or 'the directive') [3] which repealed Directive 79/112 as from 26 May 2000.

2. Essentially, the Verwaltungssenat asks the Court whether Article 15 of Directive 79/112 or Article 18 of Directive 2000/13 precludes a national rule which provides that, where foodstuffs are offered for sale after their period of minimum durability has expired, that fact must, even though their expiry date is displayed, be communicated clearly and in a generally intelligible manner.

Legislative framework

Community law

3. According to the first recital in its preamble, Directive 2000/13 consolidates the legislation on this matter and rewrites Directive 79/112 and subsequent amending legislation.

4. The preamble also indicates that the directive was adopted because 'differences between the laws, regulations and administrative provisions of the Member States on the labelling of foodstuffs may impede the free circulation of these products and can lead to unequal conditions of competition'

1 — Original language: Italian.
2 — OJ 1979 L 33, p. 1.
3 — OJ 2000 L 109, p. 29.

(second recital) and that therefore 'approximation of these laws would contribute to the smooth functioning of the internal market' (third recital). The purpose of the directive is therefore 'to enact Community rules of a general nature applicable horizontally to all foodstuffs put on the market' (fourth recital), based on the principle that 'the prime consideration for any rules on the labelling of foodstuffs should be the need to inform and protect the consumer' (sixth recital). Thus, 'detailed labelling, in particular giving the exact nature and characteristics of the product, which enables the consumer to make his choice in full knowledge of the facts is the most appropriate since it creates fewest obstacles to free trade' (eighth recital).

5. Furthermore, the 10th recital of the directive states that '..., the horizontal nature of [the] directive does not allow, at the initial stage, the inclusion in the compulsory indications of all the indications which must be added to the list applying in principle to the whole range of foodstuffs. During a later stage, Community provisions should be adopted, aimed at supplementing the existing rules'.

6. The 11th recital, for its part, states that 'in the absence of Community rules of a specific nature Member States should retain the right to lay down certain national provisions which may be added to the general provisions of this directive, nevertheless these provisions should be subject to a Community procedure'.

7. This having been said, Article 1 sets out the scope of the directive *ratione materiae* and defines the expressions used in the following terms:

'1. This directive concerns the labelling of foodstuffs to be delivered as such to the ultimate consumer and certain aspects relating to the presentation and advertising thereof.

....

(3) For the purpose of this directive,

(a) "labelling" shall mean any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging,

document, notice, label, ring or collar accompanying or referring to such foodstuff;

(b) "pre-packaged foodstuff" shall mean any single item for presentation as such to the ultimate consumer and to mass caterers, consisting of a foodstuff and the packaging into which it was put before being offered for sale, whether such packaging encloses the foodstuff completely or only partially, but in any case in such a way that the contents cannot be altered without opening or changing the packaging'.

8. Article 2, in so far as it is relevant here, provides that:

'1. The labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;

... '.

9. For its part, Article 3(1) of the directive provides that:

'1. In accordance with Articles 4 to 17 and subject to the exceptions contained therein, indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:

(1) the name under which the product is sold;

(2) the list of ingredients;

(3) the quantity of certain ingredients or categories of ingredients as provided for in Article 7;

(4) in the case of pre-packaged foodstuffs, the net quantity;

(5) the date of minimum durability, or in the case of foodstuffs which, from the microbiological point of view, are highly perishable, the "use by" date;

(6) any special storage conditions or conditions of use;

(7) the name or business name and address of the manufacturer or packager, or of a seller established within the Community.

However, the Member States shall be authorised, in respect of butter produced in their territory, to require only an indication of the manufacturer, packager or seller.

Without prejudice to the notification provided for in Article 24, Member States shall inform the Commission and the other Member States of any measure taken in pursuit of the second paragraph;

(8) particulars of the place of origin or provenance where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff;

(9) instructions for use when it would be impossible to make appropriate use of the foodstuff in the absence of such instructions;

(10) with respect to beverages containing more than 1.2% by volume of alcohol, the actual alcoholic strength by volume.'

10. Furthermore, Article 4 provides that:

'1. Community provisions applicable to specified foodstuffs and not to foodstuffs in general may provide for derogations, in exceptional cases, from the requirement laid down in Article 3(1), points 2 and 5, provided that this does not result in the purchaser being inadequately informed.

2. Community provisions applicable to specified foodstuffs and not to foodstuffs

in general may provide that other particulars in addition to those listed in Article 3 may appear on the labelling.

Where there are no Community provisions, Member States may make provision for such particulars in accordance with the procedure laid down in Article 19.'

11. Within the meaning of Article 9:

'1. The date of minimum durability of a foodstuff shall be the date until which the foodstuff retains its specific properties when properly stored.

...

2. The date shall be preceded by the words:

— "Best before..." when the date includes an indication of the day,

— "Best before end..." in other cases.'

12. Article 10 goes on to state that:

'1. In the case of foodstuffs which, from a microbiological point of view, are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health, the date of minimum durability shall be replaced by the "use by" date.

2. The date shall be preceded by the words:

... "use by"'.

13. Article 17 provides that:

'Member States shall refrain from laying down requirements more detailed than those already contained in Articles 3 to 13 concerning the manner in which the particulars provided for in Article 3 and Article 4(2) are to be shown.'

14. Article 18 of the directive, which reiterates the text of Article 15 of the repealed Directive 79/112, provides that:

'1. Member States may not forbid trade in foodstuffs which comply with the rules laid down in this Directive by the application of non-harmonised national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general.

2. Paragraph 1 shall not apply to non-harmonised national provisions justified on grounds of:

— protection of public health,

— prevention of fraud, unless such provisions are liable to impede the application of definitions and rules laid down by this Directive,

— protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition.'

15. Finally, Article 19 provides as follows:

'Where reference is made to this article, the following procedure shall apply should a Member State deem it necessary to adopt new legislation.

It shall notify the Commission and the other Member States of the measures envisaged and give the reasons justifying them. The Commission shall consult the Member States within the Standing Committee on Foodstuffs set up by Council Decision 69/414/EEC if it considers such consultation to be useful or if a Member State so requests.

Member States may take such envisaged measures only three months after such notification and providing that the Commission's opinion is not negative.

In the latter event, and before the expiry of the abovementioned period, the Commission shall initiate the procedure provided for in Article 20(2) in order to determine whether the envisaged measures may be implemented subject, if necessary, to the appropriate modifications.'

The national legislation

16. The Lebensmittelkennzeichnungsverordnung 1993 (Regulation on the labelling of foodstuffs, hereinafter 'LMKV') [4] governs the placing of particulars on packaged foodstuffs intended for the ultimate consumer.

17. More specifically, Paragraph 10 [5] of that regulation provides as follows:

'1. The period of minimum durability or the "use by" date may not be extended.

2. If the period of minimum durability has expired, that fact must be indicated clearly and in a generally intelligible manner.

3. If the "use by" date has passed, the product may no longer be offered for sale.' [6]

18. Pursuant to Article 74 of the Lebensmittelgesetz 1975 (Law on foodstuffs, hereinafter 'LMG'), [7] infringement of the provisions of the LMKV is punishable by a fine.

Facts and procedure

19. On 26 February 2001, the Berzirkshauptmannschaft Zwettl, the competent administrative authority in this matter, ordered Ms Müller, in her capacity as the responsible representative of Spar österreichische Warenhandels AG, to pay a fine of ATS 2 000 for infringement of Paragraph 10(2) of the LMKV, by offering for sale, on 22 August 2000, beer products whose period of minimum durability had expired without that fact having been clearly indicated in a generally intelligible manner.

20. Ms Müller appealed against the fine before the Verwaltungssenat which, taking the view that the Austrian legislation in question might be incompatible with Community law, referred the following question to the Court:

'Does:

Council Directive 79/112/EEC of 18 December 1978 on the approximation of the

4 — Published in BGBl. No 72/1993.

5 — Later, following amendment, Paragraph 9, BGBl. II, No 462/1999.

6 — Unofficial translation.

7 — Published in BGBl. No 86/1975; the latest amendment is to be found in BGBl. I, No 157/1999.

laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, and in particular Article 15 thereof; or

Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, and in particular Article 15 thereof

preclude a national rule which provides that, where foodstuffs are offered for sale after the period of their minimum durability has expired, that fact must be indicated clearly and in a generally intelligible manner in addition to the expiry date?'

21. Although the referring court feels it necessary to obtain a ruling from this Court on the matter, the order for reference shows that it is inclined to the view that the national rule in question is compatible with Community law. In the opinion of that court, the rule leaves the details of the manner in which the public is to be informed open and applies to all goods irrespective of their origin. In any case, as the court points out, the disputed rule is justified within the meaning of Article 18(2) of Directive 2000/13 since it is designed to prevent fraud. When an averagely sensible consumer purchases a foodstuff, he in fact assumes that the period of minimum durability of that product has not expired; if this is not the case, the obligation to indicate that fact clearly and unequivocally in order to prevent any possible deception or confusion is justified.

22. Ms Müller, the Austrian Government and the Commission have submitted observations in this case.

Law

23. As is clear from its preamble, the purpose of the directive is to remove obstacles to trade between the Member States by laying down harmonised rules on product labelling based on the need to inform and protect consumers. In line with that requirement, the directive seeks to

ensure that the movement of a foodstuff within the common market is not hindered by the fact that it does not bear labelling particulars that are required by law in the importing State or by the fact that it does bear particulars that are prohibited in that State. To that end, the directive lays down a series of general, horizontal rules applicable to all foodstuffs.

24. In particular, for the purpose of this case, I would point out that Article 3 of the directive prescribes a series of particulars which are to be compulsory for all foodstuffs, and hence those particulars are the only ones that may compulsorily be required and whose absence can lead to a marketing prohibition within the meaning of Article 18(1).

25. This conclusion is a direct result of the clear statement in Article 3(1) of the directive to the effect that 'indication of the following particulars *alone* shall be compulsory on the labelling of foodstuffs...'.[8] It seems to me to be the only conclusion that is consistent with the system of the directive, especially Article 3 thereof taken in conjunction with Article 18. If this were not the case, Article 18(1) which states that 'Member States may not forbid trade in foodstuffs... by the application of non-harmonised national provisions governing... labelling and presentation' would be meaningless. In fact, the imposition of additional particulars, if not complied with, would inevitably entail a prohibition on the marketing of products not bearing those additional particulars (or at any rate entail more onerous conditions).

26. In fact, this would also appear to me to be the line taken by the Court when interpreting Directive 79/112, when it held that 'with regard to labelling, the limits of the power retained by the Member States are set by the directive in so far as it lists exhaustively, in Article 15(2) [now Article 18(2) of Directive 2000/13], the grounds on which the application of non-harmonised national provisions prohibiting trade in foodstuffs may be justified'.[9]

27. This being said, I should add that none of the parties disputes the fact that the list of compulsory particulars applicable to all foodstuffs, contained in Article 3, is

8 — (Emphasis added). It should be pointed out that the French text states that 'l'étiquetage des denrées alimentaires comporte... *les seules* mentions obligatoires suivantes'. The German text uses the adverb *nur*, the Italian *soltanto*, the Spanish *solamente* and the Portuguese *unicamente*.

9 — See the judgment in Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 15. In the same vein, see also the Opinion of Advocate General Geelhoed in Case C-221/00 *Commission* v *Austria* [2003] ECR I-1607 and in Joined Cases C-421/00, C-426/00 and C-16/01 *Sterbenz and Haug* [2003] ECR I-1065, point 38.

exhaustive. What is disputed here is whether the information required by Article 10 of the LMKV falls within the area harmonised by the directive and, if so, whether it must therefore be held that it imposes a condition which is additional to those laid down in Article 3.

28. Ms Müller answers this question in the affirmative and she therefore considers that the national rule is incompatible with Article 3 of the directive.

29. In the Commission's view, however, Paragraph 10 of the LMKV does not fall within the scope of the directive because it concerns matters not yet harmonised by the latter; in particular, labelling requirements for the period following expiry of the period of durability. According to the Commission, Article 3(1) of the directive merely requires an indication of the 'use by' date, with Articles 9 and 10 going on to specify what that date should be, depending on whether the foodstuff is non-perishable (date of minimum durability, i.e. 'best before...' date) or highly perishable ('use by' date). The directive says nothing however about labelling requirements for the period following those dates. Therefore, until such time as there is full harmonisation in this area, the Member States retain their power to regulate the matter, duly respecting the procedural formalities laid down in Article 4 of the directive and the substantive requirements of Article 28 EC.

30. In support of its argument, the Commission plays on the fact that, as the 10th recital of the directive openly admits (see point 5 above), the horizontal harmonisation which it introduces for all foodstuffs is incomplete. In so far as its arguments are of relevance here, the Commission points out that it is only in specific rules relating to particular foodstuffs that suitable provisions have been adopted to prohibit the sale of highly perishable products after their 'use by' date; no such rule has been laid down for all other products. This merely confirms that, at a general, horizontal level, there is no Community harmonisation in this matter. Moreover, as the Commission goes on to point out, this was precisely why, in its Proposal for a Regulation laying down the general principles and requirements of food law, establishing the European Food Authority and laying down procedures in matters of food safety, [10] it included the general principle that no foodstuff may be offered for sale if it is dangerous. This principle has now been enshrined in Article 14 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 (hereinafter 'Regulation No 178/2002'), [11] which emanated from that proposal.

10 — Amended Proposal for a Regulation of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Authority, and laying down procedures in matters of food safety, of 7 August 2001 COM(2001) 475 def. (OJ C 304 E, p. 273).

11 — OJ 2002 L 31, p. 1.

31. Personally, I have to say that I support the Commission's conclusion because I consider that Paragraph 10 of the LMKV lies outside the scope of the directive. I do however have some doubts about the arguments adduced in order to arrive at that conclusion.

32. In particular, I do not think it is possible to invoke the 10th recital of the directive in order to maintain that Member States retain the power to require additional, compulsory indications that have not been harmonised. That recital merely notes that the list given in the directive is (initially at least) incomplete, due to its horizontal nature, whilst pointing in substance to the fact that it will be necessary at a later stage to add further indications applying in principle to all foodstuffs. In my view, this certainly does not seem to support the contention that the Member States retain powers of their own in relation to labelling; rather, it confirms that, in view of the horizontal nature of the harmonisation brought about by the directive, if any gaps appear in the meantime, they can be filled at Community level or, failing that, by *specific* measures taken by individual States, provided that such measures are adopted within the limits and respecting the procedures laid down for that purpose in the directive itself (see the 11th recital and Articles 4 and 19).

33. Similarly, I do not see how the fact that prior to the adoption of Regulation No 178/2002 (see above, point 30) there was no general prohibition against offering unsafe foodstuffs for sale, and that it was only for certain products which, from the microbiological point of view, were highly perishable, that there were specific rules completely prohibiting marketing after the 'use by' date, helps to found the Commission's argument. In fact, even if that confirmed, *a contrario*, a lack of general, horizontal rules on labelling applicable to the period following expiry of the period of minimum durability for non-perishable foodstuffs, it cannot also be inferred, given what I said in the previous paragraph, that Member States are free to adopt national rules on the matter. In particular, I am perplexed at the reference to the prohibition in Regulation No 178/2002, given that this prohibition (like the prohibition enshrined in the specific provisions mentioned earlier) does not relate to the rules on labelling but rather to the general principles of food law and the safety of food products.

34. It is the latter considerations which lead me to view this matter in a different light, one which might offer a more valid basis for the conclusion which the Commission has reached (in my view, correctly, as I said earlier). In my opinion, it is possible to arrive at the same conclusion, not by saying that the indications referred to in Paragraph 10 of the LMKV fall within the general scope of the directive but that, owing to the incomplete nature of the latter, those indications are not, for the moment, subject to the harmonisation pur-

sued by the directive, but rather by maintaining, more radically, that those indications do not fall within the scope of the directive at all since they are unrelated to the purpose and aims of the latter.

35. What the directive does cover are the indications needed in order to inform consumers about the *inherent and original* characteristics of a product — in other words its nature, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (see Article 2 and also the eighth recital). Now, it seems to me that the national rule at issue does not concern the indications needed to inform consumers about those particular characteristics but merely serves to indicate a possible alteration in those characteristics which has occurred during the period *after* the product has been offered for sale, indeed at the end of its normal shelf life. In that sense, therefore, those indications do not concern the 'labelling' of the product, at least not in the sense intended by the directive.

36. In particular, the fact that, as all the parties to the proceedings recognise, the information in question can be provided without any need to apply an additional label to every product offered for sale and thus without in any way affecting the 'labelling' of individual products within the meaning of the directive, is further confirmation, in my view, of the point made above. The Austrian provision merely requires the public to be informed that the period of minimum durability has expired, and does not lay down any precise rules as to how this should be done, and so it would be enough, for example, to offer the outdated goods on separate shelves and to state on a simple notice that all products on those shelves are no long 'fresh'. [12]

37. Nor do the indications laid down in Paragraph 10 of the LMKV have anything to do with the purpose of the directive. As I pointed out earlier, the directive establishes harmonised rules on labelling in order to contribute to the functioning of the internal market and in particular to prevent any differences between national laws impeding the free movement of goods and distorting competition.

38. Provisions such as those contained in Paragraph 10 of the LMKV do not, in

12 — The fact that a sign put up in a shop cannot be assimilated to labelling within the meaning of the directive seems to be confirmed indirectly by the judgment in Case C-385/96 *Goerres* [1998] ECR I-4431, paragraph 25, in which the Court held that 'all the compulsory particulars specified in the directive *must appear on the labelling* either in a language easily understood by consumers of the State or the region in question, or by means of other measures such as designs, symbols or pictograms. The placing in a shop of a supplementary sign ("Zusatzschild") adjacent to the product in question is not sufficient to ensure that the ultimate consumer is informed and protected' (emphasis added). It can therefore be inferred from this judgment that the particulars given to consumers by means of a sign placed 'in a shop,... adjacent to the product in question' are not those 'that appear on the labelling' and this would appear to confirm that the placing of such a sign does not constitute a form of 'labelling' within the meaning of the directive.

principle, have an effect on the free movement of goods or competition within the common market in any way, especially because, as the parties to the proceedings have stressed with one voice, the provision at issue applies without distinction to all products. In fact, such provisions only take effect once a product has gone through all stages of the process, from production to being offered for sale to the ultimate consumer, and has therefore moved freely within the common market. If this is correct, an obligation on the retailer to indicate the expiry of the minimum durability date obviously cannot impede movement of goods within the Community. In other words, for the purpose of this case, the imposition of such an obligation has nothing to do with the purpose of the directive.

39. I should also point out that even if the Court were to decide, either on the basis of what I have just said or by following the Commission's reasoning, that the Austrian rule at issue falls outside the scope of the directive, it is still necessary to ascertain whether that rule respects the limits imposed by the relevant principles and general provisions of the Treaty. In particular, the provision needs to be examined in the light of the general prohibition of measures having equivalent effect to a quantitative restriction contained in Article 28 EC. On the other hand, having shown that the matter falls outside the scope of the directive, I do not see any need, unlike the Commission (which later excludes the possibility), to ascertain whether the rule complies with the procedural requirements laid down in Article 4 of the directive and applying to the adoption of national provisions which lay down compulsory labelling indications applicable only to certain foodstuffs.

40. Moreover, it is reasonable to doubt the relevance of Article 28 EC to this case if one supports the contention of the Austrian Government that the conditions set forth in *Keck and Mithouard* obtain here; namely if one considers that the national rule at issue regulates mere sales methods or situations and '[applies] to all relevant traders operating within the national territory and [affects], in law and in fact, the marketing of domestic products and of those from other Member States'. [13] If this were true, as I am inclined to believe, the national provision at issue would also fall outside the scope of the prohibition on measures having equivalent effect to quantitative restrictions, covered by Article 28 EC. [14]

41. However, even if this were not the case, I agree with the Commission and indeed

13 — Judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16.

14 — See *Keck and Mithouard*, cited above, paragraph 17.

the Austrian Government that Paragraph 10 of the LMKV satisfies the requirements laid down in Article 28 EC and the conditions which the Court's case-law has inferred therefrom. It is well-known that, according to that case-law, Article 28 EC 'prohibits obstacles to the free movement of goods resulting from rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling or packaging), even if those rules apply without distinction to all national and imported products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods'. [15] In this case, in fact, the measures in question not only apply without distinction but they are also justified by a public-interest objective, given that they seek to protect consumers. Furthermore, they must also be regarded as respecting the principle of proportionality because they merely impose a presentational requirement and not an outright marketing prohibition.

42. Having said this, primarily, I should add that, if the Court were to take the opposite view and rule that the Austrian measure does fall within the scope of the directive, I am inclined to support the argument, expressed both by the Austrian Government and the Commission in the alternative, that the measure is justified on the basis of Article 18(2) of the directive. I also believe that the measure in question can be justified on that basis since it is a 'non-harmonised' (or, more correctly, a derogating) national measure justified on grounds of prevention of fraud and unfair competition.

43. That view is disputed by Ms Müller who considers that the indication required pursuant to Paragraph 10 of the LMKV is neither necessary nor proportionate in relation to its stated purpose. This is primarily because she considers, contrary to the Verwaltungssenat, that the contention that consumers, when faced with a product that is on normal offer, take it for granted that the period of minimum durability has not expired, is without grounds; a further warning relating merely to the expiry of that period is therefore unnecessary. Secondly, she contends that a warning of that kind is not proportionate in relation to its stated objective since a mere indication of the date of minimum durability, as stipulated by the directive, would suffice; on the other hand, the additional labelling burden clearly exceeds what is necessary in order to protect consumers.

44. I do not agree with those objections. In fact I consider that experience shows that consumers, including sensible consumers, normally start from the premiss that products offered for sale, albeit in packaging,

15 — See in particular the judgments in Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 38, and Case C-169/99 *Schwarzkopf* [2001] ECR I-5901, paragraph 38.

are 'fresh', in the sense that the relevant date of minimum durability has not expired. The expiry of that date does not always or of necessity occur at the time of purchase but rather when the product is used, when the consumer checks whether the products in his own larder have, through forgetfulness, passed their 'use by' date.

45. It would serve no purpose, in this regard, to object that a sensible consumer should always read all the particulars given on the label of goods that he purchases. On this point, it appears to me, as it does to the Commission, that to impose on consumers this duty to read before buying in all cases is neither justified nor appropriate, especially in the light of the obvious difference between the conflicting interests at stake here. The seller's interest in somehow disposing of foodstuffs whose period of minimum durability has expired and whose quality may therefore be diminished, would certainly not appear to be as worthy of protection as the consumer's interest in purchasing food whose qualities are intact.

46. In my opinion, therefore, a measure such as the one at issue certainly answers adequately the need to prevent deception and fraud by drawing the attention of customers to the lack of a quality which he would otherwise have assumed to be present.

47. Having said this, it is also necessary to verify whether the measure also respects the principle of proportionality. Such verification is required not so much by the Court's case-law on free movement of goods, but by the directive itself where it provides that national provisions justified on grounds of prevention of fraud must not be 'liable to impede the application of the definitions and rules' laid down therein, and so in essence they must not undermine the usefulness of the directive. In other words, a Member State which intends to avail itself of the derogation contained in Article 18(2), by adopting a provision aimed at preventing deception and fraud, will be required to opt for the provision which least hinders freedom of trade.

48. Now it seems to me that the disputed measure is suited to pursuing its intended objective, without exceeding what is necessary for the purpose. In fact, the obligation to indicate clearly and in a generally intelligible manner the fact that the period of minimum durability has expired limits trade in goods a great deal less than an outright marketing prohibition. Not only this, but as the Verwaltungssenat points out, and the applicant in the main proceedings confirms, the Aus-

trian provision does not necessarily require an additional label to be affixed to every item offered for sale after the period of minimum durability has passed. If this is the case, the disputed measure does not exceed what is strictly necessary in order to protect consumers and must therefore be regarded as respecting the principle of proportionality.

49. To conclude, I consider that the question referred by the Verwaltungssenat should be answered to the effect that Council Directive 2000/13 of 20 March 2001 does not preclude a national rule of a Member State which provides that, where foodstuffs are offered for sale after the period of their minimum durability has expired, that fact must, even though their expiry date is displayed, be communicated clearly and in a generally intelligible manner.

Conclusion

In the light of the foregoing, I therefore propose that the Court should answer the question referred by the Verwaltungssenat by order of 1 June 2001 as follows:

Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, does not preclude a national rule which provides that, where foodstuffs are offered for sale after the period of their minimum durability has expired, that fact must be indicated clearly and in a generally intelligible manner in addition to the expiry date.