OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 13 September 2001 [1]

1. By an action brought on 1 July 1999 under Article 226 EC, the Commission is asking the Court of Justice to give judgment against the Kingdom of Denmark for failing to fulfil some of its obligations under Community law.

The specific allegation made against that Member State is that it has infringed Directive 94/62/EC [2] and Articles 28 EC and 30 EC by maintaining in force the legislation which provides that beer and carbonated drinks must be sold only in reusable packaging and may not be imported in metal cans.

I — The Danish legislation

2. The provisions of Directive 94/62 ought to have been incorporated into the legislation of the Member States by 30 June 1996. The Danish authorities notified the Commission of the measures adopted for this purpose, namely Decree No 124 of 27 February 1989 on packaging for beer and soft drinks, as amended by Decree No 583 of 24 June 1996 and Decree No 300 of 30 April 1997 (hereinafter 'Decree No 124').

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

4. Under Article 2(2) and (3), the packaging must have been approved by the Environment Agency (Miljøstyrelsen), which considers, in particular, whether it

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).

is, from a technical point of view, appropriate for a collection system and whether the recovery of a significant number of empty containers for reuse may be ensured. When the product is sold, a cash deposit is charged; this is refunded to the consumer when he returns the container to the shop, which has a duty to pay it. This system encourages the consumer to return the container in order to retrieve the deposit, so that a high number of empty containers is returned. [3] In 1998 the total beer consumption in Denmark was about 580 million litres.

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

6. The Danish legislation in no way impedes the use of aluminium or steel cans for other drinks and they are, in fact, used for fruit juice, ice tea and chocolate milk.

3 — In the defence to the application, the Danish Government states that there are about 30 containers approved for beer and carbonated soft drinks. It adds that glass bottles are used more than 35 times, and plastic bottles are refilled about 20 times.

Tins and other metal containers are used, *inter alia*, for preserves, coffee and biscuits. Single-use glass containers are used, for example, for wine, and plastic or cardboard containers for milk, vinegar or oil.

Nor does it prevent the use of tins for exporting beer and carbonated drinks. The Commission states in its application that, in 1998, Denmark exported around 120 million litres of beer in metal containers, that is to say, nearly 360 million 33 cl aluminium cans, mostly to other Member States.

7. The Commission points out that Sweden and Finland have similar packaging collection systems but, unlike in Denmark, in those two countries the system also applies to cans, on which a deposit also has to be left when they are purchased. The sales outlets have equipment for collecting reusable and single-use containers and, when the consumer hands in the empty containers, he recovers the amount he deposited. Apparently, in Sweden, more

than 90% of cans are returned under this scheme. [4]

II — The Community legislation

8. In the first recital of the statement of the reasons on which Directive 94/62 is based, the following are given as grounds for its adoption: the need to harmonise the national measures concerning the management of packaging, in order to prevent or reduce its effect on the environment, thus providing a high level of environmental protection, and to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community. In the thirteenth recital, it is stated that targets set in Member States for the recovery and recycling of packaging waste should be confined within certain ranges so as to take account of the different situations in Member States and to avoid creating barriers to trade.

9. The Commission claims that the Danish legislation infringes Article 18, in conjunction with Articles 5, 7 and 9, which provide:

'*Article 5*

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

'*Article 7*

Return, collection and recovery systems

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

(a) the return and/or collection of used packaging and/or packaging waste from the consumer, other final user,

4 — See the publication *The Recycling of Aluminium Cans in Sweden*, AB Svenska Returpack, Stockholm, 1997, p. 22.

or from the waste stream in order to channel it to the most appropriate waste management alternatives;

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

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

...'

'*Article 9*

Essential requirements

1. Member States shall ensure that three years from the date of entry into force of this Directive,[5] packaging may be placed on the market only if it complies with all the essential requirements defined by this Directive including Annex II.

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

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

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

3. Member States shall communicate to the Commission the text of their national standards, as referred to in paragraph 2(b), which they deem to comply with the

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

requirements referred to in this Article. The Commission shall forward such texts forthwith to the other Member States.

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

...'

'*Article 18*

Freedom to place on the market

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

10. The Commission also alleges that the Danish State has infringed Articles 28 EC and 30 EC which provide, respectively, as follows:

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

'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

III — Pre-litigation procedure

11. In June 1997 the Commission sent a first letter of formal notice to the Danish authorities, in which it stated that the national legislation prohibiting the importation of beer and soft drinks in metal containers was incompatible with Directive

94/62 and Article 28 EC. As the result of a complaint concerning the obligation to use reusable containers for the same drinks produced in Denmark, the Commission sent a second letter of formal notice to that Member State. In August 1997, the Danish Government replied to the first of those communications and, in August 1998, to the second.

12. In November 1998, the Commission issued a reasoned opinion, in which it stated that Article 2(1), in conjunction with Article 1(2), and Article 3 of Decree No 124 were contrary to Directive 94/62, particularly Article 18, in conjunction with Articles 5, 7 and 9 thereof, and Articles 28 EC and 30 EC, and requested that the Danish authorities amend the aforementioned legislation within a period of two months. The Danish authorities replied to the reasoned opinion one month later, stating that their legislation was compatible with Community law as it stood and that there was no need to amend it.

IV — The proceedings before the Court of Justice

13. The Commission's application was received at the Court on 1 July 1999 and the defence was lodged on 31 August that year. Those two pleadings were supplemented by a reply and a rejoinder. The United Kingdom Government was granted leave to intervene in support of the form of order sought by the Commission. [6]

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

V — Analysis of the dispute

14. The Commission maintains that Directive 94/62 has established full harmonisation of the domestic rules on packaging and that, therefore, Member States may not impose more stringent rules on national manufacturers. The fact that the standardisation contemplated in Article 10 has not yet been achieved does not alter the obligation of the Member States to authorise the marketing of packaging which complies with the essential requirements laid down in Annex II; both cans and other single-use containers satisfy the specific requirements laid down in paragraphs 1 and 3 of that annex. Furthermore, the Danish legislation constitutes an impediment to trade,

6 — By order of the President of the Court of 12 November 1999.

contrary to the provisions relating to the free movement of goods, since the measures are not necessary in order to protect the environment and they are disproportionate, because the same objectives may be attained by less restrictive provisions.

15. The United Kingdom Government agrees that the Directive is an exhaustive harmonisation measure, providing for the free movement in the European Union of products marketed in packaging which meets the requirements established in its articles, and that the Danish legislation cannot prohibit the sale of canned beer and soft drinks. In any event, that legislation is contrary to Article 28 EC because, although it is based on the legitimate objective of protecting the environment, it seeks to do so by disproportionate means.

16. The Danish Government contends, essentially, that Directive 94/62 has not established full harmonisation of the rules applicable to packaging and that the essential requirements contained in Annex II are so broad, vague and discretionary that they need to be specified. That harmonisation will not be complete until common European rules have been adopted to indicate the way in which those requirements must be interpreted for each kind of product. It states that the essential requirements in the Directive refer to the product which has to be packaged, and that it is, precisely, the nature of the product that, in Denmark, dictates that beer and carbonated drinks should be sold in reusable containers, whereas uncarbonated drinks, which represent only a small part of total soft drink consumption, do not come within the scope of Decree No 124. The aim of its system is, by giving priority to packaging reuse, to reduce the harmful effects caused to the environment by the accumulation of waste.

17. As we can see, the fundamental point of disagreement between the parties is the scope of the harmonisation established by Directive 94/62. I shall therefore consider, first of all, whether the contested directive has established full harmonisation in the matter and, if not, whether the barrier which the Danish legislation constitutes to trade between Member States is justified.

A — *The scope of the harmonisation established by Directive 94/62*

18. The Commission maintains that the measures imposed by Directive 94/62 must be implemented uniformly in all the

Member States. This has a twofold consequence: first, under the provisions of Article 18 Member States are not to impede the marketing in their territory of packaging which satisfies the essential requirements; and, second, under Article 9(1) they may authorise the placing on the market only of packaging which complies with those essential requirements. The Directive does not contain transitional provisions for the implementation of those two articles, which, under Article 22, had to be transposed into the domestic law of the Member States by 30 June 1996. The Directive forms part of the series approved following the new approach to harmonisation and standardisation,[7] characterised by the imposition, on products in certain sectors, of mandatory standards concerning safety and environmental protection, amongst others.[8]

19. The Danish Government acknowledges that, overall, Directive 94/62 satisfies all the formal requirements for a full harmonisation measure, in accordance with the new approach, although it does not establish an approval procedure. Thus, it was adopted on the basis of Article 95 EC. Article 1(1) states that the Directive aims to harmonise national measures concerning the management of packaging; Article 9 provides that Member States are to ensure that three years from the date of its entry into force, packaging may be placed on the market only if it complies with all essential requirements defined by the Directive, including Annex II; it also lays down a certain number of essential requirements, and provides for the adoption of European standards requiring the Member States to recognise that packaging conforms to those requirements.

It contends, however, that the actual content of the provisions of the Directive, concerning the essential requirements laid down in Article 9 and Annex II is so general and imprecise that, in practice, it is impossible to implement the Directive as if it were a measure establishing full harmonisation. In that regard, it points out this is the only directive adopted to date in accordance with the new approach in the sphere of the environment. It stresses that, unlike the Directive on toys,[9] or the Directive on gas appliances,[10] which standardise the requirements applying to the marketing of those products, with special emphasis on safety, Directive 94/62 emphasises environmental protection. It adds that, in order to determine the essential requirements for packaging, it is necessary to examine various parameters, such as whether there is a need to assess the effect on the

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

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

9 — Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ 1988 L 187, p. 1).

10 — Council Directive 90/396/EEC of 29 June 1990 (OJ 1990 L 196, p. 15).

environment (the greenhouse effect, acidification, amongst others); whether it is necessary to analyse the consumption of raw materials and energy (oil, iron, amongst others); and how to evaluate the various stages in the life cycle of a product (manufacture, transportation, disposal). If the environmental protection requirements are not specified, it will not be possible to achieve uniform implementation.

20. I disagree with the Danish Government's view on that point, for various reasons. I do so, first, because, although Directive 94/62 may be the only directive on the environment adopted to date under the new approach, Annex II of the Council Resolution of 1985 does not restrict the legislative harmonisation to essential safety requirements, but also envisages other requirements in the general interest. My second reason is that the justifications in Part A of the 'Outline of the principles and main elements which should make up the body of the directives' of the Resolution include the safety of persons, domestic animals and goods, and the observance of other essential protection requirements in the general interest such as health, consumer or environmental protection. [11] My third reason is that it does not follow, either from the Resolution or from the text of Directive 94/62, that, to enable packaging to be sold, it is necessary to examine the parameters suggested or that, for that directive to be implemented uniformly, it is necessary to specify the environmental protection requirements.

21. The defendant Government goes on to state that another reason why Directive 94/62 cannot be operative is that the harmonisation standards which have been announced, and which would help to remedy the lack of specification of the essential requirements applicable to packaging, have however not yet been approved. In the Danish Government's submission, the absence of those standards inevitably means that Member States have a certain margin of discretion.

22. I do not wholly agree with the Danish Government on this point. As may be seen from the fundamental principles listed in Annex II to the Council Resolution of 1985, the technical specifications, the drawing-up of which is entrusted to organisations competent in the area of industrial standardisation, are not mandatory, but have the status of voluntary standards, and there is only a presumption that products manufactured in accordance with their

11 — F. Aubry-Caillaud, *Le concept de subsidiarité et la nouvelle approche en matière de libre circulation des marchandises*, Revue des affaires européennes, 1998, 1 and 2, pp. 67 to 69, especially p. 67.

provisions conform to the essential requirements established by the Directive. Accordingly, the adoption of harmonised standards is not a precondition for the implementation of a directive adopted under the new approach nor does it mean that all products must be manufactured in accordance with its precepts, since Member States will still be required to authorise the marketing of all products which, although not manufactured in accordance with the requirements of the harmonised standard, conform to the essential requirements.

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

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

24. I shall consider these objections in the same order. First, I find it difficult to believe that, as the defendant Government has stated with such insistence, the essential requirements are so lacking in specification as to be inoperative, especially when there are 13 Member States which have transposed them into their domestic law and in which Directive 94/62 is being implemented. Even assuming that they were insufficiently clear, the Member States would still be required to implement them in the best way possible, in compliance with Community law. I should also like to add that, if the Directive had had defects which invalidated it, Member States were entitled to bring an action for its annulment

under Article 230 EC, but none of them has done so and it is, therefore, binding on them all. Furthermore, in Annex II(B)(III)(1) to the Council Resolution of 1985, it is provided that the general clause relating to placement on the market applies only if the essential requirements for safety are observed, and it is added that the degree of detail of the wording will depend on the subject-matter.

25. So far as concerns the precise requirements with which packaging must comply, bearing in mind the two aims of Directive 94/62, I consider that the requirement, contained in Annex II(3)(a), that the packaging must be manufactured in such a way as to enable the recycling of a certain percentage by weight of the materials used, does not means that that proportion has to be 100% but merely that materials which are not recyclable may not be used. It is also clear from that same provision that the percentage may vary depending on the types of material of which the packaging is composed. As regards the requirement, contained in paragraph 3(b), that, for the purpose of energy recovery, packaging waste is to have a minimum inferior calorific value, I think that this excludes waste which does not make a positive contribution to energy recovery. Also, it may be inferred from the behaviour of the defendant Government that it considers that packaging which is recoverable in the form of material recycling conforms to the essential requirements, since it is used in Denmark for marketing other drinks and a significant proportion of the national beer production is exported in cans to other Member States. In any event, it cannot seriously be denied that a can meets all the specific requirements regarding manufacture and composition of packaging contained in Annex II(1), or that it also complies with the specific requirements, contained in Annex II(3), applicable to packaging recoverable in the form of material recycling, since a specific percentage by weight of the material used in its manufacture is recyclable. In any event, Denmark has not shown that the implementation of the essential requirements represents an insuperable difficulty for a Member State and, instead of trying to implement Annex II, it has merely retained in its national legislation the provisions which were already in force before the adoption of Directive 94/62.

26. As regards the way in which, on the basis of those requirements, it must be decided whether certain packaging conforms to them, I agree with the Commission that the aim of the approval procedures is to verify whether a particular product complies with the essential requirements established by the Directive, without affecting the content of those requirements, which may still be applied even if those procedures have not been adopted. Until the harmonised standards referred to in Article 9 are introduced, Member States may implement, within the framework of Directive 94/62, the national approval procedures.

I must add that, for this purpose, the joint statement of the Council and the Commission, which is not corroborated by the wording of Directive 94/62, and which has been cited by Denmark in support of its arguments, is irrelevant since, according to the case-law of this Court, declarations made in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of interpreting that directive, where the content of the declarations finds no expression in the wording of the provision in question and, consequently, such declaration has no significance in law. [12]

27. As regards the impossibility, alleged by the Danish Government, of establishing who is responsible for carrying out the verification, I should point out that responsibility for ensuring that an article which is intended to be marketed has been designed and produced in accordance with the essential requirements [13] has been assigned to the manufacturer and that that assignment of responsibility is one of the features which characterises the directives adopted under the new approach. [14]

28. The defendant Government contends, however, that the decision on the use of recyclable or recoverable containers to sell products cannot be left to the manufacturer, since the environmental requirements would be watered down to almost nothing. Given that Directive 94/62 seeks to achieve a high level of environmental protection, the requirement that the packaging should be recoverable in the form of material recycling or energy recovery seems to the Danish Government very unambitious from an ecological point of view, because there is almost no packaging on the market at the moment which is not recoverable to some extent. Even specific requirements, like those stipulating that packaging must have a minimum adequate volume and not contain harmful substances, are reasonable, but they have to be given concrete form in order to be operative.

Again, the defendant Government seems to have lost sight of the fact that the Directive does not have the sole aim of protecting the environment, since it is also intended to ensure the functioning of the internal market, to avoid obstacles to trade, and distortion and restriction of competition within the Community, and that the second objective is not subordinate to the first, but that they are on an equal footing. The Directive authorises Member States to introduce or maintain systems which promote both the reuse and recovery of packaging, and requires them to adopt the measures necessary for attaining the objec-

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

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

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

tives established, by means of return, collection, reuse or recovery systems. As the Commission states in its application, these are suitable instruments for ensuring a high level of environmental protection without jeopardising the free movement of goods.

29. The Danish Government takes the view that Member States have the power to establish an order of priority between reusable and recoverable packaging, when they establish the detailed rules for implementing the essential requirements. It is aware that that element of discretion inevitably leads to differences of interpretation between Member States, which are the consequence of the fact that Directive 94/62 has not established full and operative harmonisation in this field.

30. I have found nothing in the preamble to or in the articles of or in Annex II to Directive 94/62 that could provide a basis for the alleged power of the Member States to establish an order of priority between reusable and recoverable packaging, so that a preference for one system may justify the exclusion of the other. Specifically, this interpretation cannot be inferred from Article 1(2), which states that a first priority is the prevention of the production of packaging waste since, to that end, it provides for reuse, recycling and other forms of recovery. Nor can that interpretation be based on Article 5, which merely authorises Member States to encourage reuse systems. In so far as concerns the essential requirements in Annex II, in my view, all packaging must comply with the requirements contained in paragraph 1, concerning its manufacture and composition, and must also conform to those in paragraph 2 if it is reusable, or those in paragraph 3 if it is recoverable. Since the Directive does not provide to the contrary, it will be for the manufacturers of products to decide to use one or the other kind for packaging, and Member States, on the basis of Articles 5, 7 and 15, may influence the behaviour of the consumer by giving him a reason for preferring the more ecological designs.

It is true that, as the Commission points out in its application, implementation of the Directive may have significant practical consequences for environmental protection in some countries, owing to packaging waste, but it is no less true that, if a Member States believes that the level of protection established in the Directive is inadequate in relation to the level achieved by its national rules, it may have recourse to Article 95(4) EC. Denmark does not appear to have done this.

Nor does it seem to have considered it expedient, as a result of the publication in 1998 of the updated version of the part of the Life Cycle Assessment concerning the packaging of beer and soft drinks, [15] to invoke Article 95(5) EC. This provision allows a Member State, if, after the adoption of a harmonisation measure, it deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, to notify the Commission of the envisaged provisions as well as the grounds for introducing them.

31. The defendant Government adds that the second and eighth recitals of Directive 94/62 provide it with grounds for stating that a hierarchy has been established between reuse and recycling, on the basis of the life cycle assessments. It points out that the Danish analysis shows, overall, that steel and aluminium cans, and also single-use glass or plastic packaging, are more harmful to the environment than reusable containers, and that this fact provides a legal basis for the order of priority established in Denmark for the various types of packaging. In its submission, Article 5 of the Directive does not prevent it from prohibiting the use of single-use packaging for certain products.

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

32. I cannot agree with that interpretation. Article 5 merely authorises Member States to encourage reuse systems of packaging, but is a long way from permitting the prohibition of single-use containers, since a total or partial ban cannot be considered to be a measure encouraging a certain pattern of behaviour for the purposes of the Directive. I agree with the Commission that Member States may encourage the system of reusable packaging, by having recourse to means which do not create an impediment to the free movement of goods and which ensure the same level of environmental protection, for example, deposit and collection systems, both for reusable and for single-use packaging; the branding of products; the use of economic instruments, such as eco-taxes; and the fixing of objectives for the reuse of certain types of packaging.

33. The Danish Government maintains that the essential requirements are not necessarily the same for one and the same type of packaging irrespective of its intended use, but that it is necessary to take into account, in each case, the product which it is to contain. In that sense, it stands to reason that the order of priority as between reuse and recovery of the containers used for beer and soft drinks is not the same as that for containers used for products of lower consumption. It is precisely the characteristics of beer and carbonated drinks which has led the Danish Government to opt for a special regime for those drinks. If the Danish Government

had to create a system for collecting the packaging of fruit juice, ice tea or chocolate milk — for which the turnover is clearly lower than that of beer and soft drinks — in order for it to be reused, the damage to the environment might be more considerable than the ecological advantages obtained, creating disproportionate practical difficulties both for manufacturers and retailers, and for consumers. In the submission of the Danish Government, the superiority of reusable packaging over single-use packaging is obvious, first in that the former is not waste but has value for the manufacturer and the bottler, so that effective collection systems may be devised to encourage the various links in the chain to participate in the rotation, whereas the latter is waste which has no value other than intrinsic value, which is why there are no examples of systems for collecting this type of packaging which achieve more than 90% returns, even where it has been made compulsory to leave a deposit.

34. I think that the Commission is right when it states that the essential requirements in Annex II (2) and (3) refer to types of container and apply irrespective of the product they are to contain, whereas some of the requirements in paragraph 1, concerning manufacture and composition, may in addition cover packaging for certain products. Thus, the condition that packaging 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, means that packaging which is acceptable for one product may not be so for another. However, it cannot seriously be maintained that a can is not suitable for containing beer, that it does not meet all the safety and hygiene requirements or that most of the material used in its manufacture is not recyclable or recoverable.

In Denmark the use of cans is permitted only for drinks and food which have a very low sales volume. The reason for the ban on their use for beer and carbonated drinks is not, therefore, that the can does not fulfil the essential requirements established in Annex II(1) and (3), but the effects which might be caused to the environment by the number of those containers which would be placed on the market. [16] As the Commission very rightly points out in its application, Annex II does not establish essential requirements in respect of the number of units of a type of packaging marketed with a certain product and, in order to limit the number of single-use containers, Member

16 — At the hearing I asked the Agent of the Danish Government which of the essential requirements in Annex II are not fulfilled by cans. The reply I was given was that the aluminium top could not be separated from the rest of the steel can before it was melted down.

States may rely on Articles 5, 7 and 15 of the Directive, which authorise the setting-up of systems which help to reduce the overall number of containers, either by encouraging the use of reusable containers or by promoting the use of ecological containers, by means of economic instruments.

35. The Danish Government doubts whether aluminium cans conform to the requirement contained in Annex II(3)(a) that it must be possible for a certain percentage of their weight to be recycled, since current technology does not enable the aluminium top to be separated from the rest, before it is melted down. Although the loss of recyclable aluminium involved in the melting procedure is limited, since it only represents about 10% of the weight of the steel can, it is evident that melting entails considerable energy consumption, and the production of the top represents about 50% of the amount of energy needed for manufacture. [17] It is true that aluminium, owing to its high energy content, contributes to the melting-down process but a recycling of the aluminium is not what is concerned here, since one can only speak in terms of energy recovery.

17 — On the other hand, as pointed out in the pamphlet referred to in footnote 4 above, p. 21: 'The amount of energy used in manufacturing and reconstituting returnable cans is less than commonly believed. Refined and advanced technology has greatly reduced the amount of energy used per can. In terms of total energy used, beverage packs today are among the most economical of all types of packaging used for food products. Energy consumption per type of packaging (total energy consumption throughout the natural cycle):... 33 cl clear returnable bottle, 30 collections = 2.7 MJ/litre; 45 cl aluminium can, 90% recycling = 2.9 MJ/litre; 33 cl green returnable bottles, 30 collections = 3.3 MJ/litre.'

36. Nor do I agree with the defendant on this point. The Commission maintains that it is possible to separate the aluminium top before melting it down. No evidence to this effect, or to the contrary, has been adduced in the proceedings. It is true that the specific requirements applicable to recoverable packaging stipulate that it must be possible to recycle a certain percentage of the materials used in its manufacture, but it cannot be inferred from this wording that it must be possible to recycle a certain percentage of all the components. Also, in accordance with Annex II(3)(a), the establishment of the percentage may vary, depending on the type of material of which the packaging is composed.

37. The Danish Government states that a life cycle assessment is a method of evaluating, on the one hand, the main consumption of raw materials and energy and, on the other, the effect on the environment. It makes it possible to compare two different products from the environmental point of view and is based on the most likely hypotheses. The Danish Government states that the professional quality of the Danish life cycle assessments carried out in 1996, and updated in 1998 with regard to the section devoted to beer and soft drinks, is generally acknowledged. It includes calculations of the environmental impact of various types of containers used for beer and soft drinks, namely, reusable bottles, single-use glass and plastic bottles, and steel and aluminium cans, from extraction

of the raw materials to filling, distribution, use and waste management. It takes into account all harm to the environment, since it assesses the consumption of energy and raw materials, both in respect of unrenewable energy, for example, coal or oil, and unrenewable raw materials, for example, tin or aluminium. It also studies the impact of packaging on the environment, owing to emissions and spillages into the air and water, like the greenhouse effect, to which CO_2 emissions contribute, acidification caused by SO_2 and NO_x emissions, the pollution of nutrient salts owing to the release of NO_x, and the emissions of volatile organic particles, which contribute to atmospheric pollution.

It adds that the abovementioned Assessment shows, overall, that the impact on the environment of steel and aluminium cans, and of single-use glass and plastic bottles, is greater than that of reusable glass and plastic bottles. It also points out that the main effects on the environment of all the materials and types of packaging examined are closely linked to energy consumption, which includes the use of fossil fuels, with the subsequent release of emissions into the atmosphere. Starting from the hypothesis that electricity is produced at a new coal power station, and applying that hypothesis to the total beer consumption in Denmark, in 33 cl containers, the CO_2 emissions have been evaluated at 100 000 tonnes a year for the reusable bottles, whereas, for the single-use containers, the figure is double that and, for steel and aluminium cans, it is 247 000 tonnes and 208 000 tonnes respectively. As regards soft drinks, it is calculated that the annual CO_2 emissions are 41 000 tonnes for 50 cl reusable plastic bottles; on the other hand, single-use plastic bottles would cause emissions of 140 000 tonnes; aluminium cans, 143 000 tonnes; and steel cans, 170 000 tonnes. Furthermore, the Danish packaging collection system prevents the production of about 390 000 tonnes of waste, which is equivalent to 20% of the daily volume of the collection of domestic waste.

38. I can only congratulate the Danish Government for having commissioned this Life Cycle Assessment of drinks packaging, because of the scale of the work and the high quality of the result obtained. It is a pioneering study of its kind, which will set the standard for those carried out in the future, and will be very useful for identifying the effects which packaging may have on the environment, in order to promote certain systems of reuse through deposit and collection, or by means of economic instruments.

However, I agree with the Commission that a document of this nature cannot be used,

as the Danish Government claims, to decide whether packaging fulfils the essential requirements, nor can it serve to justify prohibiting the use of packaging which meets those requirements. Directive 94/62 does not impose on Member States the obligation to authorise only those containers which are most environmentally preferable according to the life cycle assessment, a method which, furthermore, only examines the impact on the environment, and leaves aside the Directive's other, equally important, aim, which is to ensure the functioning of the internal market.

In fact, in Annex H to the Life Cycle Assessment, which contains a critical examination of the work, some of its limitations are noted. [18]

39. I think it would be superfluous to judge the content of Directive 94/62 in the light of Article 6 EC, introduced by the Treaty of Amsterdam, which provides that environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development. The Directive itself, which takes as its legal basis Article 95 EC, seeks both to ensure the functioning of the internal market and to achieve a high level of environmental protection, by harmonising the national measures on waste management, and introducing some measures designed, as a first priority, to prevent the production of waste, through reuse, recycling and the other forms of recovery.

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

Consequently, a Member State fails to comply with its obligations under that

18 — See, in particular, paragraph H.4, p. 379, in which it is stated: 'In its present form this study report is not quite suitable as support of public decision making, and it cannot be the sole background for predicting which of the packaging systems are most environmentally preferable. For such an evaluation, many other aspects, either omitted in the study (e.g. littering, migration from packaging materials, retailer processes, work environment, functionality, hygiene, home transport, economics) or not adequately serviced by the Life Cycle Assessment tool (e.g. local environment impacts), also have to be taken into account.'

Directive, in particular, the abovementioned articles, if, on the grounds that, in its view, the rules are not sufficiently precise, it decides that certain packaging, which complies with the essential requirements in Annex II(1) and (3), cannot be used for selling products in its territory, or for importing beer and carbonated drinks.

41. However, in case the Court of Justice does not take this view, I shall now go on to consider whether the barrier to trade constituted by the prohibition on imports to Denmark of canned beer and carbonated drinks can be justified by the overriding requirement to protect the environment.

B — *Concerning the justification for the prohibition on imports of canned beer and carbonated drinks*

42. It is settled case-law of the Court that, in the absence of common rules relating to the marketing of a product, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be recognised as being necessary in order to satisfy imperative requirements recognised by Community law.[19] Such rules must also be proportionate to the aim in view and, if a Member State has a choice between various measures for achieving the same aim, it must choose the means which least restricts freedom of trade.[20]

43. The Danish Government does not dispute that the prohibition on imports of canned beer and soft drinks is a barrier to trade, but considers that its scope is very limited and that it is justified by environmental protection requirements, an objective which it cannot secure so effectively by employing less radical measures. Furthermore, the proportion of cans on the beer and soft drinks market is low in most of the European countries[21] and foreign beer imports represent a tiny part of beer consumption not only in Denmark but also in some European States; it is particularly low in those countries which have a significant domestic production: 2.7% in Germany, 1.9% in Finland, 1.3% in Den-

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

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

21 — In the defence to the application, the Danish Government points out that, according to the figures published by *Tal fra Bryggeriforeningen, 1999* (Beer Manufacturers Federation statistics), the figures are as follows: Belgium 8.2%; Germany 15.4%; Spain 13%; France 8.5%; Greece 20%; Ireland 12.7%; Italy 8.5%; Luxembourg 3.4%; Austria 11.4%; Portugal 4.4%; Finland 5.3%; United Kingdom 23%; Norway 1%; and Switzerland 5.3%.

mark, 4% in Austria, and 0.5% in Norway. [22] These figures show, in the Danish Government's submission, that there is no direct link between the relatively low level of beer imports to Denmark and the prohibition on the use of cans.

It points out that, if the prohibition on imports is lifted, several Danish manufacturers will package their products abroad in order to export them to Denmark, and there is a risk that the effectiveness of the whole container collection system, which yields a high percentage of returns, will be greatly reduced. The reason that it prohibits imports of canned beer and soft drinks, whereas it authorises their export in that type of packaging, is that, in Denmark, there is an effective system for collecting reusable packaging and the consumption of those canned drinks would have harmful consequences in relation to the greenhouse effect, which would not happen in other States which do not have such an efficient packaging collection system.

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

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

46. Second, in the date provided by the Danish Government regarding the low level

22 — Calculations provided by the Danish Government from the 1998 data of the Common Market Beer Manufacturers Confederation.

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

of imports of beer in beer-producing countries no distinction is made according to the types of packaging. I do not know, therefore, whether there is any direct link between the relatively low level of beer imports into Denmark and the prohibition on metal packaging which, moreover, affects not only beer but also carbonated soft drinks. In any event, the fact that the volume of imports is so low leads me to believe that the impact of the cans on the environment would be insignificant.

47. Third, the Danish Government has not convinced me that the prohibition on imports of canned beer and carbonated drinks is a measure which is necessary in order to protect the environment, or that it is proportionate to achieving that aim. It appears that the ban on using cans and single-use containers for beer and carbonated drinks is based on the results of the abovementioned Life Cycle Assessment. Notwithstanding the undeniable quality of that study, the truth of the matter is that it is based on a working hypothesis the materialisation of which, in practice, is, to say the least, uncertain and that, if it had started from a different assumption, modifying the specific weight accorded to each element, the results of the calculations would have been different. The Commission refers to a report drawn up in Germany which shows that, if the transport distance exceeds 1 000 km, the environmental advantages of reusable packaging are reduced,[24] so that cans may represent an attractive alternative from the environmental point of view. The journeys taken into account in the Life Cycle Assessment carried out in Denmark, which are genuine data supplied by the Beer Manufacturers Federation, are of an average of 170 km; the Commission, on the other hand, rightly points out that the internal market involves the long-distance transportation of goods.

48. Fourth, the calculations submitted by the Danish Government relating to the advantages of the reusable packaging system and the tonnes of waste which it avoids are based on the hypothesis that all packaging will be replaced by single-use packaging. It seems to me unrealistic to think in these terms[25] and, furthermore, there is the possibility of introducing a deposit and collection system to facilitate the recycling of very large numbers of used cans. Also, even in countries in which cans are not sold with a deposit, the Commission states that up to 84% are recycled.[26]

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

25 — The Commission cites the example of Germany, a country in which 78% of the beer consumed in 1997 was in reusable containers, 18.8% in cans and 3.2% in single-use glass bottles. Source: Gesellschaft für Verpackungsmarktforschung, October 1998: Einweg-und Merhrwegverpackung von Getränken 1980-1997.

26 — Source: Appeal News, Issue No 11, Recycling Rate of Steel Packaging in Europe.

49. Fifth, I agree that the Member States must adopt measures to limit the greenhouse effect, even though they may be isolated measures. However, the Commission is right in pointing out that it is not permissible for those measures to impede trade by prohibiting the sale of certain products, because that is too radical in relation to the aim it is sought to achieve. The retention of the prohibition, to which reference has been made so many times, seems to originate in the wish to perpetuate the prevailing deposit and collection system of reusable packaging rather than in the aim of fighting against the greenhouse effect by using the most advanced technical knowledge on the subject.

50. Finally, in case the prohibition on importing cans were a measure intended to mitigate the greenhouse effect, the Commission puts forward an argument which I think is conclusive. If, as emerges from the Life Cycle Assessment and is confirmed by the Danish Government, the CO_2 emissions are calculated to be 210 000 tonnes for single-use bottles and 208 000 tonnes for aluminium cans, the effect of the former is, overall, equivalent to that of the latter, so that they ought to be treated in the same way with regard to environmental protection. However, as we have seen, the Danish legislation allows the importation of beer and carbonated drinks in single-use containers, provided that a deposit and collection system is established, whereas imports in cans are wholly prohibited.

51. For the reasons which I have just stated, I consider that, by maintaining in force the prohibition on imports of beer and carbonated drinks in cans, contained in Article 3 of Decree No 124, Denmark has failed to fulfil its obligations under Articles 28 EC and 30 EC.

52. I consider, therefore, that the Commission's application is well founded and that judgment should be given against the Kingdom of Denmark.

53. In conclusion, I should like to add that, at all the stages of these proceedings, Denmark has mounted an out-and-out defence of its system of packaging beer and carbonated soft drinks in reusable deposit and return containers, and that it has been shown, in my view, that it believes that that system cannot be bettered. No-one is unaware that, in Denmark, the enthusiasm for protecting the environment is not restricted to the authorities, but extends to almost the whole population. That fact convinces me that the forecasts submitted by the defendant Government in the proceedings, regarding the huge negative impact which would be caused by the lifting of the prohibition on marketing in Denmark of beer and carbonated drinks in single-use packaging, are exaggerated, and that, therefore, the consequences would, in actual fact, be made less far-reaching and, in any event, controllable.

VI — Costs

54. 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 the Kingdom of Denmark, the latter should be ordered to pay the costs of the proceedings.

VII — Conclusion

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

(1) declare that the Kingdom of Denmark, by maintaining in force Paragraphs 2(1) and 1(2) of Decree No 124 on packaging for beer and carbonated soft drinks, which provide that these drinks may be marketed only in reusable packaging, and by maintaining Paragraph 3 of that Decree, which provides that the packaging of imported drinks may be not be made of metal, has failed to fulfil its obligations under European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, and in particular Article 18, in conjunction with Articles 5, 7 and 9 thereof.

(2) order the Kingdom of Denmark to pay the costs.