

OPINION OF ADVOCATE GENERAL  
TIZZANO

delivered on 5 December 2002<sup>1</sup>

1. By order of 25 July 2001, the Unabhängiger Verwaltungssenat Wien (Independent Administrative Chamber, Vienna) referred three questions to the Court of Justice for a preliminary ruling on the interpretation of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (hereinafter ‘Directive 90/313’ or ‘the directive’).<sup>2</sup> The Austrian court is essentially asking whether details of examinations carried out by the national administrative authorities to monitor compliance with the rules on the labelling of certain foodstuffs produced from genetically modified organisms laid down in Council Regulation (EC) No 1139/98 of 26 May 1998 (hereinafter ‘Regulation No 1139/98’ or simply ‘the regulation’)<sup>3</sup> can constitute ‘information relating to the environment’ within the meaning of the directive.

I — The legal framework

*The relevant Community provisions*

2. The object of Council Directive 90/313, adopted on the basis of Article 130s of the EC Treaty (now, after amendment, Article 175 EC) in the conviction that access to information will improve environmental protection (fourth recital in the preamble), is ‘to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available’ (Article 1).

3. Pursuant to Article 2(a) of the Directive:

<sup>1</sup> — Original language: Italian.

<sup>2</sup> — OJ 1990 L 158, p. 56.

<sup>3</sup> — Concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC (OJ 1998 L 159, p. 4). Regulation No 1139/98 was amended by Commission Regulation (EC) No 49/2000 of 10 January 2000 (OJ 2000 L 6, p. 13).

‘(a) “information relating to the environment” shall mean any available information in written, visual, aural or

data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes’.

the label of [the products in question] that they were obtained by genetic modification techniques’ (second recital). That being established, the regulation seeks ‘to ensure that the final consumer is informed of any characteristic or food property... which renders a food or food ingredient no longer equivalent to an existing food or food ingredient’ (ninth recital).

4. Regulation No 1139/98, for its part, introduces harmonised labelling requirements for certain foodstuffs produced from genetically modified soya beans and genetically modified maize, providing in particular that the words ‘produced from genetically modified soya’ or ‘from genetically modified maize’ must appear in the relevant list of ingredients (Article 2(3)).

*The relevant national provisions*

5. The regulation implements the provisions of the basic directive, Directive 79/112/EEC on the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer.<sup>4</sup> According to the preamble, the regulation was adopted because of differences between national measures and in order to prevent those differences from impeding the free movement of goods (fourth recital), despite the fact that ‘there were no safety grounds for mentioning on

6. In the Austrian legal order, access to information held by public authorities is generally governed by the Bundesgesetz über die Auskunftspflicht der Verwaltung des Bundes (Federal Law on the duty of the federal authorities to provide information, BGBl. No 287/1987, hereinafter ‘the Auskunftspflichtgesetz’) and, in the relevant sector for the purposes of the present case, by the Umweltinformationsgesetz (Law on access to information on the environment, BGBl. No 495/1993, in the version published in BGBl. No 137/1999, hereinafter ‘the UIG’), which implemented Directive 90/313 in Austria.

<sup>4</sup> — 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 (OJ 1979 L 33, p. 1).

7. Pursuant to Paragraph 2 of the UIG:

natural sites, to reduce noise pollution and measures to avert damage and to make good damage that has occurred, including in particular in the form of administrative acts and programmes'.

'Environmental data shall mean information recorded in any way relating to:

— the state of water, air, soil, fauna, flora, land and natural sites, and any changes thereto or noise pollution;

## II — Facts and procedure

— plans or activities which endanger or could endanger humans, or which damage or could damage the environment, in particular as a result of emissions, the introduction or release of chemicals, waste, dangerous organisms or energy, including ionising rays, into the environment, or as a result of noise;

— chemicals, waste, dangerous organisms, released energy, including ionising rays, or noise, in each case possessing properties in amounts or having effects that are damaging to the environment;

— existing or planned measures to preserve, protect or improve the quality of water, air, soil, fauna, flora, land and

8. The main proceedings arose from a question put by Dr Eva Glawischnig, a member of the Austrian parliament. Citing the Auskunftspflichtgesetz and the UIG, Dr Glawischnig asked her own Government, to be precise the Bundeskanzler (Federal Chancellor) who at the time was responsible for the matter, for details of examinations carried out by the administrative authorities to monitor compliance with the rules laid down in Regulation No 1139/98. In particular, she asked the following five questions about examinations in the period 1 August to 31 December 1999:

'1. How many products made from genetically modified soya and genetically modified maize were examined during the abovementioned period to check they were correctly labelled under EC Regulation 1139/98?

2. How many complaints were raised? marketing of incorrectly labelled products containing genetically modified maize or genetically modified soya which neither damage the environment nor endanger human health by polluting it. Otherwise, any activity that was theoretically likely to endanger human health would have to be regarded as 'environmental data'.
3. Which products were involved? Please state the product names and their manufacturers.
4. How many administrative penalties were imposed? Which manufacturers were fined in respect of which products?
5. How high were the highest and lowest penalties for incorrect labelling (a) between 1 August and 31 December 1999 and (b) before?'
9. By decision of 10 February 2000, the Bundeskanzler refused to give the information requested in the last three questions, on the ground that it did not constitute 'environmental data'. In particular, he held that the definition 'activities which endanger or could endanger humans or which damage or could damage the environment' contained in Paragraph 2(2) of the UIG only covers dangers to human beings arising from pollution of aspects of the environment (water, air, soil and noise) and does not cover activities such as the
10. Dr Glawischnig brought an appeal against the decision refusing the information before the Unabhängiger Verwaltungssenat Wien, requesting that the decision be amended or referred to the competent administrative authority. In the course of the proceedings the Bundesminister für soziale Sicherheit (Federal Minister for Social Security) replaced the Bundeskanzler as defendant, following a transfer of responsibility for the matter. The appellant claims that, contrary to the Bundeskanzler's assertion, placing the products in question on the market does fall into the category defined in Paragraph 2(2) of the UIG, since they could cause allergic reactions in the human body and have detrimental effects on the environment.
11. The Unabhängiger Verwaltungssenat Wien considers that the information requested by the appellant is neither 'environmental data' within the meaning of Paragraph 2 of the UIG nor 'information relating to the environment' within the meaning of Article 2(a) of Directive 90/313. The Austrian Government argues that the Commission has already given authorisation for the products in question

to be placed on the market and the fact that they are incorrectly labelled does not in itself mean that they are likely to damage the environment. Nevertheless, the Unabhängiger Verwaltungssenat still has some doubts as to the scope of the Community concept 'information relating to the environment' and it therefore decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Can the name of the manufacturer of foodstuffs and their product description, in respect of which a complaint has been made in the context of the monitoring by the administrative authorities of instances of incorrect labelling, pursuant to Council Regulation (EC) No 1139/98 of 26 May 1998 concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC, constitute "information relating to the environment" within the meaning of Article 2(a) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment?
2. Does information contained in administrative documents revealing the frequency with which administrative penalties have been imposed for infringement of Regulation (EC) No 1139/98 constitute "information relating to the environment" within the meaning of Article 2(a) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment?
3. Does information contained in administrative documents revealing the manufacturers and products to which administrative penalties for infringement of Regulation (EC) No 1139/98 relate constitute "information relating to the environment" within the meaning of Article 2(a) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment?

12. In addition to the parties in the main proceedings, the Austrian Government and the Commission also intervened in the procedure thus initiated before the Court.

### III — Legal analysis

13. As we have seen, the national court has referred three questions to the Court, seeking essentially to ascertain whether administrative documents relating to examinations to monitor compliance with the rules on labelling laid down in Regulation No 1139/98, in particular documents revealing the name of the manufacturer and the description of the product in respect of which a complaint has been made, the name of the manufacturer and the description of the product on which administrative penalties have been imposed, and the frequency with which such penalties have been imposed, can constitute information relating to the environment within the meaning of Article 2(a) of Directive 90/313.

14. To answer these questions, it is in my view necessary to determine separately, in the light of the definition contained in the said Article 2(a), whether the details requested by Dr Glawischnig can constitute information on the 'state' of the environment (first category) or information on 'activities or measures' capable of 'adversely affecting' the environment (second category) or, lastly, information on 'activities or measures designed to protect' the environment (third category).

15. I should make it clear at once that the parties are essentially agreed in considering that the details in question do not fall into the first category because, as the Commission in particular has pointed out, they do not relate to the 'state of water, air, soil, fauna, flora, land and natural sites'.<sup>5</sup> I too take the view that a document revealing that a complaint has been made or penalties have been imposed more or less frequently with respect to a certain manufacturer for marketing products when their labelling does not comply with the Community provisions, does not in itself describe or give any indication as to the present situation of the aspects of the environment listed in the provision at issue.

16. There is less general agreement as to whether the details in question can be

placed in the second category. Dr Glawischnig considers that they can, inasmuch as they constitute information on activities which represent a danger to the environment. In her view, that is proved by the fact that, in order to protect the environment, specific authorisation and a particular form of labelling are required to market products resulting from genetic engineering.

17. More generally, Dr Glawischnig points out that the term 'environment' used in the directive also covers human beings. In her view, this is already clear from Article 130r(1) of the EC Treaty (now Article 174 EC), under which protecting human health is still listed among the objectives of Community policy on the environment, and it is confirmed by Directive 90/313, which includes among activities capable of adversely affecting the environment 'those which give rise to nuisances such as noise' to which human beings alone are exposed. According to Dr Glawischnig, products containing genetically modified organisms whose effects on the human body are not known should be regarded as dangerous pending proof to the contrary. She also claims that the labelling of the products in question is particularly important for certain sections of the population such as those suffering from allergies, whose health is closely dependent on indications regarding the characteristics of products they consume. Consequently, products that may damage human health

<sup>5</sup> — My emphasis.

must also constitute a danger to the environment and access to data concerning the marketing of such products must therefore be granted in accordance with the directive.

18. The Austrian Government, however, contends that the term 'environment' used in the directive applies only to the sectors of the environment which are specifically mentioned in the directive itself, in particular the state of water, air, soil, fauna and flora, and consequently does not include human health except indirectly, that is to say in so far as it is influenced by the adverse effects an activity may have on sectors of the environment covered by the directive. Moreover, it argues that if any activity that could endanger human health were to be included in the second category, the result would be to extend the scope of the directive unduly, far beyond the intentions of the Community legislature.

19. With regard to the specific danger of placing genetically modified foodstuffs on the market, both the Austrian Government and the Commission acknowledge that in principle the possibility that the environment may be damaged in the process cannot be precluded but they point out that in the case of the products referred to in Regulation No 1139/98 the danger was specifically assessed in the course of the procedure for placing those organisms on the market in accordance with Directive

90/220/EC on the release into the environment of genetically modified organisms.<sup>6</sup> And by Decisions 96/281/EC and 97/98/EC,<sup>7</sup> the Commission authorised the placing on the market of the products in question on the premiss that 'there is no reason to believe that there will be any adverse effects on human health and the environment' (seventh and fifth recitals in the preambles to Decisions 96/281 and 97/98 respectively). The possibility that this activity represents a danger to the environment must therefore be precluded.

20. I too take the view that the details in question do not relate to activities or measures capable of adversely affecting the environment and consequently do not fall into the second category of information relating to the environment covered by the directive. Without going into the question whether the activity of marketing foodstuffs containing genetically modified organisms is liable to damage the environment, suffice it to say that the information requested by Dr Glawischnig does not relate directly to that activity but to examinations carried out in that connection. It relates, in particular, to examinations carried out by the Austrian authorities to

6 — Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, p. 15).

7 — Commission Decision 96/281/EC of 3 April 1996 concerning the placing on the market of genetically modified soya beans (*Glycine max L.*) with increased tolerance to the herbicide glyphosate, pursuant to Council Directive 90/220/EEC (OJ 1996 L 107, p. 10) and Commission Decision 97/98/EC of 23 January 1997 concerning the placing on the market of genetically modified maize (*Zea mays L.*) with the combined modification for insecticidal properties conferred by the Bt-endotoxin gene and increased tolerance to the herbicide glufosinate ammonium pursuant to Council Directive 90/220/EEC (OJ 1997 L 31, p. 69).

monitor compliance with Regulation No 1139/98, an activity that is clearly not, in itself, capable of adversely affecting the environment.

21. It only remains, therefore, to determine whether the information relating to that supervisory activity may fall into the third category of information relating to the environment, which comprises information on activities or measures designed to protect the environment. The parties differ in their views on this point.

22. As explained earlier, Dr Glawischnig considers that the term 'environment' used in the directive also covers human beings and human health and that the information to which freedom of access is accorded under the directive must therefore include information on activities designed to protect human health. In her view, it follows that the administrative activities of monitoring and imposing penalties for failure to comply with specific authorisation to market a dangerous product (in this case, a foodstuff containing genetically modified organisms) or a particular form of labelling required for the purpose of protecting human health (in this case, the health of those suffering from allergies) are likewise designed to protect human health and the environment.

23. The Commission and the Austrian Government consider that, on the contrary, information on measures taken by a public authority to ensure compliance with Regulation No 1139/98 does not fall into the third category of information relating to the environment. In particular, the Commission contends that examinations carried out by the administrative authorities to ensure compliance with the provisions in force fall into the latter category only in cases where the purpose of the provisions in question is to protect one of the sectors of the environment listed in Article 2 of the directive. In its view, that is not so in the present case, because the purpose of Regulation No 1139/98 is not to protect the environment but, as the legal basis and the preamble to the regulation make clear, to ensure that consumers are adequately informed.

24. I too take the view that the information in question cannot be regarded as information on activities or measures designed to protect the environment and cannot therefore fall into the third category of information relating to the environment covered by the directive.

25. Of course, I do not dispute that examinations such as those at issue, carried out by public authorities to monitor the application of provisions in force may theoretically constitute relevant activities for the purposes of Article 2(a) of the directive. As the Court has already had occasion to



explain in the judgment in *Mecklenburg*,<sup>8</sup> cited by the referring court and the interveners, ‘the Community legislature purposely avoided giving any definition of “information relating to the environment” which could lead to the exclusion of any of the activities engaged in by the public authorities’;<sup>9</sup> consequently all forms of activity exercised by the administrative authorities, including activity to ensure compliance with the Community rules on the labelling of certain foodstuffs produced from genetically modified organisms, may in principle be regarded as relevant for the purposes of Article 2 of the directive.

26. However, as the Court held on that occasion, ‘in order to constitute “information relating to the environment for the purposes of the directive”’, the activity of the public authorities must be ‘an act capable of... protecting the state of one of the sectors of the environment covered by the directive’.<sup>10</sup> In the present case, therefore, as the Commission has rightly pointed out, information relating to the monitoring of compliance with the regulation may be regarded as ‘information relating to the environment’ only if it is shown that the purpose of the regulation itself is to protect the environment. Consequently, it must now be established what the purpose of Regulation No 1139/98 is.

27. In that connection, I must say that I am not persuaded by Dr Glawischnig’s argument that, merely because it regulates the labelling of products containing genetically modified organisms whose effects on the human body are not known, the purpose of the regulation in question is to protect human health and therefore the environment.

28. It is true that the Commission essentially maintained in its report on the application of Directive 90/313<sup>11</sup> that the information to which freedom of access is accorded under the directive must generally speaking include information relating to human health, since protecting human health is one of the objectives of Community policy on the environment. However, without going into the question whether, and if so *what*, information relating to human health is specifically relevant for the purposes of the directive, I merely observe that, as the Commission makes abundantly clear, the purpose of Regulation No 1139/98 is not to protect the environment at all, nor even to protect it in a broad sense that also includes protecting human health.

29. Indeed the regulation expressly states that ‘*there were no safety grounds for*

8 — Case C-321/96 *Mecklenburg* [1998] ECR I-3809.

9 — Judgment in *Mecklenburg*, cited above, paragraph 20.

10 — Judgment in *Mecklenburg*, cited above, paragraph 21.

11 — The Commission, in Annex C to the ‘Report to the Council and the European Parliament on experience acquired in the application of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment’ of 29 June 2000, recommends that the directive be amended to *make it clear* that ‘information relating to the environment’ also includes among other things information relating to health (my emphasis).

mentioning on the label of genetically modified soya beans... or of genetically modified maize... that they were obtained by genetic modification techniques'<sup>12</sup> and this is entirely consistent with the decisions to authorise the placing on the market of the products in question, which were adopted on the premiss that 'there is no reason to believe that there will be any adverse effects on human health and the environment'.<sup>13</sup> In my view, it is therefore obvious that the purpose of the labelling requirements laid down in the regulation in question is not, in general terms at least, to protect human health.

30. Nor am I persuaded by the argument that the purpose of Regulation No 1139/98 is to protect the health of particular sections of the population in whom material present in soya or maize as a result of genetic engineering might cause allergic reactions. I must point out in this connection that the generic indications required under the regulation for the labelling of products containing genetically modified soya or genetically modified maize are of no use at all for the purpose of identifying the presence in the product of agents liable to cause allergic reactions.

31. Unlike the Community measure that preceded it,<sup>14</sup> Regulation No 1139/98 does

12 — My emphasis.

13 — Namely Decisions 96/281 and 97/98, cited in point 19 above.

14 — Namely Commission Regulation (EC) No 1813/97 of 19 September 1997 concerning the compulsory indication on the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC (OJ 1997 L 257, p. 7).

not require the labelling to indicate 'the presence in the food or food ingredient of material which is not present in an existing equivalent foodstuff and which may have implications for the health of certain sections of the population'<sup>15</sup> including, to be specific, those suffering from allergies. On the contrary, it merely provides that the generic phrase 'produced from genetically modified soya' or 'produced from genetically modified maize' must appear in the list of ingredients (Article 2(3) of Regulation No 1139/98). Consequently, in my view, consumers suffering from allergies cannot obtain from the indication required under Regulation No 1139/98 any information that might help them to avoid dangers to their health because they are in no position to know what materials are present in the food as a result of genetic modification of one or other of its ingredients and cannot therefore learn from the label whether they include materials to which they are allergic.

32. In actual fact, it seems to me that the purpose of the regulation at issue is, on the one hand, to promote the free movement of such products by means of uniform rules which have replaced the differing measures adopted by certain Member States in respect of their own labelling (fourth recital) and, on the other, to inform the final consumer 'of any characteristic or food property, such as composition, nutri-

15 — Article 2 of Regulation No 1813/97, cited above.

tional value or nutritional effects or the intended use of the food, which renders a food or food ingredient no longer equivalent to an existing food or food ingredient' (ninth recital). It therefore seeks, in accordance with its legal basis, to remove potential obstacles to the free movement of products containing genetically modified soya and genetically modified maize, at the same time informing the final consumer that although the foodstuffs in question may appear to be exactly the same as existing equivalent products they differ from them in that some of their properties have been modified, thus enabling the consumer to make a rational choice when buying them.

33. I therefore conclude that the purpose of Regulation No 1139/98 is not to protect human health either in general or, even less, from the specific point of view considered here; nor is it to protect the environment, not even in a broad sense that also includes protecting human health. Nor, therefore, is that the purpose of the examinations carried out to ensure compliance with the said regulation, so the information requested by Dr Glawischnig does not relate to activities or measures designed to protect the environment within the meaning of the directive.

### *Concluding observations*

34. For all these reasons, I therefore conclude that the reply to the question referred by the Unabhängiger Verwaltungssenat Wien should be that administrative documents relating to the monitoring of instances of incorrect labelling, pursuant to Council Regulation (EC) No 1139/98, in particular documents revealing the name of the manufacturer of foodstuffs and the description of the product in respect of which a complaint has been made, the name of the manufacturer of foodstuffs and the description of the product in respect of which administrative penalties have been imposed, and the frequency with which such penalties have been imposed, cannot constitute 'information relating to the environment' within the meaning of Article 2(a) of Directive 90/313.

35. That being said, I must again point out that the directive does not in itself prevent Member States from recognising a more extensive right of access to information than that accorded under the directive. The conclusions I have just reached do not therefore preclude an interpretation of national law more favourable to the appellant in the main proceedings if the broad meaning of 'environmental data' contained in the Austrian provisions would sustain it. It was certainly accorded a broad interpretation by the Bundeskanzler in the administrative procedure that led to the

main proceedings, since the administrative authorities did allow Dr Glawischnig access to some of the information she sought, despite the fact that, for the reasons given earlier, the data in question could not be described as information relating to the environment within the meaning of the directive. In the present context, however, I can do no more than indicate this possibility, since it is clearly for the referring court to interpret the relevant national law and determine whether or not it assures freedom of access also to the rest of the information requested by Dr Glawischnig that was mentioned in the question referred to the Court.

#### IV — Conclusion

36. In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the question referred by the Unabhängiger Verwaltungssenat Wien by order of 25 July 2001:

Administrative documents relating to the monitoring of instances of incorrect labelling, pursuant to Council Regulation (EC) No 1139/98 of 26 May 1998 concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC, in particular documents revealing the name of the manufacturer of foodstuffs and the description of the product in respect of which a complaint has been made, the name of the manufacturer of foodstuffs and the description of the product in respect of which administrative penalties have been imposed, and the frequency with which such penalties have been imposed, cannot constitute ‘information relating to the environment’ within the meaning of Article 2(a) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment.