Case C-228/00

Commission of the European Communities
v
Federal Republic of Germany

«(Failure of a Member State to fulfil obligations – Article 7(2) and (4) of Regulation (EEC) No 259/93 – Classification of the purpose of a shipment of waste (recovery or disposal) – Incinerated waste – Point R1 of Annex II B to Directive 75/442/EEC – Concept of use principally as a fuel or other means to generate energy)»

Summary of the Judgment

1..

Environment – Waste – Regulation No 259/93 on shipments of waste – Competence of the authorities to which notification of a proposed shipment of waste is addressed to check classification (recovery or disposal) and to object to a shipment which is wrongly classified – Competence of the Member States to lay down general rules for classification – Conditions (Council Regulation No 259/93, Art. 7(2))

2..

Environment – Waste – Directive 75/442 – Annex II B – Distinction between a disposal operation and a recovery operation – Use of waste in cement kilns – Classification as a recovery operation – Conditions
(Council Directive 75/442, as amended by Commission Decision 96/350, Annex II B)

1.

Under the system established by Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, all the competent authorities to which notification of a proposed shipment of waste is addressed must check that the classification by the notifier is consistent with the provisions of the regulation. If that classification is incorrect, those authorities must object to the shipment on the ground of that classification error, without reference to one of the specific provisions of the regulation setting out the objections which the Member States may raise. That system does not preclude Member States from laying down, in acts having general scope, criteria for distinguishing between a recovery operation and a disposal operation, provided that those acts put in place criteria for making that distinction which comply with the criteria laid down by Directive 75/442, as amended by Decision 96/350. see paras 33-36

2.

The combustion of waste constitutes a recovery operation under point R1 of Annex II B to Directive 75/442, as amended by Decision 96/350, where its principal objective is for the waste to fulfil a useful function as a means of

generating energy, replacing the use of a source of primary energy which would have had to have been used to fulfil that function. In particular, the use of waste as a fuel in cement kilns may be classified as a recovery operation if the main purpose is to enable the waste to be used as a means of generating energy, it takes place in conditions which give reason to believe that it is indeed a means to generate energy, the greater part of the waste is consumed during the operation and the greater part of the energy generated is recovered and used. It follows that, where the use of waste as a fuel meets the conditions laid down in point R1 of Annex II B to the directive, it must be classified as a recovery operation, without the need to take into consideration criteria such as the calorific value of the waste, the amount of harmful substances contained in the incinerated waste or whether or not the waste has been mixed. see paras 41-47

JUDGMENT OF THE COURT (Fifth Chamber)
13 February 2003 (1)

((Failure by a Member State to fulfil its obligations – Article 7(2) and (4) of Regulation (EEC) No 259/93 – Classification of the purpose of a shipment of waste (recovery or disposal) – Incinerated waste – Point R1 of Annex II B to Directive 75/442/EEC – Concept of use principally as a fuel or other means to generate energy))

In Case C-228/00,
Commission of the European Communities, represented by G. zur Hausen, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by T. Jürgensen, acting as Agent, assisted by D. Sellner, Rechtsanwalt,

defendant,

APPLICATION for a declaration that by raising unjustified objections against certain shipments of waste to other Member States to be used principally as a fuel the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1),

THE COURT (Fifth Chamber),,

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), D.A.O. Edward, P. Jann and S. von Bahr, Judges,
Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 April 2002, at which the Commission was represented by G. zur Hausen and the Federal Republic of Germany by W.-D. Plessing, acting as Agent, assisted by D. Sellner,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1

By application lodged at the Court Registry on 7 June 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that by raising unjustified objections to certain shipments of waste to other Member States to be used principally as a fuel the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1, the Regulation).

Legal background

Community legislation

Directive 75/442/EEC

2

The essential objective of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32, the Directive) is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. In particular, the fourth recital

of the Directive states that the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources.

3 In Article 1(e) of the Directive *disposal* is defined as any of the operations provided for in Annex II A and in Article 1(f) *recovery* is defined as any of the operations provided for in Annex II B.

4 Article 3(1) of the Directive reads: Member States shall take appropriate measures to encourage:

(a) firstly, the prevention or reduction of waste production and its harmfulness ...

(b) secondly:

— the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or

— the use of waste as a source of energy.

5 Annex II A to the Directive, entitled Disposal operations, refers in point D10 to [i]ncineration on land.

6 Annex II B to the Directive, entitled Recovery operations, refers in point R1 to [u]se principally as a fuel or other means to generate energy.

The Regulation

7 The Regulation lays down rules governing *inter alia* the supervision and control of shipments of waste between Member States.

8 According to Article 2(i) of the Regulation, disposal is as defined in Article 1(e) of Directive 75/442/EEC and, according to Article 2(k), recovery is as defined in Article 1(f) of Directive 75/442/EEC.

9 Title II of the Regulation, headed Shipments of waste between Member States, contains two separate chapters, one of which (Articles 3 to 5) concerns the procedure applicable to shipments of waste for disposal and the other (Articles 6 to 11) the procedure applicable to shipments of waste for recovery. The procedure prescribed for the second category of waste is less restrictive than the procedure for the first category.

10 Under Article 6(1) of the Regulation, when a waste producer or holder intends to ship waste for recovery as listed in Annex III to the Regulation from one Member State to another Member State and/or pass it in transit through one or several other Member States (the amber list of waste), he is to notify the competent authority of destination and send copies of the notification to the competent authorities of dispatch and transit and to the consignee.

11

Article 7(2) of the Regulation lays down the time-limits, conditions and procedures which must be observed by the competent authorities of destination, dispatch and transit to raise an objection to a notified, planned shipment of waste for recovery. It provides in particular that objections must be based on Article 7(4).

12

Article 7(4)(a) of the Regulation provides: The competent authorities of destination and dispatch may raise reasoned objections to the planned shipment:

—

in accordance with Directive 75/442/EEC, in particular Article 7 thereof, or

—

if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection, or

—

if the notifier or the consignee has previously been guilty of illegal trafficking. In this case, the competent authority of dispatch may refuse all shipments involving the person in question in accordance with national legislation, or

—

if the shipment conflicts with obligations resulting from international conventions concluded by the Member State or Member States concerned, or

—

if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.

The German legislation

13

Circulars were issued by the Ministry of the Environment of Land North Rhine-Westphalia on 19 June and 8 December 1995, and by the Ministry of the Environment of Land Baden-Württemberg on 24 March 1995, concerning the shipment to other Member States of waste intended for incineration in cement kilns.

14

Those circulars lay down distinguishing criteria in order to determine whether a shipment of waste is part of a recovery operation or a disposal operation.

15

They are based on the general criteria laid down in the Kreislaufwirtschafts- und Abfallgesetz (Law on recycling and waste) of 27 September 1994 (BGBl. 1994 I, p. 2705) for distinguishing energy recovery from heat treatment, that is to say disposal, during purely national operations.

16

The circulars mentioned in paragraph 13 above stipulate that, in order to be classified as an operation referred to in point R1 of Annex II B to the Directive, waste must:

—

be intended to be used principally as a fuel;

— have a calorific value of at least 11 000 kJ/kg;

— have a calorific value of at least 75%;

— be such that any impurities must be capable of being recovered without causing harm;

— meet the thresholds of polluting substances, and

— fulfil the conditions laid down above without requiring to be mixed or processed with highly inflammable waste.

17 The German Government stated furthermore that the Länder of Lower Saxony and Rhineland-Palatinate also took the Kreislaufwirtschafts- und Abfallgesetz as a basis for laying down the criteria for distinguishing between recovery and disposal where waste is incinerated.

Pre-litigation procedure

18 Following a complaint that had been referred to it, the Commission, by a letter of formal notice sent to the Federal Republic of Germany on 3 July 1997, requested the latter to submit its observations within a period of two months on the charge that the competent German authorities had infringed the provisions of Article 7(2) and (4) of the Regulation by objecting to shipments of waste to Belgium on the ground that the waste was intended for disposal and not intended for recovery, as indicated by the notifying party. According to the Commission, the waste in question was to be used principally as a fuel in cement kilns in Belgium and was indeed therefore intended for recovery, so the German authorities could object to their shipment only on the basis of Article 7(4) of the Regulation.

19 In its response to that letter of formal notice, sent on 30 December 1997 after an extension of the time-limit for response, the German Government maintained that since the principal objective of the incineration of the waste concerned could not, according to a number of criteria, be regarded as the generation of energy, that waste was the subject not of a recovery operation as referred to in point R1 of Annex II B to the Directive, but merely a disposal operation as referred to in point D10 of Annex II A to that Directive.

20 Dissatisfied with that response, the Commission sent the Federal Republic of Germany a reasoned opinion by letter of 19 February 1999 in which it repeated, whilst also referring to another complaint it had received concerning shipments of waste to Belgium, its view, first, that the waste shipments in question were indeed recovery operations and, second, that the criteria used by the competent German authorities for classifying a waste treatment operation did not comply with Community law. In conclusion, the Commission stated that it considered that

the Federal Republic of Germany had infringed the provisions of Article 7(2) and (4) of the Regulation and called upon it to comply with that reasoned opinion with a period of two months from its notification.

21 Having requested an extension of that time-limit, the Federal Republic of Germany sent its response to the Commission on 23 July 1999. In that response the German authorities repeated in essence the arguments they had made earlier, emphasising the point that national authorities must be able to lay down criteria for distinguishing disposal operations from recovery operations in the case of incineration of waste since no precise criteria had been laid down at Community level regarding that matter.

22 In those circumstances, the Commission brought the present proceedings.

Admissibility

23 The Federal Republic of Germany submits that the action against it is inadmissible on the basis that neither in the pre-litigation procedure nor in the application to the Court does the Commission specify the precise object of the proceedings sufficiently clearly to enable it to defend itself against the charges made against it.

24 The German Government maintains in that connection that the Commission did not identify clearly the individual administrative decisions which were at issue. The three circulars from the Länder of North Rhine-Westphalia and Baden-Württemberg referred to in paragraph 13 above do not contain objections to certain shipments of particular waste since they merely set general criteria for distinguishing thermic disposal from the recovery of energy.

25 In that regard, it should be pointed out that it is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (see, in particular, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23, and Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 10).

26 It follows that, first, the subject-matter of the proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision (*Commission* v *Netherlands* , cited above, paragraph 23). Accordingly, the application must be founded on the same grounds and pleas as the reasoned opinion (see, in particular, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 28).

27 Second, the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State

concerned had failed to fulfil one of its obligations under the EC Treaty (see, in particular, Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 18).

28 It is found that those requirements have been met in this case.

29 Both during the pre-litigation procedure and in its application to the Court the Commission clearly stated that it accused the Federal Republic of Germany of failing to comply with the provisions of Article 7(2) and (4) of the Regulation by raising unjustified objections to certain shipments of waste to another Member State for use principally as a fuel. The Commission stated that it was referring in that connection to the administrative practices of certain Länder and gave the dates of certain individual administrative decisions adopted by the competent German authorities, together with the dates on which those authorities adopted the circulars on which those administrative practices were based.

30 During the pre-litigation procedure the German Government did not deny the existence of those administrative practices, but put forward arguments seeking to demonstrate that those practices were in accordance with the provisions of the Regulation.

31 In those circumstances, even though the Commission neither produced nor identified with detailed references the individual administrative decisions to which it was referring, it must be considered to have placed the Federal Republic of Germany in a position to state effectively its grounds of defence against the charges made by the Commission.

32 The action must therefore be declared admissible.

Substance

33 It should be noted first of all that under the system established by the Regulation all the competent authorities to which notification of a proposed shipment of waste is addressed must check that the classification by the notifier is consistent with the provisions of the Regulation and object to a shipment which is incorrectly classified (Case C-6/00 *ASA* [2002] ECR I-1961, paragraph 40).

34 If the competent authority of dispatch considers that the purpose of a shipment has been incorrectly classified in the notification, the ground for its objection to the shipment must be the classification error itself, without reference to one of the specific provisions of the Regulation setting out the objections which the Member States may raise against a shipment of waste (*ASA* , cited above, paragraph 47).

35 Article 7(2) of the Regulation, which provides that the competent authorities of the Member States may not object to a shipment of waste intended for recovery except in the cases exhaustively listed in Article 7(4), does not therefore in principle preclude those authorities from objecting to a particular shipment on the

grounds that it is in reality a shipment of waste intended for disposal, nor does it preclude Member States from laying down, in acts having general scope, criteria for distinguishing between a recovery operation and a disposal operation.

36 However, such administrative practices accord with the provisions of Article 7(2) and (4) of the Regulation only where they put in place criteria for distinguishing between the disposal and recovery of waste which comply with the criteria laid down by the provisions of the Directive to which Article 2(i) and (k) of the Regulation refer in order to define those terms.

37 Thus, in order to determine whether the Federal Republic of Germany failed to fulfil its obligations under Article 7(2) and (4) of the Regulation by adopting the administrative practices in question, it is necessary to consider whether the objections which the German competent authorities raised against certain shipments of waste to another Member State, and the circulars which lay down the general criteria under which those objections were made, accord with the distinction between disposal operations and recovery operations established in Annexes II A and II B to the Directive.

38 The Commission argues that the use of a mixture of wastes as fuel in cement kilns is a recovery operation, as referred to in point R1 of Annex II B to the directive.

39 According to the German Government, the shipments in question were of waste intended for incineration on land, the operation referred to in point D10 of Annex II A to the Directive, and therefore relate to disposal operations within the meaning of that Directive.

40 In that regard, it should be observed that point R1 of Annex II B to the Directive includes among waste recovery operations their [u]se principally as a fuel or other means to generate energy.

41 That provision should be interpreted as meaning that it covers the use of waste as a fuel in cement kilns since, first, the main purpose of the operation concerned is to enable the waste to be used as a means of generating energy. The term use in point R1 of Annex II B to the Directive implies that the essential purpose of the operation referred to in that provision is to enable waste to fulfil a useful function, namely the generation of energy.

42 Second, the use of waste as a fuel in cement kilns is an operation referred to in point R1 of Annex II B to the Directive where the conditions in which that operation is to take place give reason to believe that it is indeed a means to generate energy. This assumes both that the energy generated by, and recovered from, combustion of the waste is greater than the amount of energy consumed during the combustion process and that part of the surplus energy generated during combustion should effectively be used, either immediately in

the form of the heat produced by incineration or, after processing, in the form of electricity.

43 Third, it follows from the term principally used in point R1 of Annex II B to the Directive that the waste must be used principally as a fuel or other means of generating energy, which means that the greater part of the waste must be consumed during the operation and the greater part of the energy generated must be recovered and used.

44 That interpretation is in accordance with the concept of recovery which comes from the Directive.

45 It follows from Article 3(1)(b) and the fourth recital of the Directive that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources (*ASA* , cited above, paragraph 69).

46 The combustion of waste therefore constitutes a recovery operation where its principal objective is that the waste can fulfil a useful function as a means of generating energy, replacing the use of a source of primary energy which would have had to have been used to fulfil that function.

47 Since the use of waste as a fuel meets the conditions referred to in paragraphs 41 to 43 above, it constitutes a recovery operation as referred to in point R1 of Annex II B to the Directive, without the need to take into consideration criteria such as the calorific value of the waste, the amount of harmful substances contained in the incinerated waste or whether or not the waste has been mixed.

48 It should be observed in that regard that even if a particular operation to use waste as a fuel can be classified as recovery, the competent authorities of destination and dispatch may raise objections with regard to a shipment of waste carried out in connection with such an operation in the cases referred to in Article 7(4)(a) of the Regulation.

49 In particular, the fifth indent of that provision permits the competent authorities concerned to object to a shipment of waste intended for recovery if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non- recoverable fraction do not justify the recovery under economic and environmental considerations.

50 Those authorities may in particular take into consideration criteria such as those referred to in paragraph 47 above in order to show in each case that the

conditions laid down in Article 7(4)(a), fifth indent, of the Regulation are met so that they may raise an objection to a particular shipment of waste.

51 In the present case it is clear that the administrative practices of the German competent authorities do not meet the requirements of the Regulation as set out above.

52 In the context of those administrative practices the German competent authorities have objected to shipments of waste intended for use as a fuel in cement industry kilns in Belgium on the ground that such shipments are being made in connection with a disposal operation and not a recovery operation, although their objection is not justified by failure to comply with any of the conditions referred to in paragraphs 41 to 43 above.

53 Although the waste concerned was intended for use as a fuel in Belgium, where they were to replace sources of primary energy in heating cement kilns, the competent German authorities refused to consider that the shipments in question constituted a recovery operation as referred to in point R1 of Annex II B to the Directive, solely on the ground that the operations concerned did not meet certain general criteria laid down in the circulars it had adopted, such as the minimum calorific value of the waste.

54 As is made clear in paragraph 47 above, those criteria are not relevant for the purposes of determining whether the use of waste as a fuel in a cement kiln constitutes a disposal operation or a recovery operation within the meaning of the Directive and the Regulation.

55 In those circumstances, it must be declared that, by raising unjustified objections to certain shipments of waste to other Member States to be used principally as a fuel, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of the Regulation.

Costs

56 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 the Commission has asked for costs against the Federal Republic of Germany, which failed in its submissions, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1.

Declares that by raising unjustified objections to certain shipments of waste to other Member States to be used principally as a fuel, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community;

2.

Orders the Federal Republic of Germany to pay the costs.

Wathelet Timmermans Edward

Jann von Bahr

Delivered in open court in Luxembourg on 13 February 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber

1 – Language of the case: German.

OPINION OF ADVOCATE GENERAL
JACOBS
delivered on 26 September 2002 (1)

Case C-228/00

Commission of the European Communities
v
Federal Republic of Germany

()

1. In this action brought under Article 226 EC, the Commission claims that objections raised by the Federal Republic of Germany against certain shipments of waste to other Member States to be used principally as fuel were unjustified and contrary to Article 7(2) and (4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (the Regulation). (2) The Commission accordingly seeks a declaration that Germany has failed to fulfil its obligations under Article 7(2) and (4) of the Regulation.
2. The case essentially turns on the distinction between operations for the disposal of waste and operations for its recovery, and in particular on the question whether the incineration of waste in an industrial process generating energy to be used in that process is correctly to be classified as a disposal operation or a recovery operation.
The relevant Community legislation
The Waste Directive
3. Article 3(1) of Council Directive 75/442/EEC of 15 July 1975 on waste as amended (3) (the Waste Directive or the Directive) requires Member States to take appropriate measures to encourage (a) firstly, the prevention or reduction of waste production and its harmfulness and (b) secondly: (i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or (ii) the use of waste as a source of energy.
4. Article 5 of the Directive enshrines the principles of self-sufficiency and proximity. It provides as follows:
1. Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to

become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste.
2. The network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.
5. The Directive defines disposal as any of the operations provided for in Annex IIA (4) and recovery as any of the operations provided for in Annex IIB. (5)
6. Annexes IIA and IIB to the Directive (6) are headed Disposal operations and Recovery operations respectively. Each annex is prefaced by a note to the effect that it is intended to list the operations as they occur in practice and that in accordance with Article 4 (7) waste must be [disposed of/recovered] without endangering human health and without the use of processes or methods likely to harm the environment.
7. Annex IIA includes among the listed disposal operations:D10 Incineration on land.
8. Annex IIB includes among the listed recovery operations:R1 Use principally as a fuel or other means to generate energy.
The Regulation
9. The Regulation is based on Article 130s of the EC Treaty (now, after amendment, Article 174 EC). Its aim is to provide a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment. (8)
10. Title II of the Regulation is entitled Shipments of waste between Member States. Chapters A and B of Title II lay down the procedures to be followed for the shipment of waste for disposal and of waste for recovery respectively.
11. The Regulation adopts the definitions of disposal and recovery used in the Directive. (9)
12. The procedure for shipments of waste for recovery varies according to the type of waste. Annexes II to IV to the Regulation classify specific waste in one of three lists. (10) Annex II contains the Green list of wastes, which should not normally present a risk to the environment if properly recovered in the country of destination. (11) Annex III contains the Amber list of wastes and Annex IV the Red list of wastes, regarded as particularly hazardous. Shipments of waste shown in Annex II for recovery are simply to be accompanied by a document containing prescribed information. (12) Shipments of other waste (including the waste the shipment of which gave rise to the present proceedings) for recovery and shipments of waste for disposal are subject to the following procedure.
13. Where the producer or holder of waste, generally referred to as the notifier, (13) intends to ship such waste from one Member State to another, he must notify the competent authority of destination and send a copy of the notification to the competent authority of dispatch (14) and to the consignee. (15)
14. Notification is to be effected by means of the consignment note to be issued by the authority of dispatch. (16) The notifier is to complete the consignment note and, if requested by the competent authorities, supply additional information and documentation. (17) He is to supply on the consignment note information with particular regard to a number of factors including (i) the source, composition and quantity of the waste and (ii) the operations involving disposal or recovery as referred to in Annex IIA or IIB to the Directive. (18)

15. In the case of shipments of waste for recovery, the consignment note must also include details of (i) the planned method of disposal for the residual waste after recycling has taken place; (ii) the amount of the recycled material in relation to the residual waste and (iii) the estimated value of the recycled material. (19)
16. In the case of waste for disposal, the Member State of destination is responsible for granting authorisation for shipment. The Member State of dispatch (20) has the right to raise objections and the Member State of destination may issue the authorisation only in the absence of any such objections. (21) In the case of waste for recovery, the Member States of dispatch and destination (22) have the right to object to a shipment but, as a general rule, (23) no express authorisation is required. (24)
17. The most significant difference between the procedures applying to the shipments of waste for recovery and for disposal lies in the grounds on which the various competent authorities concerned may oppose the proposed shipment.
18. In the case of waste for disposal, the objections must be based on Article 4(3). (25) Under that article, in particular, (i) Member States may prohibit generally or partially or object systematically to shipments of waste in order to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels in accordance with the Directive (26) and (ii) the competent authorities of dispatch and destination may raise reasoned objections to planned shipments if they are not in accordance with the Directive in order to implement the principle of self-sufficiency at Community and national levels. (27)
19. In the case of waste for recovery, the objections are to be based on Article 7(4). (28) Article 7(4)(a) (29) lists five grounds on which the competent authorities of destination and dispatch may raise reasoned objections of which only the fifth is of relevance in the present case. That ground — set out in the fifth indent of Article 7(4)(a) — is as follows:— if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental consideration.
The case-law of the Court
20. Two decisions of the Court are of particular interest in the context of the present case.
21. First, the Court ruled in *Dusseldorp* (30) that the principles of self-sufficiency and proximity do not apply to waste for recovery; such waste should therefore be able to move freely between Member States for processing, provided that transport poses no threat to the environment.
22. Second, the Court ruled in *ASA* (31) that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources. That case concerned *inter alia* the correct classification for the purpose of the Regulation (namely, as a recovery or a disposal operation) of the deposit of waste in a former salt mine to secure hollow spaces (mine-sealing).
23. The Court also ruled in *ASA* that Articles 4(3) and 7(4) exhaustively list the cases in which Member States may object to a shipment of waste between Member States. (32)
The action for infringement

24. This action for infringement arises indirectly from several proposed shipments of waste from Germany to Belgium. The shipments had been notified to the German competent authorities as shipments of waste intended for recovery; the German authorities considered that the proposed operations were in reality disposal operations.
25. The shipments concerned two categories of waste.
26. First, there was waste which had already been processed in Germany into a substitute fuel. Waste such as shellac, colorant, latex, oil and phenol sludges, halogenated and non-halogenated distillation residues from solvent recovery, non-halogenated solvents, sludges from cleaning tanks and washing vats, filter cakes, bleaching clay, aluminium sludge etc. had been mixed with sawdust; the mixture was intended for incineration in cement kilns, where it replaced up to one third of the energy from primary sources otherwise used. In certain cases the calorific value of the waste was at least 11 000 kJ/kg.
27. Second, there was waste which was to be processed in a plant in Belgium into a substitute fuel called Resofuel. The waste consisted of activated carbon and graphite waste, distillation residues containing solvents, materials impregnated with solvents (absorbents, alumina and sawdust, the latter partly contaminated by organic and inorganic substances), residues of synthetic thermoresistant substances, mixed synthetic waste, sludges containing polymerised synthetic substances, wood shavings, sawdust, wood fibres and sludges from paper manufacture. The resulting Resofuel was intended for incineration, in particular in cement kilns, where it could totally replace energy from primary sources.
28. The competent authorities in Germany for the purpose of the Regulation are at the level of the Länder. The authorities of North Rhine-Westphalia, Baden-Württemberg, Rhineland-Palatinate and Lower Saxony raised objections against the proposed shipments on the ground that the waste was intended for disposal and not for recovery and that the disposal should take place in Germany. In the case of the first two Länder, those decisions were based on circulars issued by the relevant Ministries of the Environment, laying down criteria for distinguishing between recovery and disposal in the case of waste to be burnt. In particular, in order for such an operation to be classified as recovery under head R1 of Annex IIB to the Directive (Use principally as a fuel or other means to generate energy (33)), the waste in question ─ and in the case of mixed waste each constituent waste ─ must have a calorific value of at least 11 000 kJ/kg, at least 75% of the energy generated from the operation must be used and prescribed thresholds of polluting substances contained in the waste must not be exceeded. Unless all those conditions were met, the operation would be classified as disposal under head D10 or D11 of Annex IIA (Incineration on land or Incineration at sea).
29. The Commission, having received several complaints concerning the German authorities' objections to proposed shipments of the abovementioned waste, initially wrote to Germany inviting an explanation. In its reply Germany maintained that the practice complained of complied with the relevant Community provisions and confirmed the view of the competent federal authorities that the shipments at issue concerned waste intended for disposal.
30. The Commission, unconvinced, sent Germany a letter of formal notice in which it expressed the opinion that the shipments at issue concerned waste intended for

recovery and that the Germany authorities could accordingly rely only on the grounds of objection set out in Article 7(4) of the Regulation. The Commission took the position that the incineration of the waste in the Belgian cement kilns was a recovery operation falling under head R1 in Annex IIB to the Waste Directive, namely Use principally as a fuel ..., or under head R13, Storage of waste pending any of the operations numbered R1 to R12 (excluding temporary storage, pending collection, on the site where it is produced) read in combination with head R1.

31. In its reply, Germany maintained its position. Since the Commission remained of the view that the shipments to Belgium of the waste in question concerned waste for recovery and that consequently objections could be raised only on the basis of Article 7(4) of the Regulation, in February 1999 it sent Germany a reasoned opinion pursuant to Article 169(1) of the EC Treaty (now Article 226(1) EC). Still considering, despite Germany's response, that the measures complained of were contrary to the Regulation, the Commission has brought the present action for infringement.

Admissibility

32. Germany submits that the action against it is inadmissible on the basis that neither in the pre-litigation procedure nor in the application to the Court does the Commission specify the precise object of the proceedings sufficiently clearly to enable it to defend itself. The administrative decisions which the Commission seeks to put in issue cannot be identified from the letter of formal notice, the reasoned opinion or the application. The Commission simply refers to three circulars issued by the Länder of North Rhine-Westphalia and Baden-Württemberg. Those circulars however do not contain unjustified objections to certain shipments of waste to other Member States to be used principally as fuel since they merely set general criteria for distinguishing thermic disposal from the recovery of energy.

33. The Commission submits that on the contrary it set out the subject-matter of the action with great precision both in the pre-litigation procedure and in the application. In particular the application confirms that the administrative practices of the competent authorities of the federal Länder of North Rhine-Westphalia, Baden-Württemberg, Lower Saxony and Rhineland-Palatinate are impugned on the ground that they do not comply with the Treaty. That practice is exemplified both by circulars adopted by the competent ministries and by individual decisions taken by the competent authorities in which those authorities, partly on the basis of the circulars, raised objections against certain shipments of waste on the grounds set out in Article 4 of the Regulation.

34. It is settled case-law that the letter of formal notice and the reasoned opinion issued by the Commission delimit the subject-matter of the dispute so that it cannot thereafter be extended. The opportunity for the State concerned to submit its observations constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the infringement procedure. (34) One purpose of the letter of formal notice is to ensure that the Member State concerned is aware of the points on which it may need to prepare its defence. (35)

35. The Commission's seven-page letter of formal notice refers in some detail both to the two complaints which initiated the proceedings and to the circulars issued by the authorities in North Rhine-Westphalia and Baden-Württemberg. It states clearly that the competent authorities raised objections on the basis of the circulars to the shipments concerned in the specific complaints. It refers also to further decisions by the authorities

of Lower Saxony and Rhineland-Pfalz, in both cases giving dates and indicating that the decisions were based on the assumption that the intended operations were disposal rather than recovery operations. The letter of formal notice states that the Commission considers that the shipments are to be regarded as destined for recovery and that Article 7(4)(a) of the Regulation is the appropriate provision for possible objections. In particular it specifies that the Commission is of the view that the operation falls under head R1 of Annex IIB to the Directive (Use principally as a fuel ...) and not under head D10 of Annex IIA (Incineration on land). The letter of formal notice concludes:On the basis of its current state of knowledge the Commission accordingly considers that the Federal Republic of Germany has infringed its obligations under [the Regulation], the second paragraph of Article 189 [of the EC Treaty, now Article 249 EC] and in particular Article 7(2) and (4) of [the Directive].

36. In my view the letter of formal notice, given the contents as described above, adequately indicated as required by the case-law of the Court the essential elements of the Commission's position. In response, Germany sent the Commission an 18-page response in which it set out its arguments in full. It expressed the view that, until the Community legislature had better defined recovery and disposal, the national authorities were bound to set specific criteria for operations under heads D10 of Annex IIA and R1 of Annex IIB to the Directive. In Germany's view, recovery presupposed that the principal objective of the operation was the generation of energy. The various criteria used sought to ensure that only when that definition was satisfied would an operation be classified as recovery.

37. As for the reasoned opinion, the Court has ruled that the purpose of the requirement in Article 226 EC that the Commission deliver a reasoned opinion is to give the Member State an opportunity to justify its position and, as the case may be, to enable the Commission to persuade the Member State to comply of its own accord with the requirements of the Treaty. If this attempt to reach a settlement is unsuccessful, the function of the reasoned opinion is to define the subject-matter of the dispute. (36)

38. The reasoned opinion in the present case is in similar terms to the letter of formal notice; in addition the relevant Community legislation is set out and the relevant case-law summarised. The Commission prefaces its analysis of the alleged infringement with the statement:The Commission maintains the view that the shipments in question are destined for recovery, and that a Member State therefore may object to a shipment of waste only on the basis of criteria set out in Article 7(4)(a) of Regulation 259/93 or by invoking Article 130t EC, and that the measures taken by the Federal Republic of Germany are not justified and therefore infringe Community law.

39. The reasoned opinion also contains a summary of the German arguments put forward in the reply to the letter of formal notice followed by the Commission's refutation of those arguments. It concludes with the declaration that Germany has infringed Regulation EEC No 259/93 Articles 7(2) and (4).

40. Again, Germany sent a response to the reasoned opinion, repeating its earlier position and referring to the lack of clarity of the reasoned opinion.

41. It may be that the letter of formal notice and the reasoned opinion could have been drafted with greater precision. However it is apparent from the above summary of their contents that the documents gave a sufficient indication of the subject-matter of the dispute as required by the case-law of the Court. The reasoned opinion did not

moreover broaden that subject-matter as compared to the letter of formal notice (or the application compared to the reasoned opinion), which would not have been permissible.
42. I accordingly conclude that the action brought by the Commission is admissible.
The issues before the Court
43. The Commission submits that the administrative practice of the German Länder in question is contrary to Article 7(2) and (4) of the Regulation: it is clear from Article 7(2) that the competent authorities of the Member State of dispatch may raise objections against the shipment to another Member State of waste for recovery only on the basis of Article 7(4), which does not include the principle of self-sufficiency apparently relied on by the competent authorities of those Länder, on the basis of administrative circulars, in their objections against the shipments of waste. At issue essentially therefore is whether the operation to which the waste in question was to be subject constitutes recovery or disposal. In particular the parties are at odds over the questions whether the Länder were entitled to formulate criteria not to be found in the Community waste legislation in order to distinguish between the two types of operation for the purpose of application of the Regulation, what precisely is meant by Use principally as a fuel or other means to generate energy in head R1 of Annex IIB to the Directive and whether the specific criteria set by the Länder in the present case are lawful in the sense that they correctly reflect criteria inherent in the Directive. I shall consider those issues in turn.
Member States' discretion to set criteria
44. Germany submits, first, that the Member States have the power to lay down their own criteria for distinguishing between disposal and recovery operations in cases such as those at issue, given the potential overlap between the disposal operation under D10 Incineration on land and the recovery operation under R1 Use principally as a fuel or other means to generate energy and the lack of further guidance in the Community legislation.
45. Germany refers to several other Member States which have also set criteria for the distinction, in particular by imposing a minimum calorific value (apparently of 5 000 kJ/kg in France, between 9 500 kJ/kg and 15 000 kJ/kg in the Flemish region of Belgium, between 11 500 kJ/kg and 15 000 kJ/kg in the Netherlands and 21 000 kJ/kg in the United Kingdom).
46. It also refers to my Opinion in *Tombesi* , (37) where I referred to the Member States' need to lay down practical rules and guidelines for the day-to-day application of the Directive providing the necessary degree of legal certainty for individuals and stated: As the Directive stands at present, I think it must to some extent be left to Member States to develop more detailed criteria to apply the term recovery operation to the various situations which may occur in practice.
47. In similar vein Germany refers to the Opinion of Advocate General Tesauro in *Commission* v *Council* , (38) which concerned the correct legal basis for Council Directive 91/156 (39) which substantially amended the original version of the Waste Directive. (40) The Advocate General stated: [The Directive] sets out the broad lines of the action which the Member States are to take in order to ensure that waste management within the Community is conducted so as to guarantee protection for the environment and health. However, the Member States remain substantially free to define the content of that action and the means which they employ....As regards in

particular the conditions of competition, the directive does not ... lay down common rules relating to the activity of waste management, but merely defines the principles by which action by the Member States is to be guided. It follows that each Member State may adopt *in subiecta materia* the provisions which, in its view, are most appropriate for the purpose of attaining the prescribed objectives. Consequently, the rules on waste disposal and recycling may differ — even to a significant degree — from one Member State to another ...

48. In my view however the situation in *Tombesi* was different in a material respect from the present case: the question before the Court was whether certain substances including residues from production or consumption cycles constituted waste. In order to approach that question I considered, given the definition of waste in the Directive, that under the Directive the sole question is whether the substance in issue is subject to a disposal or recovery operation within the meaning of Annex IIA or B. (41) Since Italy had imposed additional criteria for the definition of waste which were not mentioned in the Directive, I stated in the paragraph following that relied on by Germany: It is in fact probably unnecessary in the present cases to determine the extent of any discretion left to the Member States since it is clear that the Italian decree-laws which prompted the national courts' questions are inconsistent with the Directive. (42) It is manifest therefore that — unsurprisingly — I was not suggesting that Member States had an unfettered discretion to delimit the notions of disposal and recovery. Where — as in *Tombesi* and, as I will suggest, as in the present case — national law or practice is manifestly inconsistent with the Directive, the question of discretion becomes irrelevant.

49. As for the statements of Advocate General Tesauro in *Commission* v *Council* , it appears from a closer reading of his Opinion that he was considering the framework rules on national waste management proposed by the Directive and not the specific terms there defined: indeed he prefaces his discussion with the words If we now turn to its *content* , the directive (apart from defining the terms which determine its scope), establishes .... (43) The differences between Member States' practice to which the Advocate General alludes may be taken to concern national policies in the field of waste management, for example to encourage the reduction of waste production and its harmfulness and to encourage the recycling of waste. It must be borne in mind that *Commission* v *Council* was a challenge to the legal basis chosen by the Council for Directive 91/156, (44) and hence the discussion focused on the objectives of the legislation. There is nothing in the Opinion — or in the judgment of the Court — to suggest that the Advocate General envisaged Member States applying their own criteria to the disposal and recovery operations described in Annex IIA and IIB to the Directive.

50. Germany also refers to the statement of the Court in *ARCO* (45) that:In the absence of specific Community provisions on proof of the existence of waste, it is for the national court to apply the provisions of its own legal system in that regard, while taking care that the objective and effectiveness of [the Waste Directive] are not undermined.

51. That proposition cannot however be relevant to the present case given the existence in the Directive of specific Community provisions describing disposal and recovery operations. It may be noted that the Court in the immediately following paragraph stated that what is commonly regarded as waste ... is irrelevant in view of the express definition of waste in Article 1(a) of [the Waste Directive]. Contrary to

Germany's view, therefore, the Court's statements in *ARCO* support the proposition that Member States may not further qualify definitions contained in the Directive.

52. The unacceptable consequences of Member States' being permitted to apply their own criteria in such a way are evident from the diverse minimum calorific values which, according to Germany, certain Member States require of waste in order for its incineration with recovery of heat generated to be classified as a recovery operation under head R1 in Annex IIB to the Directive. As mentioned above, those calorific values range from 5 000 kJ/kg in France to 21 000 kJ/kg in the United Kingdom. The application by different Member States (and possibly different regions in the same Member State) of such wide-ranging thresholds would clearly run counter to the objectives of both the Directive, whose aims include a common terminology ... to improve the efficiency of waste management in the Community, (46) and the Regulation, which is built on the premiss that different Member States will apply the same procedures to waste intended for particular operations. As the Commission points out, if Member States were free to set their own divergent criteria determining which operations were to be classified as recovery operations, the impact of Article 7(4) of the Regulation, which exhaustively lists the cases in which Member States may object to shipments of waste for recovery, (47) would be much reduced.

53. That is not to say that a uniform criterion based on calorific value might not be a useful and workable means of distinguishing between recovery and disposal operations if set at Community level. However it appears that it has not been possible to agree such a criterion to date.

54. Both the Commission and Germany refer to a working document submitted by the Commission to the Technical Adaptation Committee in 1999 (48) pursuant to the Directive, which provides for the amendments necessary for adapting the Annexes to the Directive to scientific and technical progress to be adopted in accordance with a prescribed procedure involving a committee composed of representatives of the Member States. (49) That document put forward a number of suggestions for limiting movements of waste to be incinerated. One of the options considered was the development of criteria for distinguishing more clearly between Incineration on land under head D10 of Annex IIA and Use principally as a fuel or other means to generate energy under head R1 of Annex IIB. One of the criteria discussed was calorific value: it was suggested that a calorific value of 17 000 kJ/kg be used as a limit value. However, it appears that a distinction based on that calorific value was not accepted by the majority of Member States.

Use ... as a fuel or other means to generate energy

55. Germany submits that Use ... as a fuel or other means to generate energy in the description in head R1 of Annex IIB to the Directive should be interpreted by reference to the objective of the operation. In order to constitute recovery, therefore, the specific aim of an incineration operation must be that the waste is used as a source of energy. Germany considers that that principle, which underlies the practice of the Länder at issue in the present proceedings, precisely reflects the criterion laid down by the Court in *ASA* , (50) which is also expressed in terms of the operation's principal objective.

56. The Commission in contrast considers that the decisive factor for the purpose of head R1 of Annex IIB to the Directive is that the waste is used as a fuel. Waste will be used as a fuel only if first its combustion generates thermic energy and second the

energy so generated is actually used; the waste being burnt is therefore in fact replacing other sources of energy. If those conditions are not satisfied, there is no use as fuel but simply incineration. The Commission notes that the waste to be shipped consisted of mixed waste to be used as fuel in the Belgian cement industry. The waste is unquestionably to be used in Belgian cement factories in such a way that its combustion generates thermic energy which is actually used, replacing in one case up to one third of the energy from primary sources otherwise used and in the other case all such energy. The waste is accordingly intended to be used as a fuel. With regard to the judgment in *ASA* , the Commission refers to the Court's statement that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources. (51) It considers that, in the light of its analysis summarised above, that criterion applied to the present case leads ineluctably to the conclusion that the use of mixed waste in cement factories must be classified as a recovery operation.

57. The Commission's analysis appears to me to be sound. As a matter of common sense and on a natural reading of the description, Use ... as a fuel or other means to generate energy must involve the two criteria the Commission proposes. First, if the incineration of waste does not generate more energy than it consumes ─ for example because the waste in question is not easily combustible, so that more energy is required to ignite it and/or keep it burning than is generated by the incineration itself ─ there will be no surplus energy available as a fuel. Second, even if surplus energy is generated the waste cannot be regarded as being used as a fuel or other means to generate energy unless that energy is itself used. The concept of using waste as a fuel or other means to generate energy thus inevitably entails that, to the extent to which it is so used, it replaces energy from primary sources. That is clearly consistent with the notion of recovery.

58. Moreover the principal objective of an incineration operation which is an integral part of an industrial process and which generates surplus energy to be used in that industrial process may be said to be the use of the waste as a fuel. Since the use of waste in such a way will evidently replace other fuel, natural resources will be conserved. So interpreted, the description in head R1 of Annex IIB to the Directive may therefore be seen as an application of the criterion laid down by the Court in *ASA* , (52) namely that the principal objective of a recovery operation is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources. As I suggested in my Opinion in that case, the decisive question is whether the waste is used for a genuine purpose: if it were not available for a given operation, would that operation none the less be carried out using some other material? (53) In the case of waste used as fuel for a cement factory, the answer to that question is clearly yes: in the absence of available waste, the factory would still operate using other fuel.

59. It is instructive to contrast the present case with *Commission* v *Luxembourg* , (54) another action for infringement which concerns proposed shipments of household waste for incineration with incidental recovery of the energy generated. In my Opinion also delivered today I state that, in the case of waste being incinerated in a plant developed for that purpose, the answer to the question set out above is clearly no: in the absence

of available waste, there would be no incineration. In those circumstances it would not be right to describe the operation as recovery simply because, whenever waste is available and incinerated, the heat generated by the incineration is used, wholly or partly, as a means to generate energy. That fact does not of itself make the principal objective of the incineration the use of the waste as a fuel or other means to generate energy.

60. In the present case it appears (55) furthermore that the complaints to the Commission which ultimately prompted the present action for infringement were made by the cement manufacturers. It may be assumed therefore that it was advantageous to those manufacturers that the waste should be shipped, which also suggests that the principal objective of the operations at issue is the use of the waste as fuel. The fact that the cement manufacturers lodged complaints illustrates the adverse consequences both for the free movement of goods and for the Community's environmental policy which would flow from an interpretation of the legislation to the effect that operations such as those at issue were correctly classified as disposal. The Member State of dispatch would then be able ─ as Germany apparently wishes ─ to prohibit shipments of the waste on the basis of proximity and/or self-sufficiency; manufacturers in other Member States would be prevented from saving natural resources by using the waste as fuel in an industrial process and thereby contributing to the objective of prudent and rational utilisation of natural resources enshrined in Article 174 EC.

61. As the Court noted in *Dusseldorp* , (56) it was in order to encourage recovery in the Community as a whole, in particular by the development of the most efficient technologies, that the Community legislature stipulated that waste for recovery should be able to move freely between Member States for processing. Admittedly, the Court added the proviso that the transport should pose no threat to the environment. That proviso cannot however in my view be understood in absolute terms, since virtually all methods of transport currently involve some risk to the environment. I understand the Court rather to have been imposing a balancing exercise. As I noted in my Opinion in that case, the environmental arguments are much more finely balanced where the waste to be shipped is for recovery than where it is for disposal: while the transport of waste over distance may, depending on the type of waste, entail certain environmental risks, a single market in waste for recovery is likely to improve recycling, thereby reducing the volume of waste for disposal and conserving primary raw materials. (57)

62. Again the contrast with *Commission* v *Luxembourg* is useful: in that case, where the objective of the operation at issue is primarily to dispose of the waste, it seems reasonable that the imperative of environmental protection should override the imperative of the free movement of goods, whereas in the present case, where the objective is to use the waste to fuel a manufacturing process thus sparing natural resources, the converse is true.

Quantitative criteria ─ the meaning of principally

63. Even though it is not in my view lawful for Member States to superimpose further criteria on the description of the recovery operation in head R1 of Annex IIB to the Directive, Use principally as a fuel or other means to generate energy, Germany's submissions as to the lawfulness of the criteria it has laid down remain potentially relevant since it considers that the criterion of minimum calorific value correctly translates the requirement of principal use. It submits that the concept of principal use

requires that the principal objective of the operation be the recovery of energy. A use in which the waste is not principally used as a fuel but simply burned does not suffice: in order for the definition in head R1 to be satisfied, the greater part of the waste must be used as a source of energy. According to Germany's calculations, that occurs in general only when the calorific value of 11 000 kJ/kg is reached. Almost all incineration operations make some further use of the heat released: if that fact alone meant that the operation were recovery, virtually all incineration would be recovery.

64. The Commission repeats that the only quantitative element in the definition in head R1 is the requirement that the waste must be *principally* used, which means that the greater part of the waste must be used as fuel. An operation in which only a minor portion of the waste is burned with use of the heat generated, while the major portion is recovered in another way, would not therefore be classified under head R1 of Annex IIB to the Directive.

65. The Commission's view to my mind is consistent with the wording of Annex IIB. All the language versions of head R1 reflect the requirement that the use must be principally as a fuel or, in slightly different words, that the principal use must be as fuel. If only a minor portion of a consignment of waste is burned with use of the heat generated, the operation evidently cannot be regarded as constituting use principally as a fuel or other means to generate energy. In order to fall within the description in head R1, the consignment as a whole must be principally used.

66. Germany objects that the effect of that interpretation is that an operation will constitute recovery provided that a mere 51% of the waste is to be burned and the energy generated is to be used. It is not however the case that the Member State of dispatch must authorise all shipments of waste intended for such an operation. If the unincinerated portion of the waste is not itself to be recovered, the Member State of dispatch may be entitled to object to its shipment on the basis of the fifth indent of Article 7(4)(a) of the Regulation, which concerns the situation where the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations. The Member State of dispatch will be in a position to make such an assessment since in accordance with the Regulation the consignment note must include information with regard to the planned method of disposal for the residual waste after recycling has taken place, the amount of the recycled material in relation to the residual waste and the estimated value of the recycled material. (58)

67. As discussed above, waste can be regarded as used as a fuel or other means to generate energy only where the operation results in a net production of energy and that energy is actually used. The requirement that the waste be principally used as such applies in my view to both those elements of the definition. Thus not only must the greater part of a consignment of waste be burnt in a given incineration operation, the operation will not be recovery unless the energy generated is itself principally used.

68. Provided that those conditions are satisfied, it seems to me that the requirements of head R1 in Annex IIB to the Directive are met and the operation will be a recovery operation. There is thus no need for presumptions involving the calorific value of the waste etc. As the Court stated in *ASA* (59) in the context of the correct classification of the deposit of waste in a disused mine, the competent authorities must assess

proposed shipments of waste on a case-by-case basis. That principle appears to me to be equally applicable in cases such as the present: in order to determine whether the conditions discussed above are satisfied with regard to a given shipment of waste, the authorities will inevitably have to assess each case individually. The use of general presumptions however clearly conflicts with such an approach.

The status of mixed waste

69. Germany submits that, in order to determine whether mixed waste is to be genuinely recovered, the qualities of the constituent individual wastes must be considered and not the mixture itself. (60) That, it states, accords with the practice of the majority of the Member States. Germany argues that if mixed waste includes waste the incineration of which could not be regarded as a recovery operation either because it would not if burned alone generate surplus heat or because it would not burn at all, the incineration of that mixed waste cannot be so regarded either but is correctly to be classified as disposal. That point is illustrated by the example given by Germany: various sludges (sludges from cleaning tanks and washing vats, colorant and shellac sludges and phenol sludges) contained in the mixed waste at issue consist of at least 75% water, which does not burn, but evaporates because it is combined with inflammable substances which burn at a temperature sufficient to heat water. Germany argues that the incineration of individually uninflammable waste is not therefore a means to generate energy but on the contrary uses the energy generated by the other waste with which it is combined.

70. In my view however that argument does not take the matter much further: if in fact there is a net energy gain from the incineration of mixed waste and that energy is recovered, the operation is a recovery operation in accordance with head R1 of Annex IIB to the Directive. I do not see why that conclusion should be different merely because individual constituent parts of the waste would, if burned separately, not react in the same way. What is relevant is that the less inflammable waste, as a result of being mixed with more inflammable waste, in fact burns and the energy generated by the combined incineration is used.

71. Germany adds that if it is sufficient that the mixture alone, rather than the component elements, satisfy the definition of the operation in head R1 of Annex IIB to the Directive, the strict separation laid down by the Regulation between waste intended for disposal and waste intended for recovery would become impossible: all waste in fact unsuitable for use as a fuel and hence fit only for disposal could be simply mixed with waste which was so suitable; the first waste would thereby also be regarded as for recovery and thus escape the provisions of the Regulation applicable to waste for disposal. That argument however is also flawed: if those wastes not incinerable on their own are mixed with other, more inflammable, waste and the resulting mixture is in fact to be used principally as a fuel, it is surely appropriate that a shipment of such a mixture should be treated as a shipment of waste for recovery.

72. I accordingly do not accept Germany's submission that components of mixed waste must be assessed individually in order to determine whether the operation to which they are intended to be subjected is a recovery or a disposal operation.

Waste containing hazardous or harmful elements

73. Germany submits that, to the extent that components of the mixed waste constitute hazardous waste within the meaning of Council Directive 91/689/EEC on hazardous

waste, (61) mixing them with other waste is contrary to Article 2(2) of that directive, which provides:Member States shall take the necessary measures to require that establishment[s] and undertaking[s] which dispose of, recover, collect or transport hazardous waste do not mix different categories of hazardous waste or mix hazardous waste with non-hazardous waste.

74. However, mixing waste contrary to the provisions of Directive 91/689 cannot affect the meaning of recovery and disposal for the purpose of the Waste Directive and of the individual operations listed in Annex IIA and IIB thereto. That view is supported by Article 1(3) of Directive 91/689, which states that the definition of waste and the other terms used therein ─ which include recovery and disposal ─ are to be those in the Waste Directive.

75. If Germany has reason to fear that hazardous and non-hazardous wastes are being mixed contrary to the terms of the Hazardous Waste Directive, it must take the necessary measures as required by that directive to ensure that such practices are brought to an end.

76. The criteria laid down by the Länder concerned include the nature and quantity of polluting substances in the waste mixture: if the concentration of certain substances is above a prescribed threshold, incineration of the waste will be regarded as disposal. Germany explains first that this is because ─ as is clear from the note introducing Annex IIB to the Directive (62) ─ recovery operations must be harmless and compatible with the environment. However since the note introducing Annex IIA (63) governing disposal is in identical terms, that criterion alone cannot help to distinguish recovery and disposal operations.

77. Germany adds that the network of disposal installations required to be established by the Directive must enable waste to be disposed of by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health in accordance with Article 5(2) of the Directive. Recovery installations on the other hand do not always have in all Member States an equivalent level of technology. Member States may therefore impose a criterion of harmful content to distinguish between waste for disposal and waste for recovery and hence to ensure that waste containing harmful substances is disposed of in accordance with Article 5(2).

78. I cannot accept that argument.

79. First, Article 4(1) of the Directive imposes a general requirement on Member States to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment; again, therefore, there is no basis for a distinction between waste for recovery and waste for disposal by reference to different levels of environmental regulation of recovery and disposal operations.

80. Second, harmonised standards for air pollution from waste incineration plants are set throughout the Community, currently by Directives 89/369 (64) and 89/429, (65) to be replaced in due course by Directive 2000/76. (66) In those circumstances, Germany cannot prevent the shipment of waste on the basis of alleged lesser compliance with those norms by other Member States. (67) That applies even though Germany may in accordance with the Directives and Article 176 EC maintain or introduce measures for the protection of the environment more stringent than those there laid down: (68) the Court has recently ruled that a Member State may not subject the shipment of waste for

disposal to the condition that the intended disposal satisfy the requirements of the environmental protection legislation of the Member State of dispatch, (69) and it is clear from the terms of that judgment and the scheme of the Regulation that that principle will apply *a fortiori* to any analogous objection to the shipment of waste for recovery.

81. Third, the Court made it clear in *ASA* (70) that it does not follow from ... the Directive that the hazardous or non-hazardous nature of the waste is, of itself, a relevant criterion for assessing whether a waste treatment operation must be classified as recovery. There is nothing to suggest that that proposition will not be equally applicable where it is the allegedly harmful nature of individual components of mixed waste, rather than the fact that the waste as a whole is hazardous waste, which is at issue.

82. Finally, the Directive itself envisages that waste destined for recovery may contain dangerous substances: the third indent of Article 3(1)(a) requires Member States to take appropriate measures to encourage the development of appropriate techniques for the final disposal of dangerous substances contained in waste destined for recovery.

83. For those reasons also I cannot accept Germany's further argument that, since certain other Community waste instruments regulate the extent to which specific types of harmful waste may be recovered rather than disposed of, the harmful content of individual components of mixed waste is a lawful general criterion which Member States may impose for distinguishing between waste for disposal by incineration and waste for recovery by use as a fuel.

84. I accordingly do not accept that the hazardous or harmful nature of elements of mixed waste is relevant to determining whether the waste should be classified as waste for recovery or waste for disposal.

Conclusion

85. I am accordingly of the opinion that the Court should:

(1) declare that, by raising objections on the ground of self-sufficiency in the disposal of waste to shipments of waste to other Member States to be used principally as a fuel, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community;

(2) order the Federal Republic of Germany to pay the costs.

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1 – Original language: English.

2 – OJ 1993 L 30, p. 1.

3 – OJ 1975 L 194, p. 39, as amended by Council Directive 91/156/EEC of 18 March 1991, OJ 1991 L 78, p. 32, and by Council Directive 91/692/EEC of 23 December 1991, OJ 1991 L 377, p. 48.

4 – Article 1(e).

5 – Article 1(f).

6 –

As adapted by Commission Decision 96/350/EC of 24 May 1996 adapting Annexes IIA and IIB to Council Directive 75/442/EEC on waste, OJ 1996 L 135, p. 32.

7 – Which requires Member States to take the necessary measures to the same effect.

8 – Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857, paragraph 26 of the judgment.

9 – Article 2(i) and (k).

10 – As adapted by Commission Decision 94/721/EC of 21 October 1994 adapting, pursuant to Article 42(3), Annexes II, III and IV to Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, OJ 1994 L 288, p. 36.

11 – Recital 14 in the preamble to the Regulation.

12 – Articles 1(3) and 11 of the Regulation.

13 – Article 2(g).

14 – And, if relevant, of transit.

15 – Articles 3(1) (waste for disposal) and 6(1) (waste for recovery).

16 – Articles 3(3) and 6(3).

17 – Articles 3(4) and 6(4).

18 – Articles 3(5) and 6(5), first and fifth indents.

19 – Article 6(5), sixth, seventh and eighth indents.

20 – And, if relevant, of transit.

21 – Articles 4(1) and 4(2).

22 – And, if relevant, of transit.

23 – Where the waste is listed in Annex IV or has not been assigned to Annex II, III or IV, the competent authorities concerned must give their consent in writing (Article 10).

24 – Article 7(1) and (2).

25 – Article 4(2)(c).

26 – Article 4(3)(a)(i).

27 – Article 4(3)(b)(i).

28 – Article 7(2).

29 – Article 7(4)(b) concerns the objections which may be raised by the competent authorities of transit, not relevant to the present case.

30 – Case C-203/96 [1998] ECR I-4075, paragraphs 33 and 34 of the judgment.

31 – Case C-6/00, paragraph 69 of the judgment delivered on 27 February 2002.

32 – Paragraph 36 of the judgment.

33 – In fact at the time of the circulars, Annex IIB to the Directive had not been adapted by Commission Decision 96/350, cited in note 6. The operation now described under head R1 was then mentioned under head R9; in the German version, moreover, although not in the French or English, the wording was Use as a fuel (other than in direct incineration). Germany however refers throughout its pleadings to the current version of Annex IIB, recognising that the difference in the two German versions was the result of a drafting error.

34 – Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 23 of the judgment.

35 – Case 211/81 *Commission* v *Denmark* [1982] ECR 4547, paragraph 8 of the judgment.

36 – Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraph 15 of the judgment.

37 – Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi* [1997] ECR I-3561, paragraph 56 of the Opinion.

38 – Case C-155/91 [1993] ECR I-939, paragraphs 8 and 9 of the Opinion.

39 – Cited in note 3.

40 – Directive 75/442, cited in note 2.

41 – Paragraph 57 of the Opinion.

42 – Ibidem.

43 – Paragraph 8; emphasis in original.

44 – Cited in note 3.

45 – Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland* [2000] ECR I-4475, paragraph 70 of the judgment.

46 – See the third recital in the preamble to Directive 91/156, cited in note 3.

47 – . *ASA* , cited in note 31, paragraph 36 of the judgment.

48 – 28 January 1999, XIE3/KW D(99).

49 – Articles 17 and 18.

50 – Cited in note 31, paragraph 69 of the judgment.

51 – Paragraph 69 of the judgment.

52 – Cited in note 31, paragraph 69 of the judgment.

53 – Paragraph 86.

54 – Case C-458/00, paragraph 42 of the Opinion.

55 – According to Germany's representative at the hearing.

56 – Cited in note 30, paragraph 33 of the judgment.

57 – Paragraph 61.

58 – Sixth, seventh and eighth indents in Article 6(5).

59 – Cited in note 31, paragraph 71 of the judgment.

60 – This appears to be feasible, since the first indent of Article 6(5) of the Regulation requires the consignment note to include information concerning the source, composition and quantity of the waste for recovery ... and, in the case of waste from various sources, a detailed inventory of the waste.

61 – Directive of 12 December 1991, OJ 1991 L 377, p. 20.

62 – Set out in paragraph 6 above.

63 – See paragraph 6 above.

64 – Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants, OJ 1989 L 163, p. 32.

65 – Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste-incineration plants, OJ 1989 L 203, p. 50.

66 – Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste, OJ 2000 L 332, p. 91.

67 – See for example Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 20 of the judgment and the cases there cited.

68 – Final recital in the preamble to each directive.

69 – Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraphs 48 to 65 of the judgment.

70 – Cited in note 31, paragraph 68 of the judgment.