Case C-458/00

Commission of the European Communities
v
Grand Duchy of Luxembourg

«(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 – Classification of the proposed shipment by the notifier – Competence of the authorities to which notification of a proposed shipment is addressed to check classification (recovery or disposal) and to object to a shipment which is wrongly classified
(Council Regulation No 259/93, Art. 7(2) and (4))

2..

Environment – Waste – Directive 75/442 on waste – Annex II B – Distinction between a disposal operation and a recovery operation – Combustion of waste – Classified 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 a 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. It is not, however, for the competent authority to reclassify ex officio the purpose of the shipment of waste.
see paras 21-22

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 combustion of household waste 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 reclaimed and used. It follows that an operation whose principal objective is the disposal of waste must be classified as a disposal operation where the reclamation of the heat generated by the combustion constitutes only a secondary effect of that operation. see paras 31-37, 43

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-458/00,
Commission of the European Communities, represented by H. Støvlbaek and J. Adda, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by J. Faltz, acting as Agent,

defendant,

supported by **Republic of Austria** , represented by C. Pesendorfer, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that by raising unjustified objections to certain shipments of waste to another Member State to be used principally as a fuel, in breach of 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), and of Article 1(f) in conjunction with point R1 of Annex II B to 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 Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 2, 6 and 7 of that Regulation and under Article 1(f) in conjunction with point R1 of Annex II B to that Directive,

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 J. Adda, the Grand Duchy of Luxembourg by N. Mackel and R. Schmit, acting as Agents, and the Republic of Austria by E. Riedl, acting as Agent,

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 19 December 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 another Member State to be used principally as a fuel, in breach of 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), and of Article 1(f) in conjunction with point R1 of Annex II B to 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), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 2, 6

and 7 of that Regulation and under Article 1(f) in conjunction with point R1 of Annex II B to the Directive.

2

By order of the President of the Court of Justice of 7 June 2001 the Republic of Austria was granted leave to intervene in support of the forms of order sought by the Grand Duchy of Luxembourg.

Legal background

Community legislation

The Directive

3

The essential objective of 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.

4

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.

5

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.

6

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

7

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

8

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

9

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.

10

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.

11

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.

12

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).

13

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 national measures

14

In early 1998 the company J. Lamesch Exploitation SA, established in Bettembourg (Luxembourg), submitted two notifications to the competent Luxembourg authority seeking authorisation to ship to France household and similar waste coming under Annex III to the Regulation. According to the notifications, the waste, which came from two waste producers established in

Luxembourg, was to be recovered by incineration at the incinerator of the municipality of Strasbourg, and the energy generated thereby would be reclaimed. An undertaking operating under the name of Négoce de tous matériaux réutilisables (NTMR), established in Metz (France), was to act as charterer in shipping the waste concerned.

15 By two decisions of 1 October 1998 (the contested decisions), the competent Luxembourg authority reclassified the shipments ex officio as shipments of waste intended for disposal. It added that such shipments could be carried out only on proof that for technical reasons or because of insufficient capacity the waste could not be delivered to a disposal plant in Luxembourg.

16 The competent Luxembourg authority justified the ex officio reclassification on the basis that incineration of waste in a plant the primary purpose of which is thermal treatment with a view to the mineralisation of the waste, whether or not there is reclamation of the heat produced, is considered in Luxembourg to be a D10 disposal operation under Annex II A to Directive 75/442/EEC as amended.

Pre-litigation procedure

17 Following a complaint referred to it by NTMR, the Commission sent a letter of formal notice to the Grand Duchy of Luxembourg on 22 October 1999 requesting that Member State to submit its observations within a period of two months on the charge that the competent Luxembourg authorities had infringed the provisions of the Regulation and the Directive by refusing to classify as a recovery operation incineration of waste in a non-industrial incineration plant where the energy generated during incineration is recovered in full or in part.

18 As the Grand Duchy of Luxembourg had not responded to that letter of formal notice, the Commission sent it a reasoned opinion by letter of 4 April 2000 in which it found that that Member Sate had failed to fulfil its obligations under Articles 6 and 7 of the Regulation, Article 1(f) and point R1 of Annex II B to the Directive and, where appropriate, Article 34 of the EC Treaty (now, after amendment, Article 29 EC). In the same letter the Commission called upon the Grand Duchy of Luxembourg to take the necessary measures in order to comply with the reasoned opinion within a period of two months from the date of notification of the reasoned opinion.

19 In a letter of 28 April 2000 the Grand Duchy of Luxembourg maintained that a waste processing operation could be classified as an operation under point D10 of Annex II A to the Directive even if energy generated by it may be recovered and that, in addition, the Luxembourg authorities had reclassified the operations in question with the agreement of the French authorities of destination.

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

Substance

21

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).

22

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 make to a shipment of waste (*ASA* , cited above, paragraph 47). In any event, it is not for the competent authority to reclassify ex officio the purpose of the shipment of waste (*ASA* , cited above, paragraph 48).

23

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 ground that it is in reality a shipment of waste intended for disposal.

24

However, such an objection accords with the provisions of Article 7(2) and (4) of the Regulation only where there exist 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.

25

By the contested decisions, the Luxembourg authorities reclassified the shipments ex officio as shipments of waste for disposal and objected to them being carried out. Those decisions must be regarded as having been intended to raise the objection that the classification referred to in the notifications of the shipments concerned was incorrect.

26

Consequently, in order to determine whether, in taking the contested decisions, the Grand Duchy of Luxembourg failed to fulfil its obligations under Article 7(2) and (4) of the Regulation, it is necessary to consider whether the objection raised in those decisions is in accordance with the distinction between disposal operations and recovery operations established by the Directive in Annexes II A and II B.

27

The Commission contends that the shipments to which the contested decisions objected concerned waste intended for use as a means of generating energy, which is a recovery operation under point R1 of Annex II B to the Directive.

28

The Commission considers that waste may be regarded as being used as a means of generating energy where the operation generates surplus energy and a

substantial proportion of the energy contained in the incinerated waste is reclaimed for use.

29 The Luxembourg Government maintains that incineration of the waste in question, and reclamation of the energy, in the incinerator of the municipality of Strasbourg did not constitute a recovery operation under point R1 of Annex II B to the Directive. The only operations covered by that provision are operations which not only allow the generation and use of surplus energy, but also, in the light of the purpose of the waste processing plant, have as their objective the use of the waste as a fuel or other means of generating energy. In the view of the Luxembourg Government, that conclusion results from the use of the words use principally in that provision.

30 The Luxembourg Government therefore maintains that the contested decisions were correct in considering that the waste shipments in question related to waste that was in reality intended for a disposal operation under point D10 of Annex II A to the Directive.

31 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.

32 That provision should be interpreted as meaning that it covers the combustion of household waste if, 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.

33 Second, the combustion of household waste constitutes 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 reclaimed 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 is effectively used, either immediately in the form of the heat produced by incineration or, after processing, in the form of electricity.

34 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 that the greater part of the energy generated must be reclaimed and used.

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

36 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).

37 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.

38 In the light of those criteria, the Commission has failed to establish that the objection raised in the contested decisions does not accord with the distinction between disposal operations and recovery operations laid down by the directive in Annexes II A and II B thereto.

39 In the contested decisions the competent Luxembourg authorities refused to consider the shipment of the waste concerned to an incinerator situated in France as recovery, on the grounds that the primary purpose of that plant was thermal processing with a view to the mineralisation of the waste.

40 The objection thus raised by those authorities is based therefore on the consideration that the principal objective of the operation in question is the disposal of waste, a consideration which constitutes appropriate grounds for objecting to the shipment of waste to that plant being classified as a recovery operation.

41 The shipment of waste in order for it to be incinerated in a processing plant designed to dispose of waste cannot be regarded as having the recovery waste as its principal objective, even if when that waste is incinerated all or part of the heat produced by the combustion is reclaimed.

42 Certainly, such reclamation of energy is in accordance with the Directive's objective of conserving natural resources.

43 However, where the reclamation of the heat generated by the combustion constitutes only a secondary effect of an operation whose principal objective is the disposal of waste, it cannot affect the classification of that operation as a disposal operation.

44 The Commission has not adduced any evidence in the context of its action which shows that, contrary to what the competent Luxembourg authorities considered in the contested decisions, the principal objective of the operation in question was the recovery of waste. It has not provided any evidence at all of this, such as the fact that the waste in question was intended for a plant which, unless it was

supplied with waste, would have had to operate using a primary energy source, or that the waste was to have been delivered to the processing plant in exchange for payment by the plant operator to the producer or holder of the waste.

45 The Commission only maintained in that regard that the shipments were of waste intended for use as a means of generating energy and that the purpose of the processing plant to which the waste was to be shipped did not constitute a relevant criterion for the purposes of classifying an operation for the shipment of waste.

46 Consequently, the Commission's application is unfounded and must therefore be dismissed.

Costs

47 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 Grand Duchy of Luxembourg has asked for costs against the Commission, which failed in its submissions, the latter must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Republic of Austria, which has intervened in the proceedings, is to bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the Republic of Austria to bear its own costs.

Wathelet Timmermans Edward

Jann von Bahr

Delivered in open court in Luxembourg on 13 February 2003.

R. Grass
Registrar

M. Wathelet
President of the Fifth Chamber

1 –

Language of the case: French.

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

Case C-458/00

Commission of the European Communities
v
Grand Duchy of Luxembourg

()

1. In this action brought under Article 226 EC, the Commission claims that objections raised by the Grand Duchy of Luxembourg against certain shipments of waste to other Member States to be used principally as fuel were unjustified and contrary to the wording of 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) and Article 1(f) read in conjunction with head R1 of Annex IIB to Council Directive 75/442/EEC of 15 July 1975 on waste (the Directive or the Waste Directive). (3) The Commission accordingly seeks a declaration that Luxembourg has failed to fulfil its obligations under Articles 2, 6 and 7 of the Regulation and Article 1(f) read in conjunction with head R1 of Annex IIB to the Directive.

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 municipal waste at an incineration plant in which most or all of the heat

generated is used as energy is correctly to be classified as a disposal operation or a recovery operation.

The relevant Community legislation

The Directive

3. Article 3(1) of 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.

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 175 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. (7)

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. (8)

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. (9) 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. (10) 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. (11) 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, (12) 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 (13) and to the consignee. (14)

14. Notification is to be effected by means of the consignment note to be issued by the authority of dispatch. (15) The notifier is to complete the consignment note and, if requested by the competent authorities, supply additional information and documentation. (16) 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. (17)

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. (18)

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 (19) has the right to raise objections and the Member State of destination may issue the authorisation only in the absence of any such objections. (20) In the case of waste for recovery, the Member States of dispatch and destination (21) have the right to object to a shipment but, as a general rule, (22) no express authorisation is required. (23)

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). (24) 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 (25) 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. (26)

19. In the case of waste for recovery, the objections are to be based on Article 7(4). (27) Article 7(4)(a) (28) lists five grounds on which the competent authorities of destination and dispatch may raise reasoned objections. Those grounds do not provide for objections to be based on the principles of proximity or self-sufficiency.

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* (29) 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* (30) 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. (31)
The action for infringement
24. In early 1998 the undertaking NTMR (Négoce de tous matériaux réutilisables) submitted two notifications to the competent Luxembourg authority seeking authorisation to ship household and similar waste coming under position AD160, Municipal/household wastes, of Annex III (amber list) to the Regulation. It appears that NTMR's notifications indicated that the shipment was of waste for recovery to be processed at the incinerator of the municipality of Strasbourg. According to the Commission (which has not been contradicted on this point), it appears from a letter from the Prefect of the Bas-Rhin (32) dated 3 July 1998 that incineration at that plant enables all the energy generated thereby to be recovered.
25. By decision of 1 October 1998 the competent authority in Luxembourg re-classified the shipment as concerning waste for disposal which could be shipped only on proof that for technical reasons or because of insufficient capacity the waste could not be delivered to a disposal plant in Luxembourg. The authority justified that re-classification on the basis that the incineration of waste in a plant the primary purpose of which is thermal treatment with a view to the mineralisation (33) of the waste, whether or not there is recovery of the heat produced, is considered in Luxembourg to be a disposal operation coming under head D10 in Annex IIA to the Waste Directive.
26. Considering that those facts suggested that Luxembourg had infringed the Regulation and the Directive, the Commission sent it a formal notice which was not answered. The Commission accordingly issued a reasoned opinion. In its reply Luxembourg maintained in essence that the fact that energy generated by a waste processing operation may be recovered does not preclude classification of that operation as a disposal operation under head D10 of Annex IIA to the Directive, that it had re-classified the operation with the agreement of the French authorities, that Articles 3 and 4 rather than Articles 6 and 7 of the Regulation were therefore applicable and that Luxembourg had accordingly not infringed the legislation.
27. Luxembourg also noted in its reply that its waste incineration plant enabled the heat generated by the incineration to be used, in particular for the production of electrical energy which was fed into the national grid.
28. Since Luxembourg has not taken the measures necessary to comply with the reasoned opinion, the Commission has brought the present action.
29. Austria has intervened in support of Luxembourg.
30. The Commission is seeking a declaration that Luxembourg has failed to fulfil its obligations under Articles 2, 6 and 7 of Regulation No 259/93 and Article 1(f) read in conjunction with head R1 of Annex IIB to Directive 75/442. The alleged infringement consisted in Luxembourg's raising unjustified objections against certain shipments of waste to other Member States to be used principally as fuel. At issue therefore is the

correct classification in accordance with the Directive — and hence also the Regulation — of the incineration of household waste in an incineration plant which uses most or all of the energy thereby generated. Is it necessarily a recovery operation, as the Commission maintains, in which case the objections, essentially on the ground of self-sufficiency in the disposal of waste, raised by Luxembourg cannot be justified and the infringement is made out, or is it, as Luxembourg maintains, a disposal operation, in which case the objections may be justified on the basis of that principle?

31. The Commission's principal submission is drawn from the wording of Annex IIB. Use principally as a fuel or other means to generate energy

32. The Commission maintains that the decisive test is, first, whether the incineration process generates more energy, or heat transformed into energy, than the energy or heat which would have been generated from combustion of the gas injected into the furnace in order to incinerate the waste — in other words, is there a net production of energy? — and, second, whether the plant is able to reclaim or recover a substantial proportion of the energy contained in the incinerated waste.

33. Luxembourg considers that the Commission's position in effect bases the distinction between disposal and recovery on the energy potential of the waste in question. The definition of recovery operation R1 (Use principally as a fuel) however is based on the criterion of use and hence of the objective of the operation, and not the quality or composition of the waste. Luxembourg submits that the correct criterion is the objective of the incineration plant: if its principal objective is the generation of energy, the incineration is a recovery operation; if however its objective is the thermal processing of waste, whether or not there is accessory reclamation of energy, the incineration is a disposal operation.

34. Each party submitted at the hearing that the judgment in *ASA* (34) — which was delivered after the written procedure in the present case had ended — supported its position.

35. The Commission considers that the principles there laid down are wholly applicable to the present case with the result that the operation should be classified as a recovery operation. It follows from that judgment that the objective of the operation determines its classification. Luxembourg, however, focuses on the objective of the incineration plant. The Commission submits that the correct criterion is whether the energy generated by the incineration is in fact reclaimed, thereby serving a useful purpose.

36. Luxembourg argues on the other hand that the criterion formulated by the Court in *ASA* , namely that of the principal objective of the operation, is in effect the same as the criterion of the objective of the incineration plant used by Luxembourg.

37. I agree with the Commission that, in order to determine whether a given operation is to be classified as a disposal operation falling within head D10 of Annex IIA to the Directive or as a recovery operation under head R1 of Annex IIB, the wording of the descriptions set out under those heads must be carefully analysed.

38. Head R1 refers to Use principally as a fuel or other means to generate energy.

39. As Luxembourg argues, the criterion of use requires interpretation in the light of the objective of the operation. That conclusion follows clearly, in my view, from the natural meaning of the term use, and perhaps in particular the concept of use principally as something. It may be noted that that construction — or the analogous principal use as — is reflected in all the language versions of the Directive.

40. The Commission submits that, since head R1 refers to Use principally as a fuel or other means to generate energy, classification as a recovery operation must extend not only to use principally as a fuel but also to use as any other means to generate energy. That argument suggests that the qualification principally is not relevant where waste is being used not as fuel but as another means to generate energy. That seems to me to be an unnatural reading of the provision — in all the language versions. (35) It is clear to me that, in order to fall under head R1 of Annex IIB to the Directive, an operation must consist in the use of waste principally as a fuel or the use of waste principally as another means to generate energy.

41. On the basis of the wording of the legislation, therefore, an incineration operation will not fall within the description in head R1 unless its objective is the use of waste principally as a fuel or the use of waste principally as another means to generate energy. If that condition is not satisfied, the operation will be incineration on land under head D10 of Annex IIA to the Directive. (36)

42. That analysis is consistent with the judgment in *ASA* , (37) where the Court ruled 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? (38) In the case of waste being incinerated in a plant developed for that purpose, the answer to that question 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.

43. The notion of the principal objective can thus be regarded as a criterion of general application, of which heads D10 and R1 are specific applications.

44. The significance of the objective of the operation may be seen particularly clearly in cases involving the incineration of household waste with incidental energy recuperation. Classifying all such operations as recovery solely on the basis that the energy generated — however little — is recovered leads to unacceptable consequences. The Commission states in its application that Community law prescribes no minimum quantity of energy generated in order for the incineration of waste with accessory energy recuperation to be classified as a recovery operation: at most it may be conceded that an operation is not recovery if that quantity is ridiculously small. It appears however from information provided to the Court that the incineration of urban waste with energy recovery is the principal method of disposing of such waste in many Member States; classifying all such operations as recovery simply on the basis of that energy recuperation would in effect mean that such waste could be shipped within the Community with little restriction, which would run counter to the Regulation's objective of providing a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment. (39) In that context it may also be noted that the Council in its Resolution of 24 February 1997 on a Community strategy for waste management (40) notes and shares the concerns of Member States at the

large-scale movements within the Community of waste for incineration with or without energy recovery. (41)

45. That the principal objective of the incineration operation at issue in the present case is disposal rather than recovery is also suggested by which party bears the cost of the transaction: the contracts between the Luxembourg holders of the waste and the municipality of Strasbourg, which are among the annexes to the defence, provide for the holders to pay to the municipality the fee currently applicable when the waste is transported to the plant. Although I do not consider that payment by the holder of the waste is necessarily conclusive evidence that a given operation is disposal rather than recovery, it will normally none the less be a significant factor. (42)

46. The approach I propose — namely that a given incineration operation will constitute disposal if that is its principal objective, notwithstanding that there may be incidental energy recovery — to my mind achieves the correct balance between the principle of the free movement of goods and that of the protection of the environment. It is clearly desirable on environmental grounds to limit large-scale shipments of household waste for incineration; if, however, incineration of such waste were classified as recovery simply on the basis that the resulting energy could be used, transport of such waste — possibly over significant distances — would be encouraged.

47. Moreover that solution is confirmed if the present case is contrasted with *Commission* v *Germany* , (43) in which I am also delivering my Opinion today. That case concerns the correct classification for the purposes of the Regulation of waste to be incinerated in cement factories; the energy generated by the incineration is to be used in the manufacturing process where it will replace conventional fuel in one instance by up to one third and in the other instance totally. In my Opinion I express the view that the principal objective of an incineration operation which is an integral part of an industrial process and which generates energy to be used in that industrial process may be said to be the use of the waste as a fuel. If one puts the question whether, if the waste were not available for a given operation, that operation would none the less be carried out using some other material, the answer in the case of waste used as fuel for a cement factory is clearly yes: in the absence of available waste, the factory would still operate using other fuel.

Conclusion

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

(1) dismiss the Commission's application;

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

8 – Article 2(i) and (k).

9 – 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.

10 – Recital 14 in the preamble to the Regulation.

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

12 – Article 2(g).

13 – And, if relevant, of transit.

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

15 – Articles 3(3) and 6(3).

16 – Articles 3(4) and 6(4).

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

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

19 – And, if relevant, of transit.

20 – Articles 4(1) and 4(2).

21 – And, if relevant, of transit.

22 – 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).

23 –

Article 7(1) and (2).

24 – Article 4(2)(c).

25 – Article 4(3)(a)(i).

26 – Article 4(3)(b)(i).

27 – Article 7(2).

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

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

30 – Case C-6/00, paragraph 69 of the judgment delivered on 27 February 2002. It may be noted that the judgment was delivered after the pleadings in the present case had been lodged.

31 – Cited in note 30, paragraph 36 of the judgment.

32 – Strasbourg is in the département of the Bas-Rhin.

33 – Converting an organic to a mineral substance.

34 – Cited in note 30.

35 – See in particular the French and German versions: Utilisation principale comme combustible ou autre moyen de produire de l'énergie and Hauptverwendung als Brennstoff oder andere Mittel der Energieerzeugung.

36 – Or, if appropriate, incineration at sea under head D11.

37 – Cited in note 30, paragraph 69 of the judgment.

38 – Paragraph 86.

39 – . *Parliament* v *Council* , cited in note 7, paragraph 26 of the judgment.

40 – OJ 1997 C 76, p. 1.

41 – Point 42.

42 – See further paragraph 88 of my Opinion in *ASA* , cited in note 30.

43 – Case C-228/00; see in particular paragraph 56 of the Opinion.