JUDGMENT OF THE COURT (Fifth Chamber)

13 February 2003 *

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),

* Language of the case: German.

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