

JUDGMENT OF THE COURT
10 May 1995 *

In Case C-422/92,

Commission of the European Communities, represented by Rolf Wägenbaur, Principal Legal Adviser, acting as Agent, assisted by Alexander Böhlke, of the Brussels Bar, with an address for service in Luxembourg at the office Georgios Kremliis, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat, Federal Ministry of the Economy, acting as Agent, and Ludger-Anselm Versteyl, Rechtsanwalt, Burgwedel, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Émile Reuter,

defendant,

APPLICATION for a declaration that, by failing to bring into force all the measures needed to transpose Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43), Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (OJ 1984 L 326, p. 31) and Council Directive 86/279/EEC of 12 June 1986 amending Directive 84/631 (OJ 1986 L 181, p. 13), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

* Language of the case: German.

THE COURT,

composed of G. C. Rodríguez Iglesias, President, F. A. Schockweiler and C. Gulmann (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward, J.-P. Puissechet (Rapporteur) and G. Hirsch, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Loutherman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 January 1995,

after hearing the Opinion of the Advocate General at the sitting on 16 March 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 18 December 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to bring into force all the measures needed to transpose Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39, hereinafter 'Directive 75/442'), Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43, hereinafter 'Directive 78/319'), Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (OJ 1984 L 326, p. 31, hereinafter 'Directive 84/631') and Council Directive 86/279/EEC of 12 June 1986 amending Directive

84/631/EEC (OJ 1986 L 181, p. 13, hereinafter 'Directive 86/279'), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2 It is apparent from the form of order sought by the Commission that it criticizes the Federal Republic of Germany in particular for:

- excluding from the scope of the rules on waste certain substances which fall within the definition of waste given in Directives 75/442 and 78/319,
- providing, in breach of Directives 84/631 and 86/279, that the treatment of waste is to be subject to the principle of disposal within national territory,
- providing that a permit is required for all transfrontier shipments of waste of all kinds, the conditions for which are different from the grounds for objections laid down by Directive 84/631, as amended by Directive 86/279,
- failing to fulfil its obligation to draw up, keep up to date and publish or notify plans pursuant to Directive 78/319.

3 The purpose of Directive 75/442 is to harmonize the laws of the Member States regarding the disposal of waste and at the same time to lay down wider rules intended to ensure attainment of one of the objectives of the Community in the sphere of environmental protection and improvement of the quality of life. Article 1 defines waste as, in particular, 'any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force' and Article 2(1) provides that Member States may adopt specific rules for particular categories of waste. Article 2(2) enumerates various categories of waste that are excluded from the scope of the directive.

- 4 Directive 78/319 pursues the same objectives regarding the disposal of toxic and dangerous waste. Article 1 repeats the definition of waste given in Directive 75/442 and gives a more detailed definition of toxic and dangerous waste. In particular, Article 5 of that directive imposes on the Member States the obligation to take the necessary steps to ensure that such waste is disposed of without endangering human health and without harming the environment. Article 12 also requires plans for the disposal of dangerous and toxic waste to be drawn up, kept up to date and published by the competent authorities and forwarded to the Commission.
- 5 The purpose of Directive 84/631 is to establish a system of control of transfrontier shipments of dangerous waste until it is treated or disposed of under safe conditions. Article 3 imposes in particular on a holder of dangerous waste who intends to ship it or have it shipped from a Member State to another Member State or routed through one or more Member States the obligation to notify the competent authorities of the Member States concerned. Article 4 provides that a transfrontier shipment may not be executed before the competent authorities of the Member State of destination, or the last Member State of transit in the case of shipment to a non-member country, have acknowledged receipt of the notification. It grants the national authorities, under certain conditions, the possibility of raising objections substantiated on the basis of laws and regulations relating to environmental protection, safety and public policy or health protection which are in accordance with the provisions of the directive, with other Community instruments or with international conventions concluded by the Member State concerned before notification of the directive.
- 6 The purpose of Directive 86/279 is to complete the system of control of transfrontier shipments of dangerous waste, taking account of the pollution risks likely to arise outside the Community. It amends in particular Articles 3 and 4 of Directive 84/631 by laying down stricter conditions for the shipment of waste to non-member countries. Thus, it requires the holder to obtain the agreement of the non-member country of destination before embarking upon the notification procedure and, in the case of shipments of waste from a Member State for disposal outside the Community, it confers on the Member State of despatch or, by way of exception and under certain conditions, on the last Member State of transit the right to issue the acknowledgment of receipt or to raise objections.

- 7 It should be noted that Directive 75/442 has been amended in its entirety by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78 p. 32, hereinafter 'Directive 91/156'). Directive 78/319 was repealed with effect from 12 December 1993 by Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20, hereinafter 'Directive 91/689'), which was itself amended by Council Directive 94/31/EC of 27 June 1994 (OJ 1994 L 168, p. 28), which deferred to 27 June 1995 the date on which the repeal of Directive 78/319 is to take effect. Finally, Directive 84/631, amended by Directive 86/279, was repealed on the date of application of Council Regulation (EEC) No 259/93 of 12 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, hereinafter 'Regulation No 259/93').
- 8 The basic German legislation relating to the matters covered by the abovementioned directives is to be found in the Abfallgesetz of 27 August 1986 (Law on the prevention and disposal of waste, BGBl. I 2126, hereinafter 'the AbfG'). Several of its provisions are relevant to this case.
- 9 Paragraph 1(1) of the AbfG defines as waste 'anything movable of which the holder intends disposing or the proper disposal of which is necessary in order to safeguard the public interest and in particular environmental protection.' The same provision specifies that 'anything movable left by its holder with the body responsible for disposal or with a third party entrusted with disposal by the latter constitutes waste, even if it is subjected to a reclamation process, until such time as the thing in question or the substances or energy obtained from it enter economic channels'. However, Paragraph 1(3) excludes from the scope of the AbfG a number of materials which include, in sub-subparagraph 7, subject to certain exceptions, those substances 'which are reclaimed in accordance with the rules, for the purposes of collection for industrial use, provided that proof of such reclamation is produced to the bodies responsible for disposal and provided that higher public interests do not militate against this'.

- 10 Paragraph 2 provides in particular that waste produced within the territory covered by German law must be disposed of there, unless otherwise provided in Paragraph 13. It also states that disposal must be carried out so as not to have any adverse effect on the public interest, care being taken to ensure that human health and the environment are protected.
- 11 Under Paragraph 6 of the AbfG, the *Länder* are to draw up plans, which must be harmonized, for the disposal of waste.
- 12 Paragraph 13 of the same Law regulates the shipment of waste inside and outside German territory. In particular, it requires any person wishing to ship waste to obtain a permit, which can be issued only if the transport, treatment, storage or depositing of the waste involves no risk adverse to the public interest and if there are no doubts as to the trustworthiness of the applicant. As regards the import and export of waste, that paragraph also imposes other conditions for issue of the permit, which may differ according to the destination of the waste.
- 13 Finally, Paragraph 13c lays down the conditions under which Directive 84/361 is to be transposed by means of regulations. Transposition was effected by the Abfallverbringungs-Verordnung of 18 November 1988 (Regulation on the trans-frontier shipment of waste, BGBl. I 2126, hereinafter the 'AbfVerbrV'), which prescribes in particular how the administrative procedure laid down by the Law and that provided for by the directive are to correspond.
- 14 Considering that those national provisions did not in several respects conform with Directives 75/442, 78/319, 84/631 and 86/279, the Commission sent a letter of formal notice to the German Government under Article 169 of the Treaty, to which the German authorities responded on 2 May 1990. The Commission then issued, on 25 September 1995, a reasoned opinion to the effect that the Federal Republic of Germany had failed to fulfil its obligations, and called on it to take the

necessary measures within a period of two months. The Federal Government's reply, of 2 March 1992, was not considered satisfactory by the Commission, which therefore brought the present proceedings.

Admissibility

- 15 The Federal Republic of Germany contends that the action is inadmissible on the ground that the Commission has no interest in instituting proceedings and that the action is time-barred. First, in the view of the Federal Republic of Germany, the Commission had not, as it was required to do by Directive 75/422, as amended by Directive 91/156, drawn up the list of waste which constitutes a precondition for the transposition of that directive, as amended. Secondly, it brought its action long after the publication of the contested national provisions and did so at a time when developments in Community policy and law on the environment were such as could give the impression that there was no longer any expectation that such an action would be brought.
- 16 It is not necessary for the Commission to have a specific interest in bringing an action in order to commence proceedings under Article 169 of the Treaty. Article 169 is not intended to protect the Commission's own rights but provides one of the means by which the Commission ensures that the Member States give effect to the provisions of the Treaty and the provisions adopted under the Treaty by the institutions. In any event, the fact that the amending directive could not be transposed into national law so long as the Commission had not drawn up the list constituting a precondition for such transposition has no bearing on the admissibility of the action, which is concerned with failure to fulfil obligations imposed by the initial provisions of Directive 75/442 as then in force.
- 17 On the other hand, it is true, and somewhat surprising, that the Commission brought its action more than six years after the entry into force of the basic German legislation on the shipment of waste, and did so at a time when the Community had in fact changed its policy in that field along the same lines as those

followed by that legislation. As the Advocate General points out at paragraphs 18 and 79 of his Opinion, it is relevant to ask why the Commission thought that it was under an obligation to commence and pursue the present action in such circumstances.

- 18 However, it is settled law that the rules of Article 169 of the Treaty must be applied and the Commission is not obliged to act within a specified period (see in particular the judgment in Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461, paragraph 15). The Commission is thus entitled to decide, in its discretion, on what date it may be appropriate to bring an action and it is not for the Court to review the exercise of that discretion. The objection of inadmissibility must therefore be rejected.

Substance

- 19 The Commission's complaint, four in number, relate, respectively, to the exclusion of certain recyclable materials from the scope of the AbfG, the rule that waste must be disposed of within national territory, the requirement of a permit for transfrontier shipments of dangerous waste and the drawing up of plans for the disposal of waste.

The first complaint

- 20 The Commission considers that the exclusion, by virtue of Paragraph 1(3)(7) of the AbfG, of certain recyclable materials which are regarded not as waste but as 'residues' to which the German legislation on waste is not applicable, is incompatible with Directives 75/442 and 78/319, which adopt a wide definition of waste and do not exclude recyclable waste from their scope.

- 21 The German Government contends that the disparity alleged by the Commission between the concept of waste in Community law and that in German law is non-existent or exists no longer. It considers, however, that waste must be distinguished from a used product capable of remaining within the economic circuit where the holder thereof wishes to dispose of it for a socially useful purpose or for a commercial operation.
- 22 As the Court had held, the concept of waste within the meaning of Article 1 of Directives 75/442 and 78/319 is not to be understood as excluding substances and objects which are capable of economic reutilization. National legislation which defines waste as excluding substances and objects which are capable of economic reutilization is not therefore compatible with those directives (see the judgment in Case C-359/88 *Zanetti and Others* [1990] ECR I-1509, paragraphs 12 and 13).
- 23 That finding is not affected either by the amendments made to the first of those two directives by Directive 91/156, the final date for the transposition of which falls after the date on which this action was commenced, or by the repeal of the second by Directive 91/689, which made that repeal effective from a date falling after the date of commencement of this action.
- 24 As regards the German Government's argument that there is no disparity in that field between the Community legislation and the national legislation, attention need merely be drawn to that same government's statement that the envisaged widening of the scope of the German legislation will make it possible to eliminate that disparity. That statement shows that the disparity will remain until such time as the new national legislation has been adopted.
- 25 It must therefore be held that, by excluding certain categories of recyclable waste from the scope of its legislation on waste disposal, the Federal

Republic of Germany has failed to fulfil its obligations under Directives 75/442 and 78/319.

The second and third complaints

26 According to the Commission, the German legislation is incompatible with Directives 84/631 and 86/279 in that, first, it imposes the rule that waste must be disposed of within national territory and, secondly, it requires a permit to be obtained for transfrontier shipments of dangerous waste.

27 On the first point, the Commission considers that those directives embody the premise that it is permissible to ship dangerous waste to other Member States or to non-member countries and therefore no general principle that such waste must be disposed of within national territory can be inferred from them.

28 The German Government contends that that principle constitutes a priority and not a prohibition of exports, as is evidenced both by the provisions allowing transfrontier shipments and by the large volumes of waste which are in fact exported. It also contends that the directives at issue cannot be interpreted in a manner contrary to the higher-ranking rule contained in Article 130r(2) of the Treaty, which lays down, in particular, the principle that environmental damage should be rectified as a matter of priority, which also inspired the new Community legislation on waste and the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, to which the Community is a signatory (*International Environment Law*, Kluwer, Deventer-Boston, 1991, p. 546).

29 On the second point, the Commission considers that the obligation to obtain a permit before making any shipment goes beyond the requirements of the system of supervision established by those directives. In its view, the special conditions laid down by the German legislation for the shipment of waste to other Member States exceed the possibilities available under Article 4(6) of Directive 84/631 — the wording of which was repeated in Directive 86/279 — to the competent authorities of the Member State of despatch, which may merely lay down conditions concerning the shipment of waste on their territory and raise objections on certain grounds. Similarly, the conditions imposed for shipment to non-member countries go beyond the scope of Article 3(4) of the same directive, as amended by Directive 86/279, which merely provides that, for such shipments, the holder of the waste must obtain the agreement of the non-member country of destination before embarking upon the notification procedure.

30 The German Government contends, on the contrary, that the provisions of its legislation on transfrontier shipments of waste are in conformity with Directive 84/631, as amended by Directive 86/279, which they transposed. With regard more particularly to the restrictions on exports of waste to non-member countries, they are motivated not only by the public interest in Germany but also by the concern to protect the local population in the State of destination. That, according to the German Government, is one of the objectives of Regulation No 259/93, which makes exports of waste to non-member countries subject to particularly restrictive conditions specifically in order to protect the environment in those countries.

31 The reference to the latter regulation is not relevant to this case since its date of application, marking the repeal of Directive 84/631, as amended by Directive 86/279, falls later than the date on which the action in this case was brought. The Commission's criticisms must therefore be examined only in the light of those two directives.

32 In that connection, it must be borne in mind that Directive 84/631 introduced a complete system covering, in particular, transfrontier shipments of dangerous

waste with a view to their disposal at establishments conforming to specific requirements and is based on the obligation of the holder of the waste to make a detailed notification in advance. The relevant national authorities are entitled to raise objections and are therefore able to prohibit a particular shipment of dangerous waste (as opposed to shipments of dangerous waste in general) in order to deal with the problems concerning, first, protection of the environment and of health and, secondly, public policy and security. Thus, that system does not leave the way open for the Member States to impose a general prohibition on such shipments (see the judgment in Case C-2/90 *Commission v Belgium* [1992] ECR I-4421, paragraph 20).

33 Contrary to what the Commission's apparently thinks, as evidenced by its reference to the judgment in *Commission v Belgium*, cited above, the German legislation is not comparable to the rules of the Walloon Region, which, in paragraph 21 of that judgment, the Court found not to be in conformity with Directive 84/631 in so far as they disapplied the procedure provided for by that directive and imposed an absolute prohibition on the import of dangerous waste into Wallonia. Although Paragraph 2 of the AbfG lays down the principle that waste produced in German territory must be disposed of there, that principle applies only 'unless otherwise provided by Paragraph 13'. Paragraph 13 lays down the conditions under which transfrontier shipments of waste are permitted and must be read in conjunction with Paragraph 13c, the specific object of which is to enable the provisions of Directive 84/631 to be transposed, by means of regulations.

34 In view of the conditions for its application, the rule requiring disposal on national territory laid down in the German Law, which, by definition, does not concern the import of waste, cannot be regarded as a general and absolute prohibition on the export of dangerous waste, which would be contrary to Directives 84/631 and 86/279. As the German Government contends, that rule reflects the pursuit of an objective which is in conformity with the principle laid down in Article 130r(2) of the Treaty that environmental damage should, as a priority, be rectified at source.

- 35 As regards the obligation to obtain the permit which the same Law imposes for transfrontier shipments of waste, it has been altered by an amending regulation. As pointed out in paragraph 13 of this judgment, the AbfVerbrV prescribes in particular how the administrative procedure laid down by the Law and that provided for by the directive are to correspond. In particular, the terms 'notification', 'acknowledgment of receipt' and 'objection' used in the directive have as their respective counterparts an application for a permit, the grant of a permit and a negative decision or deferral within the meaning of the German legislation.
- 36 In particular, that legislation requires the competent authority to disallow a transfrontier shipment of waste if there is a risk that the public interest might be adversely affected, if there are doubts as to the trustworthiness of the persons responsible for shipment, if the plans for the disposal of waste militate against such a shipment and if, unless such plans include other possibilities, there are appropriate facilities for the disposal of waste in the *Land* in which it was produced or if the use of facilities in another *Land* is possible.
- 37 Contrary to the Commission's view, those provisions are not incompatible with those of Directive 84/631, as amended, whatever the kind of transfrontier shipment envisaged.
- 38 As regards both imports of dangerous waste and exports of such waste with a view to its disposal outside the Community, it is apparent from Article 4(1) and (2) of that directive, as amended by Directive 86/279, that the competent authorities of the Member State of destination and, in the case of shipments to a non-member country, those of the Member State of despatch, are authorized to issue an acknowledgment of receipt allowing the shipment or, on the contrary, to raise

objections having the effect of prohibiting it. Pursuant to Article 4(3), those objections must be substantiated on the basis of the legislation and regulations on environmental protection, public policy and public safety or protection of health, which are in conformity with the directive, with other Community instruments or international conventions.

- 39 The grounds laid down by the German legislation for the non-authorization of certain transfrontier shipments of waste, which are based essentially on the public interest and, as is apparent from the first two paragraphs of the AbfG, are linked with the protection of human health and of the environment, reflect exactly the same concerns as are embodied in the abovementioned provisions of the directive.
- 40 As regards transfrontier shipments of dangerous waste to another Member State, the competent authorities of the Member State of despatch are authorized, by the first subparagraph of Article 4(6) of Directive 84/631, as amended, to lay down conditions regarding the shipment of waste on their national territory. They may also, under the second subparagraph of Article 4(6), raise objections on the ground that the shipment of waste adversely affects the implementation of plans drawn up pursuant to Article 12 of Directive 78/319 or that it conflicts with obligations resulting from international agreements concluded prior to notification of the directive.
- 41 As the Advocate General points out in paragraph 56 of his Opinion, the drawing up of the plans provided for in Article 12 of Directive 78/319 is a specific instance of the general obligation imposed by Article 5 to take the necessary measures to ensure that toxic and dangerous waste is disposed of without endangering human health and without harming the environment. The contested provisions of the German legislation are specifically based on such concerns and, as the Advocate General rightly points out in paragraph 57 of his Opinion, the disposal of hazardous waste in another Member State, particularly an adjacent Member State, may have serious environmental consequences in Germany and justify a refusal to allow a shipment to that State.

42 The Commission's second and third complaints must therefore be rejected.

The fourth complaint

43 Finally, the Commission criticizes the Federal Republic of Germany for a number of specific failures to comply with the requirements of Article 12 of Directive 78/319, which requires plans for the disposal of dangerous and toxic waste to be drawn up, kept up to date, published and notified.

44 In response to that complaint, the German Government produced documents which summarize all the plans drawn up by the *Länder* in accordance with Paragraph 6 of the AbfG.

45 On being asked by the Court to state at the hearing its position because following the communication to it of those documents, the Commission stated that it maintained its head of claim on this point.

46 In the light of that exchange, the Commission's complaint is well founded.

47 In order to comply with Directive 78/319, the obligation to draw up, keep up to date, publish and notify plans for the disposal of dangerous and toxic waste was to be fulfilled by the Member States within a period of two years.

- 48 It is apparent from the abovementioned documents that, whilst it is true that the German Government very largely fulfilled that obligation, it had not done so to a sufficient degree by the expiry of the period fixed by the Commission in its reasoned opinion, in other words by 25 November 1991. In particular, certain plans for Rhineland-Westfalia had not yet been drawn up or notified, the definitive plans for Baden-Württemberg had not yet been adopted and certain other plans had not been kept up to date or published.
- 49 It must therefore be held that, by failing to draw up, keep up to date, publish or notify to the Commission within the prescribed period the plans for the disposal of toxic and dangerous waste for certain regions, the Federal Republic of Germany has failed to fulfil its obligations under Directive 78/319.
- 50 It follows from all the foregoing that, by excluding certain categories of recyclable waste from the scope of its legislation on the disposal of waste and by failing to draw up, keep up to date, publish or notify to the Commission within the prescribed period the plans for the disposal of toxic and dangerous waste for certain regions, the Federal Republic of Germany has failed to fulfil its obligations under Directives 75/442 and 78/319.

Costs

- 51 Under Article 69(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared or that each party bear its own costs. Since the Commission has failed on two of its heads of claim and the Federal Republic of Germany has failed on the other two heads, the parties should be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by excluding certain categories of recyclable waste from the scope of its legislation on the disposal of waste and by failing to draw up, keep up to date, publish or notify to the Commission within the prescribed period the plans for the disposal of toxic and dangerous waste for certain regions, the Federal Republic of Germany has failed to fulfil its obligations under Directives 75/442 and 78/319;
2. For the rest, dismisses the application;
3. Orders the parties to bear their own costs.

Rodríguez Iglesias

Schockweiler

Gulmann

Mancini

Moitinho de Almeida

Murray

Edward

Puissochet

Hirsch

Delivered in open court in Luxembourg on 10 May 1995.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President