

OPINION OF MR ADVOCATE GENERAL LENZ  
delivered on 22 November 1984<sup>1</sup>

*Mr President,  
Members of the Court,*

A. The case on which I shall now express my views once again centres on the directive on the disposal of waste oils (Official Journal 1975 L 194, p. 23 *et seq.*), which is familiar from other proceedings.

In France — as the Court will also recall — Decree No 79/981 of 21 November 1979 and two implementing orders of the same date were issued to give effect to the directive, as was (a point of which the importance has emerged only in the present case) an order of 21 May 1980 on the conditions governing the specifications for, and operation of, heating installations which burn waste oil.

Although initially the burning of waste oils in France was forbidden by an order of November 1956, the legislation introduced in 1979 provided that only undertakings holding a ministry permit were authorized to dispose of waste oils. Article 7 of the decree and Article 2 of the implementing order on the disposal of waste oils placed the emphasis on regeneration, and — under a 1980 order — waste oil may be burned only in approved installations which incorporate special safeguards. Furthermore, the unauthorized burning or unlicensed disposal of oil is an offence under Article 24 of the Law of 15 July 1975 on the disposal of waste.

The defendant in the main proceedings is an association founded under the Law of 1 July 1901 which represents the interests of manufacturers, dealers and users of stoves and

heating plant which can burn both heating oil and waste oils. Having regard to the legislation mentioned earlier, the Procureur de la République [Public Prosecutor] attached to the Tribunal de Grande Instance [Regional Court], Créteil, came to the conclusion that the Association was inciting the commission of an offence within the meaning of the Law of 15 July 1975. It was thereby pursuing an illegal purpose and was thus a nullity which should be dissolved pursuant to Article 3 of the Law of 1901.

To that end, the Procureur de la République instituted proceedings before the Tribunal de Grande Instance, Créteil. As the 1979 decree and its implementing orders had been issued to give effect to the directive mentioned earlier, in the course of the proceedings, the defendant raised the question whether the directive afforded a legal basis for the prohibition of the burning of waste oil (which, in its opinion, was not the case). In addition, it seems that doubts were expressed as to the validity of the directive, inasmuch as there was a possibility of conflicts, not covered by Article 36 of the EEC Treaty, between the zoning arrangements of the directive and the principle of the free movement of goods, between the provision for indemnities to be granted to undertakings engaged in the collection and/or disposal of waste oil and the principle of free competition, and between the requirement of special authorization and the principle of freedom of trade.

In view of those considerations, the court before which the action was brought sees problems in the interpretation of the directive in pursuance of which the French legislation in question was adopted, especially as regards whether it affords a

<sup>1</sup> — Translated from the German.

legal basis for the prohibition of the burning of waste oil. It also sees problems concerning the validity of the directive in the light of the arguments and the legal principles relied upon by the defendant, which — should the latter's contentions be upheld — would entail the result that the French legislation was devoid of any legal basis. The court therefore, by judgment of 23 March 1983, stayed the proceedings before it and submitted the following questions for a preliminary ruling under Article 177 of the EEC Treaty:

Is [Council] Directive [No 75/439/EEC of 16 June 1975 on the disposal of waste oils] in conformity with the principles of freedom of trade, the free movement of goods and free competition established by the Treaty of Rome, in view of the fact that Articles 5 and 6 of [that] directive empower the administrative authorities of the States to draw up zones which are assigned to one or more undertakings approved by those authorities and charged by them with the collection and disposal of waste, and the fact that Articles 13 and 14 authorize the granting of subsidies?

In addition, does the directive provide legal grounds justifying the prohibition of the burning of waste oils?

B. In the light of the submissions made to this Court, the following comments on those questions are called for:

1. *Validity of the directive*

It has been rightly stressed that, in view of the arguments adduced in proceedings before the national court, the question at issue is not whether the directive *as a whole* is invalid, but rather whether certain parts of it should be regarded as invalid.

The first point concerns Article 5, under which Member States may divide their territory into zones and authorize one or more undertakings in each zone to collect and/or dispose of waste oil, in such a way

that other undertakings are prevented from carrying out those operations.

The second point concerns Article 6, under which the disposal of waste oil may be carried out only by undertakings which, after inspection of their installations and imposition of the conditions dictated by the current state of technical development, have received a permit (which means that undertakings whose installations fail to comply with certain requirements are excluded from such operations).

The last point concerns Articles 13 and 14, which provide that undertakings engaged in the collection and disposal of waste oils, upon which certain obligations are imposed by Article 5, may be granted indemnities financed by a charge imposed on products which after use are transformed into waste oils, or on waste oils themselves (which is reminiscent of a subsidy paid from public funds).

As is clear from the submissions made in the main proceedings, those legal provisions must be examined in the light of the principles contained in the Treaty on the freedom of trade, the free movement of goods and freedom of competition.

(a) As far as the first of those principles is concerned, it is relevant only in relation to Articles 5 and 6 of the directive. The request for a preliminary ruling contains no further particulars, but the Council is inclined to concentrate on the provisions regarding the *freedom to provide services*, whilst the Commission thinks in terms of the *fundamental freedom to pursue a professional or trade activity*. It is my impression that the national court is alluding to the latter; however, this Court's appraisal should also take account of the Council's view.

(aa) In that regard, it may readily be observed that the principle of the *freedom to provide services* can hardly be used as a basis for challenging the validity of the directive.

It is really not clear how the freedom to provide services might be affected by the provision in the directive requiring disposal undertakings to hold a permit, at least if — and this is a matter for the Member States implementing the directive — permits are issued strictly on the basis of technical criteria and without discrimination, within the meaning of Article 59 of the EEC Treaty. As regards the fact that the directive provides for the establishment of zones in which exclusive rights for collection and disposal may be granted to certain undertakings (in France there are apparently only exclusive *collecting* rights), it is significant that foreign undertakings may also respond to the calls for tenders relating thereto and that, once again, it is the responsibility of the individual Member States to ensure non-discriminatory application of the procedure. Furthermore, it should be remembered in this context that the collection of waste oils is essentially a local activity, not extending beyond national frontiers; at the same time the fact must not be overlooked that Article 5 (as has been made clear in successive judgments) allows no absolute territorial protection, with the result that deliveries by holders and collectors of waste oil to foreign collection undertakings are quite possible.

(bb) If the national court's question in fact raises the issue whether the limitations on the disposal of waste oil encroach upon the basic freedom to pursue a professional or trade activity, it must be acknowledged at the outset that considerations of that nature are perfectly in keeping with Community law. I would refer in that connection to the very considerable body of case-law cited by the Commission regarding the role played by fundamental rights in Community law, and to the fact that the fundamental freedom to engage in commerce or pursue a professional or trade activity is regarded as a general principle of Community law (see, for instance, the judgment in Case 4/73<sup>2</sup>). It should, however, be added immediately

that — as is also clear from the judgments of the Court — rights guaranteed in that manner do not constitute unfettered prerogatives and the protection accorded to them is subject to restrictions dictated by the public interest (see judgment in Case 4/73<sup>2</sup>).

The goals to be pursued within the Community also come into play here.

That being so, it must be conceded at once that in view of the goals pursued by means of the directive at issue here, namely environmental protection and the conservation of energy supplies, it is justifiable, as a matter of principle, to restrict freedom of action regarding the disposal and use of waste oil. I need merely mention — with reference only to environmental protection — the Commission's highly detailed submissions on the enormous problems which arise from the accumulation of large quantities of widely differing types of waste oil and on the particular dangers inherent in the ageing of used oils and of the additives which they contain. Accordingly, it is clear that no one today can countenance merely dumping substances of that kind and that the mere burning of them in conventional installations (even if heating oil is mixed in) cannot be tolerated since dangerous substances thereby find their way into the air.

And even if consideration is given to the further question — imposed by the principle of proportionality which must be observed in this context — whether the measure provided for in the directive appear to be proportionate to the goal pursued, there can still be no misgivings in that regard. That is certainly the case in so far as the directive — characteristically — limits itself to

2 — Judgment of 14 May 1974, Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, [1974] ECR 491.

specifying *goals* and leaves the Member States to determine exactly how they are to be achieved. That applies to Article 2, which refers to the safe collection and disposal of waste oils, to Article 4 (3), which prohibits any processing of waste oils causing air pollution in excess of the level prescribed by existing provisions, and to Article 9, which refers to avoidable risks of water, air or soil pollution. It also applies to Article 6 of the directive which requires a permit to be obtained by undertakings which dispose of waste oils and thereby imposes the requirement of a prior inspection of the installations to be used (specifically in response to the requirement laid down in Article 4 (3)). Not only is it significant that prior inspections are customary in all Member States where perils of that nature are involved, but it is also immediately apparent that it is by that method that efficiency can most readily be achieved, and the risk of irreparable damage entailing great expense avoided.

(b) It might be appropriate to consider the *principle of the free movement of goods*, which is also claimed to be relevant to the appraisal of the validity of the directive, in view of the possibility, under Article 5, of creating zones in which exclusive collection and disposal rights are granted in order to ensure that all waste oil is collected and disposed of.

However, it can easily be demonstrated that in reality Article 5 does not contravene that principle, which is of essential importance to the common market. In the first place, Article 5 is formulated restrictively, that is, it makes provision for the adoption of that measure only in cases where the aims defined in Articles 2, 3 and 4 of the directive *cannot otherwise* be achieved, which means that the circumstances must be such that less restrictive measures would be

impossible. It is also especially important that the wording of the provision in no way indicates that absolute territorial protection is contemplated; it must, rather, be interpreted in the light of the seventh recital in the preamble to the directive, that is to say, in such a way that no barriers to intra-Community trade are created. That is why the Court of Justice expressly held (in Case 172/82<sup>3</sup>) that although the provision authorizes the grant of exclusive collection or disposal permits, it does not permit the establishment of barriers to exports; the directive does not in fact permit the prohibition of exports to disposal undertakings duly approved in other Member States (and, in view of what has emerged from Case 173/83<sup>4</sup>, it may also be stated that deliveries to collection undertakings lawfully operating in other Member States may not be prohibited either).

The foregoing of course sheds no light on the question — which is, indeed, not the subject of the present proceedings — whether the French legislation implementing the directive does not perhaps have excessively far-reaching effects on the free movement of goods and cannot therefore be regarded as covered by the directive.

(c) Lastly, in the context of the first question, consideration must be given to the *principle of free and fair competition*, which, in the opinion of the national court, might be affected by the possibility of indemnities financed by a levy being granted to collection and disposal undertakings.

3 — Judgment of 10 March 1983, Case 172/82, *Syndicat national des fabricants raffineurs d'huile de graissage and Others v Groupement d'intérêt économique 'Inter-Huiles' and Others*, [1983] ECR 555.

4 — Opinion of the Advocate General in Case 173/83, *Commission of the European Communities v French Republic*, [1985] ECR 491.

However, there are no real grounds for doubt as to the validity of the directive in that respect either. The Commission has rightly argued that the prohibition imposed by the Treaty on State-funded aid is not absolute but is moderated by certain factors and, as Articles 92 to 94 show, derogations are permissible. It is also important to note that the indemnities allowed under Articles 13 and 14 of the directive are not mere subsidies; in fact, they are intended as a *quid pro quo* for obligations imposed on certain undertakings in the public interest. A further significant point is that Article 13 establishes a clear limit: the indemnities must not exceed annual uncovered costs actually recorded by the undertaking, taking into account a reasonable profit. Even here, it is expressly mentioned that they must not be such as to cause any significant distortion of competition.

There can therefore really be no question of a breach of the principles of competition law resulting from the formulation of the directive. That point was, indeed, conceded by the Court of Justice itself, in Case 172/82<sup>3</sup> (in so far as it held that prohibitions on exports cannot be regarded as satisfying an economic requirement, precisely because Articles 13 and 14 of the directive permit the granting of indemnities).

(d) All in all, there appears to be no foundation for the view that the directive is invalid. Indeed, the defendant in the main proceedings admitted as much during the oral procedure, thereby making it clear that

its criticism is aimed not so much at the directive itself as at the way in which it has been implemented in France, a matter which — as previously observed — is not at issue in these proceedings.

2. *Interpretation of the directive* in relation to the question whether it provides a legal basis for the prohibition of the burning of waste oil.

It should be noted at the outset that, in view of the legal position in France under consideration here, the question should be construed more narrowly. The situation is that French law — by virtue of Article 7 of the decree of 21 November 1979 — merely gives priority to the recycling of waste oil in preference to burning. The burning of waste oil is thus not completely excluded, but is, by virtue of the order of May 1980 mentioned at the beginning, limited to specific industrial installations.

There is thus no need to analyse in detail the merits of the French Government's view that Article 3 of the directive leaves the choice open between the recycling and the burning of waste oil and that it is therefore permissible — if a Member State has opted for recycling — to rule out burning altogether. None the less, it should be stated that that view does not reflect a correct understanding of the directive; rather, it must be assumed that the two possibilities specified in Article 3 are supposed to rank equally, and it therefore seems hardly justifiable to maintain that, since the directive is silent as to how to give effect to the two possibilities, Member States may draw the line between recycling and combustion exactly as they please.

<sup>3</sup> — Judgment of 10 March 1983, Case 172/82, *Syndicat national des fabricants raffineurs d'huile de graissage and Others v Groupement d'intérêt économique 'Inter-Huiles' and Others*, [1983] ECR 555.

In the first place, it is clear from the directive — and I now address myself to the problem raised by the second question — that the disposal of waste oil (which, under Article 3, includes combustion) may be undertaken only by a person holding a permit in accordance with Article 6.

Where no permit has been granted, the prohibition of burning rightly prevails. The directive also makes the following unequivocal provisions: waste oils are to be disposed of safely (Article 2); any processing of waste oils causing air pollution which exceeds the level prescribed by existing provisions is to be prohibited (Article 4 (3) — and the provisions referred to doubtless include national provisions as well); disposal is to be carried out in installations which are in keeping with the current state of technical development (second paragraph of Article 6); and disposal is to be carried out in such a way as to preclude any avoidable risk of water, air or soil pollution (Article 9). The question is therefore limited to whether those provisions cover legislation of the kind in force not only in France but also in the Federal Republic of Germany (whereby combustion is not permitted except in industrial installations), or whether the meaning and purpose of the directive demand that the only rules which may be laid down must be rules designed to ensure compliance with the aforementioned requirements, with the result that any undertaking which observes them must obtain a permit.

In my view there can be little doubt — in the light of all the submissions made in the proceedings — that the first proposition is to be preferred. It is important to note — and the information, supported by tables, given by the Commission and the German Government leaves no room for the slightest doubt — that if waste oil is simply burnt in normal, conventional installations (even those fitted with special burners) a large volume of dangerous substances escapes into the air. That problem cannot be dealt with by laying down rules and standards, on account of the very varied composition of waste oils. Furthermore, because of the costs involved, small installations cannot be equipped with purification devices which eliminate harmful fumes, as required by the directive. In addition, there is still the problem of supervision, which is essential for the effective enforcement of the directive. It would be wholly unrealistic to imagine that small-scale combustion plants (of which there are apparently several hundred thousand throughout the Community) could be reliably supervised.

The only possible reply to the second question, therefore — even though it may be doubted whether the directive at issue allows total prohibition of oil-burning — is that the directive does allow restrictions on that method of disposal of waste oil whereby the burning of waste oil is confined to large-scale installations capable of being reliably supervised, where the fitting of the requisite protective devices is not precluded on economic grounds.

C. Accordingly, the answers to be given to the questions submitted by the Tribunal de Grande Instance de Créteil are that no grounds have been disclosed which might warrant doubts as to the validity of the directive and that the directive does indeed provide a legal basis for restrictions on burning as a means of disposing of waste oil.