OPINION OF ADVOCATE GENERAL JACOBS

delivered on 10 January 1991 *

Mr President,
Members of the Court,

1. In these proceedings the Commission seeks a declaration that, by prohibiting the storage, tipping or dumping in Wallonia of waste from other Member States or from Belgian regions other than Wallonia, the Kingdom of Belgium has failed to fulfil its obligations under

(1) Council Directive 75/442/EEC on waste (OJ 1975 L 194, p. 39);

(2) Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (OJ 1984 L 326, p. 31);

(3) Articles 30 and 36 of the EEC Treaty.

2. The prohibitions complained of by the Commission are to be found in a decree of the Walloon Regional Executive of 19 March 1987 concerning the disposal of certain waste products in the Region of Wallonia (*Moniteur Belge* of 28 March 1987, p. 4671). Article 1, paragraph 1, as amended by Article 130 of the decree of 23 July 1987 (*Moniteur Belge* of 29 September 1987, p. 14078), prohibits the storage, tipping or dumping of waste from a foreign country in authorized depots, stores and tips in Wallonia, except in depots annexed to an installation for the destruction, neutralisation and disposal of toxic waste. Article 1, paragraph 2, forbids waste disposal undertakings to permit the storage etc. of foreign waste on their premises. Under Article 2, derogations from Article 1 may be granted by the Walloon Regional Executive for a limited period not exceeding two years and must be justified by reference to serious and exceptional circumstances. Under Article 3, the storage, tipping or dumping of waste from the other Belgian regions, namely Flanders and Brussels, is also prohibited, but exceptions may be made in accordance with agreements to be made with those other regions. In addition, under Article 4, public or private persons who produce, collect or remove waste may request derogations from Article 3. Under Article 5, paragraph 1, waste from a foreign country or another region means waste which is not produced in Wallonia.

3. The decree of 19 March 1987 repealed and replaced a decree of 17 Mai 1983

* Original language: English.

(*Moniteur Belge* of 14 June 1983, p. 7717) which contained substantially similar provisions. It is not disputed that the effect of the decree of 19 March 1987 is to impose a global ban on the importation of all waste products into Wallonia, subject only to the exceptions contained in the decree and to the possibility of further derogations.

4. The Commission alleges breach of two Community directives. The first of these, Directive 75/442 on waste, sets out a number of general provisions and general principles regarding waste disposal. Member States are required to take appropriate steps to encourage the prevention, recycling and processing of waste (Article 3) and to take the necessary measures to ensure that waste is disposed of without endangering human health or harming the environment (Article 4). Member States are to establish or designate the competent authority or authorities to be responsible, in a given zone, for the planning, organization, authorization and supervision of waste disposal operations (Article 5). Any installation or undertaking treating, storing or tipping waste on behalf of third parties must obtain a permit from the competent authority (Article 8) and shall also be subject to periodic inspections by the latter (Article 9). Undertakings transporting, collecting, storing, tipping or treating their own waste, and those which collect or transport waste on behalf of third parties, are also to be subject to supervision by the competent authority (Article 10). 'Waste' is broadly defined in Article 1(a) as any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force.

5. Directive 84/631, as amended by Council Directive 86/279/EEC (OJ 1986 L 181, p. 13) and Council Directive 87/112/EEC (OJ 1987 L 48, p. 31), establishes a system of supervision and control of the transfrontier shipment of hazardous waste. Where a holder of waste intends to ship it from one Member State to another, or to have it routed through one or more Member States, he is required to notify the competent authorities of the Member States concerned by means of a uniform consignment note (Article 3). The shipment may not be carried out before the competent authorities have acknowledged receipt of the notification. The competent authorities of the Member State of destination or transit may, within one month of notification, object to the shipment. Any such objections must be 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 directive and other Community instruments (Article 4). The directive covers (with certain minor exceptions) toxic and dangerous waste as defined in Council Directive 78/319/EEC on toxic and dangerous waste (OJ 1978 L 84, p. 43) and PCB as defined in Council Directive 76/403/EEC on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (OJ 1976 L 108, p. 41).

Breach of the directives

6. The Commission argues that no provision of the two directives permits a Member State to adopt prohibitions of the kind contained

in the decree of 19 March 1987. It adds that such prohibitions are contrary to the scheme and objectives of the directives which are essentially designed to ensure the free movement of waste products while protecting health and the environment.

7. Belgium replies that if no specific provision permits the ban, none excludes it either, and argues that the ban is compatible with the essential objective of both directives, namely, the protection of human health and of the environment.

8. In my view, breach of Directive 75/442 has not been established. It is true that the objective of the directive, as its first recital indicates, is not only the protection of health and the environment, but also the prevention of disparities in national laws which may create unequal conditions of competition and affect the operation of the common market: it can thus be said to take as its point of departure the free movement of goods. However, beyond that the directive merely establishes a general framework of rules for the supervision of waste disposal operations: it contains no substantive provision which is specifically concerned with inter-State trade in waste products or which expressly or by necessary implication excludes the type of measure adopted by the Walloon Regional Executive.

9. The position is different as regards Directive 84/631. That directive also, as the fourth recital indicates, seeks to ensure that differences between the provisions on disposal of hazardous waste do not distort conditions of competition and thus directly affect the functioning of the common market. But, in contrast to Directive 75/442, Directive 84/631 is also specifically concerned with the transfrontier movement of dangerous waste, setting up a detailed, uniform system of supervision and control, including in particular the obligatory prior notification of intended shipments. In my view, the fact that the directive has opted for a system of prior notification, under which the onus is on the Member State of destination to raise objections, of itself excludes the possibility of adopting an alternative system of control such as a general prohibition on imports, subject to the possibility of derogations.

10. The fact that Directive 84/631 provides for objections by the Member State of destination suggests that the directive *does* envisage the possibility of restrictions on the importation of dangerous waste. However, the wording and scheme of the provisions relating to notification and to objections make it plain that any such restrictions must be limited in scope. The text of Article 3, and in particular the reference to the information which must be contained in the consignment note, indicates that the prior notification procedure relates to the intended shipment of a specific consignment of waste. Under Article 4(1), objections must be raised not later than one month after receipt of the notification, that is to say the notification of

the intended shipment by means of the consignment note. In my view, it follows that any objections raised by the Member State of destination must relate to the specific consignment which is the object of the notification, and must relate to the information concerning the consignment which is contained in the consignment note. Thus a Member State might, for instance, delay a shipment if it is not satisfied as to the measures taken to ensure safe transport, or that the consignee of the waste has adequate technical capacity for the disposal of the waste in question, matters on which the holder of the waste is required to provide satisfactory information (Article 3(3), third and fourth indents). However, these provisions exclude a global, a priori ban on the influx of waste.

11. This interpretation of the relevant provisions is supported by the objective of the directive, which inter alia is to ensure that the system of supervision and control of the transfrontier shipment of hazardous waste should neither create barriers to intra-Community trade nor affect competition (sixth recital). It is also, as I shall suggest, supported by Article 30 of the Treaty.

12. I am therefore of the opinion that the Commission has succeeded in establishing a breach of Directive 84/631.

Breach of Article 30 of the Treaty

13. In its application the Commission seeks a declaration that the Kingdom of Belgium has infringed Article 30 and Article 36 of the Treaty. Since it is Article 30 which contains the substantive prohibition, to which Article 36 merely sets out a number of exceptions, I consider that it is inappropriate to plead an infringement of Article 36 as such. I will therefore proceed on the basis that the issue is one of a breach of Article 30 only.

14. The Commission argues that the ban on the storage, tipping and dumping of waste from other countries plainly amounts to a measure of equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty. It also argues that reliance on Article 36 is excluded because the directives institute a uniform, harmonized system of supervision of waste disposal and of inter-State movement of waste which excludes any residual power on the part of the Member States. It adds that in any event the ban on imports of waste from other Member States constitutes a means of arbitrary discrimination within the meaning of the second sentence of Article 36, since there is no reason to believe that waste from other Member States is more dangerous than that produced in Wallonia.

15. Belgium contends that waste — at any rate when it cannot be recycled or re-used — has no commercial value and therefore cannot be considered to fall within the scope of the provisions relating to the free movement of goods. It relies in this respect on the Court's judgment in Case 7/68 *Commission* v *Italy* [1968] ECR 423, where it is stated, at page 428, that by goods within the meaning of Article 9 of the Treaty 'there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions'. Belgium also points out that the

prohibitions in the decree affect not only waste produced in other Member States, but also that from other Belgian regions. Finally, Belgium argues that the ban is justified under Article 36 and that it must be seen as an urgent and temporary safeguard measure which was taken to prevent Wallonia becoming 'the dustbin of Europe' as a consequence of influxes of waste from countries where disposal is more tightly regulated and more highly taxed.

16. In my view, the Treaty provisions on free movement of goods must be taken to apply to all types of waste product, even those which cannot be recycled or re-used. While it is clear that such products have no intrinsic commercial value — indeed, they rather have a negative value — they clearly form the subject of commercial transactions in that waste disposal undertakings are paid to dispose of them. Indeed, as the Commission agent pointed out at the hearing, a substantial industry is devoted to the disposal of waste products. Account must also be taken of the purpose of the Community provisions on the free movement of goods, namely the removal of all internal frontiers: the acceptance that certain classes of product do not benefit from these provisions would in practice entail the re-erection of internal frontiers. I would add that this view appears to be supported by the Court's judgment in Case 172/82 *Fabricants Raffineurs d'Huile de Graissage* v *Inter-Huiles* [1983] ECR 555 in which the Court ruled that the Community rules on the free movement of goods and Council Directive 75/439 on the disposal of waste oils do not allow a Member State to organize a system for the collection and disposal of waste oils within its territory in such a way as to prohibit exports to an authorized disposal or regenerating undertaking in another Member State.

17. Once it is accepted that all waste is covered by the Treaty provisions on free movement of goods, then it is in my view plain that a measure which, by prohibiting the storage, tipping and dumping of waste, has the effect of restricting imports of waste from other Member States, must be viewed as a measure of equivalent effect. In that regard, it is irrelevant that the ban also extends to waste from other Belgian regions. The fact that a measure restricting intra-Community trade also restricts trade as between the regions of the Member State concerned cannot have the effect of removing the measure from the scope of Article 30. Moreover, as already mentioned, exceptions to the ban are possible by virtue of agreements made with the other Belgian regions, a possibility which does not exist in respect of imports from other Member States. In any event, as the Commission points out in answer to a written question from the Court, the ban on imports from other Belgian regions is capable of reinforcing the ban on imports from other Member States, in that it will prevent the treatment of waste from other Member States in the Flanders or Brussels regions, followed by final disposal in Wallonia.

18. It is in my view also irrelevant that by virtue of Article 2 of the decree derogations may be granted to the prohibition on the influx of waste from other countries. According to well-established case-law, the mere requirement that importers and traders must comply with certain administrative formalities may itself constitute a measure having an effect equivalent to a quantitative restriction (see, for example, Case 82/77 *Van Tiggele* [1978] ECR 25).

19. The question then arises whether reliance on Article 36 is possible. Directive 75/442, which contains only a general framework for the supervision of waste disposal, does not in my view displace Article 36. However, I consider that Directive 84/631 does exclude reliance on Article 36, at any rate as regards the categories of *dangerous* waste covered by that directive. As already stated, Directive 84/631 establishes a detailed, uniform system for the supervision and control of the transfrontier shipment of dangerous waste. As the Court has indicated, where in application of Article 100 of the Treaty, Community directives provide for the harmonization of measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive. (See Case 5/77 *Tedeschi* [1977] ECR 1555, at paragraph 35; Case 148/78 *Ratti* [1979] ECR 1629, at paragraph 36).

20. In my view it is not in any event open to Belgium to rely on Article 36 in order to restrict imports of non-dangerous waste. According to well-established case-law, Article 36 must be interpreted restrictively (see, for example, Case 46/76 *Bauhuis* [1977] ECR 5), and I therefore do not think it possible to adopt a wide interpretation of the 'human health' exception so as to permit restrictions on substances which do not threaten health or life but at the most 'the quality of life'. Nor is it possible to rely on the 'mandatory requirements' exceptions to Article 30, which include the protection of the environment (see Case 302/86 *Commission* v *Denmark* [1988] ECR 4607). Those exceptions can be invoked only for measures which are not discriminatory. But the measure in question, which favours waste produced in one region of a Member State, is plainly not indistinctly applicable to domestic and imported products.

21. The result is that Belgium might in principle rely on Article 36 only in relation to the categories of dangerous waste excluded from the scope of Directive 84/631, such as the radioactive waste excluded by Article 3 of Directive 78/319, or the chlorinated and organic solvents excluded by Article 2(1)(a) of Directive 84/631. Without it being necessary to consider the possible justification for restrictions on the imports of such products into Wallonia, it is sufficient to say that a global, a priori ban on imports of waste from other Member States is clearly neither necessary nor proportionate

to avert any danger to public health which might be posed by those products.

22. Before concluding, I will deal briefly with certain arguments of a general nature which were developed by Belgium at the hearing in this case.

23. Belgium argues that the measure adopted by the Walloon Regional Executive is compatible with certain principles concerning waste disposal which are established in international law and which are about to be adopted into Community law. These are, first, the principle of self-sufficiency in waste disposal and, secondly, the principle of proximity, i. e. that waste should be disposed of as near as possible to the place of production so as to reduce to a minimum the transportation of waste. Belgium contends that these principles are laid down in the Basle Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, which has been signed by the Community, and that they are recognized in the Council Resolution of 7 May 1990 on waste policy (OJ 1990 C 122, p. 2) and in the Commission's proposal for a Council regulation on the supervision and control of shipments of waste within, into and out of the European Community, submitted by the Commission on 10 October 1990 (OJ 1990 C 289, p. 9).

24. The preamble to the Council Resolution of 7 May 1990 states that it is important for the Community as a whole to become self-sufficient in waste disposal and that it is desirable for Member States individually to aim at such self-sufficiency (fifth recital). Paragraph 7 of the resolution accordingly calls for the development of an adequate and integrated network of disposal facilities in the Community on a regional or zonal (but not a national) level so as to facilitate the disposal of waste in one of the nearest suitable facilities. In addition the preamble to the resolution (seventh recital) and paragraph 11 call for the reduction to a minimum of movements of waste. However, even if the resolution were a binding instrument, there is in my view nothing in these statements to justify a measure as far-reaching as that adopted by the Walloon Regional Council.

25. The proposal for a regulation is designed inter alia to implement the Basle Convention. It is based on Articles 100A and 113 of the Treaty and is intended to replace Directive 84/631. The eighth recital to the proposal states that Community strategy for waste disposal is based on the reduction of shipments of waste to strict essentials. Title II of the draft regulation, which is concerned with the movement of waste within the Community, reinforces the system of prior notification laid down in Directive 84/631. Under Article 4(1) to (3) of the draft it will be open to either the Member State of dispatch or that of destination to object to a transfer of waste, and if necessary to refuse authorization, if there is an authorized and suitable waste disposal centre significantly nearer than the one chosen by the notifier. While this system is certainly more restrictive than that currently provided for in Directive 84/631, even if the draft regulation

were currently in force, it could not be relied on as a basis for the general prohibition instituted by the Walloon Regional Executive.

26. I would add that, in my view, there is no incompatibility in principle between the Treaty provisions on the free movement of goods and the principles of self-sufficiency and proximity, provided that those principles are applied in a Community as opposed to a purely national framework: that indeed appears to be the intention both of the Council Resolution and of the draft regulation referred to. Accordingly, these final arguments do not affect the conclusion I have reached.

27. Although, as I have indicated, the Commission has in my view not established a breach of Directive 75/442, I consider that it has succeeded on the substance of its case and that it is therefore entitled to the costs of the action.

Conclusion

28. Accordingly, I am of the opinion that the Court should:

(1) declare that by prohibiting the storage, tipping or dumping in Wallonia of waste from other Member States and, insofar as waste originating in other Member States is concerned, from Belgian regions other than Wallonia, the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 84/631/EEC and Article 30 of the EEC Treaty;

(2) For the rest, dismiss the application;

(3) Order the Kingdom of Belgium to pay the costs.