OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 23 September 2004 [1]

I — Introduction

1. In these proceedings brought under Article 226 EC the Commission seeks a declaration from the Court that Ireland has failed to take adequate measures to ensure the correct implementation of Articles 4, 5, 8, 9, 10, 12, 13 and 14 of Council Directive 75/442/EEC of 15 July 1975 on waste, [2] as amended by Council Directive 91/156/EEC [3] (hereinafter: the waste directive). In addition, it seeks a declaration that by failing to provide information requested by the Commission on 20 September 1999 in relation to a waste operation at Fermoy, County Cork, Ireland has infringed its obligations pursuant to Article 10 EC.

2. The case is based on a series of complaints received by the Commission between 1997 and 2000 from Irish citizens on a number of incidents involving the deposit of waste allegedly in violation of the provisions of the waste directive. By its action the Commission not only requests the Court to establish that Ireland has failed to comply with its obligations under the waste directive in each of these individual cases, it also maintains that these cases provide the basis for a declaration by the Court that there has been a general and structural infringement of the waste directive by Ireland.

3. The Commission's request is obviously important from a point of view of enforcing Community law and ultimately affects the way in which it is able to perform its duty under Article 211 EC to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. As things stand it is for the Commission to prove that a given factual situation exists and that this situation is contrary to the obligations lying on the Member State concerned under Community law. This implies that factual situations which have not been dealt with in the context of infringement proceedings before the Court formally need not be regarded as

1 — Original language: English.
2 — OJ 1975 L 194, p. 39.
3 — OJ 1991 L 78, p. 32.

instances of non-compliance until this has been established by the Court in proceedings under Article 226 EC. As a result, certain unsatisfactory situations of non-compliance with Community law may persist until the Commission has gathered sufficient information to initiate infringement proceedings.

4. Having to act against many instances of non-compliance obviously increases the burden on the Community's law enforcement machinery and impedes the effectiveness of that machinery. This, by the way, is a problem which is not restricted to the field of the environment. I need only to refer to a field such as public procurement where successive instances of non-compliance with the relevant directives by the same Member State have been brought before the Court. In these cases the Court can only establish *ex post facto* that the directives concerned have not been complied with in the particular case. This approach not only does not provide an effective remedy in the given situation, more importantly it does not address basic underlying structural problems of non-compliance with the directives concerned in a Member State. The Community institutions are restricted to what in German is referred to as 'Kurieren am Symptom'. This explains why it is important to consider the possibility of inferring from a series of factual situations that there may be a situation of structural non-compliance by a Member State. A finding by the Court that this is the case would open the way to more effective enforcement of Community law obligations against Member States.

II — The Waste Directive

5. The core obligation for the Member States under the waste directive is to ensure that waste is recovered or disposed of without endangering human health and without using processes and methods which could harm the environment (Article 4, first paragraph). To this end it requires them to impose certain obligations on all those dealing with waste at various stages. Thus, in what the Commission describes in its application as 'a seamless chain of responsibility', the Directive imposes obligations on holders of waste, collectors and transporters of waste and undertakings which carry out waste disposal or recovery operations. Holders of waste must ensure, where they do not recover or dispose of it themselves, that it is handled by a public or private waste collector or by a disposal or recovery enterprise (Article 8). Dumping and uncontrolled disposal of waste are to be prohibited (Article 4, second paragraph). Undertakings which collect or transport waste on a professional basis must at least be registered with the competent national authorities (Article 12), whereas undertakings carrying out disposal or recovery operations must obtain a permit from these authorities (Articles 9 and 10). These undertakings are

to be inspected periodically by the competent authorities (Article 13) and, in order to facilitate these inspections, they must keep records of their activities in respect of waste (Article 14). With a view to achieving self-sufficiency in waste disposal both at Community and national level, the directive instructs the Member States to take appropriate measures to establish an integrated and adequate network of disposal installations (Article 5).

6. The date for fully implementing the original waste directive, Directive 75/442, expired in July 1977, whereas the amendment of the directive by Directive 91/156 should have been implemented by 1 April 1993.

7. The exact content of the provisions at issue in this case is as follows:

8. *Article 4*

Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

— without risk to water, air, soil and plants and animals,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.

11. *Article 5*

1. Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations,

taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialized installations for certain types of waste.

2. The network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.

Article 8

Member States shall take the necessary measures to ensure that any holder of waste:

— has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B, or

— recovers or disposes of it himself in accordance with the provisions of this Directive.

Article 9

1. For the purposes of implementing Articles 4, 5 and 7, any establishment or undertaking which carries out the operations specified in Annex II A must obtain a permit from the competent authority referred to in Article 6.

Such permit shall cover:

— the types and quantities of waste,

— the technical requirements,

— the security precautions to be taken,

— the disposal site,

— the treatment method.

2. Permits may be granted for a specified period, they may be renewable, they may be subject to conditions and obligations, or, notably, if the intended method of disposal is unacceptable from the point of view of environmental protection, they may be refused.

Article 10

For the purposes of implementing Article 4, any establishment or undertaking which carries out the operations referred to in Annex II B must obtain a permit.

Article 12

Establishments or undertakings which collect or transport waste on a professional basis or which arrange for the disposal or recovery of waste on behalf of others (dealers or brokers), where not subject to authorization, shall be registered with the competent authorities.

Article 13

Establishments or undertakings which carry out the operations referred to in Articles 9 to 12 shall be subject to appropriate periodic inspections by the competent authorities.

Article 14

All establishments or undertakings referred to in Articles 9 and 10 shall:

— keep a record of the quantity, nature, origin, and, where relevant, the destination, frequency of collection, mode of transport and treatment method in respect of the waste referred to in Annex I and the operations referred to in Annex II A or B,

— make this information available, on request, to the competent authorities referred to in Article 6.

Member States may also require producers to comply with the provisions of this Article.

III — Complaints filed with the Commission

8. As indicated above the background to this case was formed by a series of 12 complaints received by the Commission between 1997 and 2000 concerning some 18 waste disposal incidents in Ireland.

(1) The first of these complaints concerned the disposal of construction and demolition waste by Limerick Corporation on wetlands in LimerickCity without a permit (registered by the Commission as complaint P1997/4705).

(2) By the second complaint it was claimed that very large amounts of organic waste had been stored without a permit in lagoons at Ballard, Fermoy, CountyCork and disposed of elsewhere by a private company (P1997/4792).

(3) The third complaint related to the operation of a commercial waste transfer station at Pembrokestown, County Wexford, for several years, despite a waste permit having been refused on environmental grounds and without sanctions having been imposed (P1997/4847).

(4) The subject of the fourth complaint was the operation of a municipal landfill at Powerstown, County Carlow since 1975 without a waste permit. It was observed that the facility was the cause of a range of environmental problems (P1999/4351).

(5) The fifth complaint raised the problem of the unauthorised operation of a private waste facility at Cullinagh, Fermoy, County Cork, consecutive applications for a permit having been rejected between 1991 and 1994 (P1999/4478).

(6) The sixth complaint concerned the unauthorised dumping of large quantities of rubble waste on a green area at Poolbeg Peninsula, Dublin, and the operation of a waste processing plant in the same area for a number of years without a permit (P1999/4801).

(7) The seventh complaint claimed that since the 1970s Irish local authorities in Waterford had been operating municipal landfills without a permit at Kilbarry and Tramore, County Waterford, and that these landfills adversely affect places of special interest, the former being located beside a wetland which is a proposed Natural Heritage Area, the latter being located beside a special protection area under Directive 79/409[4] and partially within an area proposed as a special area of conservation within the meaning of Directive 92/43[5] (P1999/5008).

(8) The eighth complaint was directed against the operation of waste facilities without a permit by a private operator since the 1980s in two disused quarries near Portarlington, County Laois, one at Lea, the other at Ballymorris, both within the catchment of the river Barrow which has an important aquifer. Both the local county council and the Irish Environment Protection Agency had failed to enforce the permit requirement (P1999/5112).

(9) The ninth complaint related to inter alia the unauthorised dumping since 1990 of construction and demolition waste and other waste on the foreshore at Carlington Lough, Greenore, County Louth, in an environmentally sensitive area (P2000/4145).

(10) In the tenth complaint, attention was drawn to the fact that waste collection in the municipality of Bray, County Wicklow, was conducted by private operators who were neither licensed nor registered and were not subject to inspections. Reference was also made to the discovery of a large amount of hospital waste at an unauthorised disposal site at Glen of Imaal, CountyWicklow (P2000/4157).

(11) The subject of the eleventh complaint was the unauthorised use of municipal landfills at Drumnaboden, Muckish and Glenalla, County Donegal. This landfill was the source of serious environmental pollution, particularly of the river Lennon (P2000/4408).

(12) The twelfth complaint concerned unauthorised disposal of waste, particularly demolition and excavation

4 — Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ 1979 L 103, p. 1.

5 — Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206, p. 7.

waste, which was adversely affecting several wetlands in County Waterford at Ballynattin, Pickardstown, Ballygunner Bog and Castletown (P2000/4633).

These complaints will be referred to in this Opinion by the numbers 1 to 12.

IV — Procedure

9. The Commission addressed formal notices to Ireland in respect of the first three complaints on 30 October 1998, in respect of complaints 4, 6, 7, 8 and 11 on 25 October 2000 and in respect of complaints 5, 9, 10 and 12 on 17 April 2001. It also addressed a separate formal notice to Ireland in respect of complaint 5 on 28 April 2000 for not having duly provided it with the information it had requested contrary to Article 10 EC.

10. Whereas Ireland responded to the letter of formal notice of 30 October 1998, the formal notices of 28 April 2000, 25 October 2000 and 17 April 2001 were not responded to in a global sense. Ireland did however respond to enquiries by the Commission in relation to some of the complaints.

11. The formal notices mentioned were followed by reasoned opinions of 14 July 1999 relating to complaints 1 and 2 and of 26 July 2001 relating to all 12 complaints, both of which invited Ireland to adopt the necessary measures to comply with the reasoned opinion within two months of notification and receipt of it respectively.

12. Considering that Ireland had not taken the requisite measures to comply with its obligations under the waste directive within that period, the Commission introduced the present proceedings, which were registered on 20 December 2001.

13. Given the fact that the first two complaints were covered by both reasoned opinions, the Court requested the Commission by letter of 24 May 2004 to state to what extent, for the purpose of ruling on the application, account must be taken of the reasoned opinion of 14 July 1999. In its written response of 7 June 2004, the Commission indicated that the earlier reasoned opinion had been replaced by the reasoned opinion of 26 July 2001. This means that the whole application must be considered by reference to the second reasoned opinion.

14. The Commission and Ireland presented their oral submissions at the hearing on 6 July 2004.

V — Preliminary observations

A — *Scope of the application*

15. First of all, the scope of application must be determined as this is decisive for the way in which the case must be approached and decided.

16. The Commission emphasises in its application that the Directive creates a 'seamless chain of responsibility for waste' and that its main concern is to ensure that in Ireland this chain of responsibility is fully recognised and made effective. This is also the reason why the Commission chose to group the various complaint investigations together rather than pursuing each one individually. Its action is therefore aimed primarily at establishing that Ireland has failed to comply with its obligations under the waste directives in a general and structural manner. Even though it may be found that Ireland had indeed complied with its obligations in respect of certain situations before the expiry of the time-limit set in the reasoned opinion of 26 July 2001, the Commission maintains that this does not affect its claim that Ireland has infringed its obligations in a more general sense.

17. The Commission indicates further that the complaints cited do not represent unique examples of non-compliance with the waste directive by Ireland and that it reserves the right to cite further illustrations of non-compliance. In its application, under the heading 'information in the public domain', it thus refers to large-scale dumping of waste in County Wicklow (96 cases), identified in a report of 7 September 2001 to the local authorities.

18. Ireland objects to the approach followed by the Commission and states that it is too broad. It maintains that the application should be restricted to the 12 complaints referred to above and that other facts and complaints which were not communicated to it during the pre-litigation procedure, such as the case of dumping in County Wicklow, should not be taken into account. The Court should therefore confine itself to assessing whether the alleged infringement existed in respect of these 12 complaints at the end of the two-month time-limit set in the reasoned opinion of 26 July 2001 and it is for the Commission to adduce sufficient evidence to prove that infringement. It submits that the Court cannot be invited by the Commission to assume that Ireland is in general dereliction of its obligations under the waste directive by reference to specific matters complained of that were unresolved at that date.

19. By presenting its application in this manner the Commission seeks to obtain a

declaration by the Court that Ireland has failed to observe its obligations under the waste directive in a general and structural manner. Instead of regarding the 12 complaints as individual and unrelated infringements of the directive, each of which could have been brought before the Court under Article 226 EC, it wishes to demonstrate that these incidents are part of an underlying pattern. It would appear to me that it certainly cannot be ruled out that, under certain conditions, a pattern of complaints may provide the basis for a finding that a Member State has structurally infringed its Community law obligations. As the Commission pointed out in its reply, if Ireland's argument that the scope of the application is too broad were to be accepted, this could seriously affect its ability to exercise its role as guardian of the Treaty. Although the Commission's request does raise questions as to what must be understood as a structural infringement and how such a situation is to be established, I do not believe that these are reasons to restrict the scope of the present application in the way sought by Ireland.

20. One other aspect of the scope of the application which should be clarified at this stage is that the main emphasis of alleged infringement concerns the application of the provisions adopted by Ireland for the implementation of the waste directive, rather than the transposition of the provisions of the directive into Irish law. In its application the Commission acknowledges that, in adopting the Waste Management Act 1996 and ancillary regulations, the Irish authorities have 'substantially improved' the legislative basis for managing waste in Ireland. The main problems that subsist concern the practical application of the provisions adopted for the transposition of the waste directive. Nevertheless, the Commission does maintain that the transposition of Article 12 of the waste directive is defective. Furthermore, in reaction to Ireland's subsequent observation that the directive has been properly transposed, it states that it does not accept that there are no further defects in the transposition of the directive in Ireland. As these possible further transposition defects have neither been identified nor discussed during the pre-litigation procedure, they cannot be considered in the context of the present application.

21. Finally, as regards the temporal scope of the application the Commission explains that the fact that its action is brought in respect of the non-compliance by Ireland with the waste directive as amended by Directive 91/156, does not imply that activities which pre-date that amendment do not now need to be addressed. There is a continuity of requirements under the original and the amended version of the directive. I agree with this approach to the extent that it applies to activities commenced after the entry into force of Directive 75/442 in 1977.

B — *Plan of discussion*

22. As indicated above, this case raises the more general question as to the possibility of establishing a general and structural failure on the part of a Member State to fulfil its obligations in implementing a Community directive on the basis of a series of complaints relating to incidents of non-compliance. Before considering whether the Commission's application in respect of the implementation of the waste directive in Ireland can be upheld, it would seem appropriate to consider this question on a more abstract level. I will therefore begin my analysis by briefly recalling the general requirements developed in the Court's case-law in respect of the proper implementation of directives and then what these general requirements mean in the context of the waste directive. Next, it should be determined under which conditions it may be established that these requirements have not been complied with in a structural manner. This will be followed by a discussion of the issue of proof. I will then turn to the assessment of the object of the application in the present case, the question whether, by reference to the complaints listed above, Ireland has failed to fulfil its obligations under the waste directive in a structural manner.

VI — Framework for assessment

A — *General requirements of proper implementation* [6]

23. As is well established, although Article 249 EC lays down that directives addressed to the Member States are binding as to the result to be achieved, but leave to the national authorities the choice of form and methods, this does not imply that the process of implementation is left wholly to the discretion of the Member States. In the course of the years the Court has had occasion to formulate a number of standards in order to assess the adequacy of measures adopted by the Member States for the implementation of directives. In setting out these requirements schematically, it is useful to distinguish between two phases in the implementation process: the transposition phase and the operational phase.

24. The transposition phase, in turn, consists of two main aspects: the normative aspect and the organisational aspect.

25. The normative aspect involves absorbing the substantive content of the directive into

6 — I use the term 'implementation' here as an overarching term encompassing transposition of a directive into national legislation and the application and enforcement of these provisions by the national authorities.

national law in sufficiently clear and precise terms within the time schedule set in the directive.[7] The national provisions concerned must be of a binding nature with the same legal force as those which must be amended.[8] Ensuring clarity and precision of provisions implementing a directive is particularly relevant where the directive is intended to create rights and duties for individuals. It is a requirement of legal certainty that transposition measures are sufficiently transparent to enable individuals to ascertain the full extent of their rights under the directive.[9] However, the requirement of precision also applies where a directive is not specifically intended to produce rights for individuals. In that case there is an interest in ensuring that the provisions of the directive are applied correctly by all the authorities concerned within the national legal order.[10] In addition, it must also be clear that the adapted national provisions have a Community origin, so that, if necessary, they may be interpreted in the light of the objectives of the directive and that Community remedies are available in respect of decisions taken pursuant to them.

26. The organisational aspect of implementation is aimed at creating the legal and administrative framework for the proper application and enforcement of the national provisions incorporating the norms contained in the Directive. This involves designating authorities competent for applying these provisions, ensuring that these authorities are endowed with adequate powers, creating facilities for monitoring compliance with these provisions, providing guarantees for legal protection, ensuring the availability of legal remedies, laying down sanctions in case of offences against these provisions and establishing enforcement structures in relation to offences. Directives often provide explicitly for such organisational measures to be taken, but even where they are silent on the matter, it may be inferred from Article 10 EC that the Member States are under an obligation to ensure that such measures are adopted.

27. The operational phase of implementation is the ongoing process in which the objectives of the directive must be secured by the full and active application by the competent national authorities of the national provisions transposing the directive into national law and the credible enforcement of these provisions where they are breached. The implementation process, in other words, is not concluded with the correct transposition of the provisions of the directive and the establishment of the organisational framework for the application of these provisions, it must also be ensured that these two aspects operate in such a way as to achieve in practice the result sought by the directive. As the Court observed in *Marks & Spencer* in a consideration relating to directives in general, 'the adoption of national measures correctly [transposing] a directive does not exhaust the effects of the

7 — See e.g. Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 15.

8 — See, e.g., Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 10.

9 — See, e.g., Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 15 and Case C-197/96 *Commission* v *France*, cited in note 7, paragraph 15.

10 — Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraphs 39 and 44.

directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures'. [11] Although the question of the direct effect of the directive is not at issue in the present proceedings, it is meaningful for the operation of directives in general, that in this judgment the Court went on to assert that individuals are entitled to rely on unconditional and sufficiently precise provisions against the State before the national courts 'whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been [transposed] or has been [transposed] incorrectly, but also where the national measures correctly [transposing] the directive are not being applied in such a way as to achieve the result sought by it'. [12] This latter consideration of the Court confirms that implementation in the wider sense of the word is a continuous process entailing enduring obligations for the Member States.

28. As regards the enforcement of directives or rather, of the national legal provisions in which they are incorporated, I would point out that here too, it follows from both the general obligation to achieve the objective of a directive and Article 10 EC that the steps taken and machinery set in place for this purpose are effective. In my view, effective enforcement means that offenders run a credible risk of being detected and being penalised in such a way as at least to deprive them of any economic benefit accruing from their offence. As I observed earlier this year in an Opinion concerning the common fisheries policy, control effort and the threat of repressive action must generate sufficient pressure to make non-compliance economically unattractive and therefore to ensure that the situation envisaged by the relevant Community provisions is realised in practice. [13] The context of this case may be different, the basic rationale is the same.

29. Beyond the 'paper wall' erected in the transposition phase, the Member States, therefore, are and remain responsible for ensuring that the directive is applied and enforced correctly, in short, that its useful effect is achieved. Any negligence in this respect will not only lead to a situation which is different from that envisaged by the directive, it will also undermine the uniform effect of the directive within the Community and influence the conditions under which market participants operate on the internal market.

30. Where the Commission maintains that one provision of the waste directive, Arti-

11 — Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 27. I would point out that in order to retain the consistency of terminology used in this Opinion, I have replaced the words 'implementation' and 'implemented' with 'transposition' and 'transposed'. Obviously these terms all refer in this context to the adaptation of national legislation to the provisions of a Directive.

12 — Ibid.

13 — Opinion of 29 April 2004 in Case C-304/02 *Commission* v *France*, not yet published in the ECR, paragraph 39.

cle 12, has not been properly incorporated into Irish law, the present case focuses mainly on the organisational aspect of the first phase and the operational phase of the implementation process. It will now be examined what in the light of the previous observations these requirements entail for the waste directive.

B — *Implementation of the waste directive*

31. The waste directive introduces a complete system in respect of the handling of waste with a view to ensuring that waste is treated in a way which is neither harmful to public health or the environment. This is confirmed by the preamble to Directive 91/156, amending the original Directive, which states that the waste directive is aimed at monitoring waste 'from its production to its final disposal'.[14] In order to determine the result to be achieved by the Member States and given the primary objective of the Commission's application, it is necessary to look at the directive as a whole, what it seeks to accomplish and how the various provisions which are at issue in this case fit in to the system.

32. Article 4, first paragraph, which may be regarded as the core provision of the directive, describes this objective in greater detail, providing that 'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular without risk to water, air, soil and plants and animals, without causing a nuisance through noise or odours and without adversely affecting the countryside or places of special interest'. The second paragraph of Article 4 prohibits the abandonment, dumping and uncontrolled disposal of waste. The key instrument for achieving these goals is the requirement laid down in Articles 9 and 10 that, for the purposes of implementing inter alia[15] Article 4, first paragraph, undertakings and establishments carrying out disposal and recovery operations must obtain a permit from the competent authority. Through this instrument the national authorities are able to subject disposal and recovery activities to conditions (which for disposal activities are specified in the directive) aimed at achieving the objectives of Article 4 and to monitor compliance with these conditions. In order to ensure that all waste is processed within this system, obligations are imposed

14 — See the penultimate consideration in the preamble to Directive 91/156, already cited in footnote 3.

15 — Article 9 of the directive also refers to Articles 5 (network of disposal installations) and 7 (waste management plans)

upstream on the holders of waste [16] (Article 8) to ensure that it is handled by a public or private waste collector or by a licensed disposal or recovery undertaking. Otherwise the holder is obliged to recover or dispose of the waste himself in accordance with the provisions of the directive, in particular Article 4. Professional waste collectors, transporters and brokers must, to the extent that they are not subject to authorisation under national law, at least be registered with the competent authorities (Article 12). This also brings them within the system, without prior conditions having to be complied with. Operators within this system must be subject to periodic inspections by the competent authorities and are required to keep records which, on request, must be made available to them (Articles 13 and 14). Finally, and more generally, under Article 5 of the directive, the Member States must ensure that there is an adequate and integrated network of disposal installations on their territory in order to attain self-sufficiency in waste disposal. The reference to Article 5 in Article 9 concerning the licensing of disposal operations implies that licensed undertakings which carry out disposal operations operate within the context of this network.

33. For the sake of completeness, I would also mention that the directive provides for a number of other important elements of the system described above which fall outside the scope of the present application and will not be further discussed: the principle of prevention (Article 3), the designation of authorities (Article 6), drawing up waste management plans (Article 7) and the 'polluter pays' principle (Article 15). The fact that compliance with these provisions is not disputed does not detract from the systematic nature of the alleged failure by Ireland to comply with the waste directive as a whole, particularly as the Commission's action focuses on the key instrument of the directive, the licensing requirement.

34. Where the waste directive provides for a number of specific instruments aimed at ensuring that waste is treated in such a way that public health and the quality of the environment are not endangered, full implementation of the directive implies firstly that these instruments have been created within the national legal order, that these instruments are adequate in order to attain the objectives of the directive and that they are fully operational.

35. The most important of these instruments is the permit requirement in respect of the disposal and recovery operations (Articles 9 and 10), referred to in the Annexes II A and II B to the waste directive, which are carried out within national territory. Given the fact that this instrument is intended to secure the objectives of Article 4

16 — Holders of waste are described in Article 1, subparagraph c, of the waste directive as: the producer of the waste or the natural or legal person who is in possession of it.

of the directive, the way in which it is set up and applied must meet certain quality standards. Proper implementation of the permit requirement, therefore, does not only involve laying down this obligation in national law, it presupposes the existence of an adequate and effective administrative framework for processing applications for permits within reasonable time-limits, for assessing these applications with a view to imposing suitable conditions in respect of the operations involved and having sufficient capacity to monitor compliance with these conditions. An adequate and effective licensing system ensures that the activities falling within its scope are conducted in such a way that the overall objectives of the system are achieved. For newly projected activities this implies that authorisation is sought and granted prior to them being carried out, so that carrying out the activity can be made subject to appropriate conditions; here, the licence has a preventive effect. For existing activities this means that they should be adapted to the extent possible to these objectives under reasonable conditions or phased out, in which case the licensing system has both a preventive and a corrective effect. It also implies that licences are only granted to operators who have the technical means to carry out the waste operations involved. In order to be effective the licensing scheme, finally, should be backed up by adequate sanctions.

36. Article 4, second paragraph, requiring measures to be taken to combat dumping of waste may be deemed to be properly implemented when the prohibition envisaged by the directive is laid down in national law, adequate sanctions are provided for in case of offences and compliance with this provision is monitored in an effective manner.

37. The emphasis of the implementation requirement in respect of Article 8, which imposes obligations on waste holders, would seem to be on the transposition aspect. Laying down this obligation in national law, backed up by the threat of penalties in case of offences, would at first sight appear to be sufficient in order to comply with the directive on this point. In the light of the goal of the waste directive stated in the preamble to Directive 91/156 to monitor waste 'from its production to its final disposal',[17] it is conceivable, however, that there is an implicit obligation for the Member States to make an adequate and accessible infrastructure available to holders of waste in order to facilitate compliance with this obligation and to guarantee that waste is fed into the system described above. It is only where waste is processed within the licensing system that the Member State can exercise its control over the treatment of waste in accordance with the general objectives laid down in Article 4 of the directive. If it is apparent that holders of waste are unable to comply with the obligations laid down in Article 8 due to a lack of such facilities, it would be possible to establish an infringement of this provision by the Member State concerned. In addition Member States must ensure compliance with these obligations by means of adequate enforcement measures.

17 — Already cited in footnote 12.

38. The registration requirement of Article 12 applicable to professional waste collectors, carriers and brokers, too, is intended to permit the competent authorities to monitor the full chain of waste treatment from production to final disposal and to create transparency in this regard. Where the Member States do not subject these operators to authorisation, they must at least be registered. As this provision seeks to ensure that the competent authorities of the Member States have full knowledge of those active at the various stages of processing waste, proper implementation of this provision requires that they set up a registration system and adopt adequate arrangements to ensure that requisite information is provided, the ultimate aim being to be able to inspect the operations concerned, as provided for in Article 13, in order to ascertain that these are being carried out in accordance with the objectives of Article 4.

39. Proper and full implementation of Article 13 on periodic inspections of the operators named in Articles 9 to 12 of the directive presupposes that authorities have been designated and that they possess adequate powers of investigation to carry out this task. This would include, in my view, the power to register offences and to report these to enforcement authorities. As this provision provides for periodicity in the inspections this indicates that control effort is an ongoing activity. It follows from the general obligation of the Member States to guarantee the useful effect of directives that the inspections must also effectively contribute to the realisation of the overall objective of Article 4 of the directive. Not only should they be directed at detecting offences, in a more constructive vein, they should be organised and carried out in such a way as to encourage compliance by the operators concerned with the obligations in respect of handling waste.

40. The obligation under Article 14 of the directive for undertakings and establishments carrying out disposal and recovery operations to keep records and to make them available on request to the competent authorities obviously is necessary to facilitate the periodic inspections referred to in Article 13 of the directive. It is therefore essential that this obligation is clearly and unambiguously laid down in national law as a an obligation for the undertakings concerned.

41. Article 5 of the waste directive contains an obligation of a different type from the provisions discussed above. Whereas the latter focus on the obligations and activities of operators within the chain of waste handling, Article 5 relates to the infrastructure available within the Member State for waste disposal. Proper implementation requires primarily technical measures to be taken to ensure that there is sufficient capacity within the Member State to dispose of waste. This may be derived from the term 'adequate' in this provision and from the obligation of Member States to strive

towards self-sufficiency in this field. 'Adequacy' may be interpreted as meaning that the supply of disposal capacity is sufficient to meet the growing demand for disposal capacity. The condition that the network be 'integrated' implies that disposal installations must operate within a system and that there is a form of coordination within this system aimed at ensuring as much as possible that demand for and supply of disposal capacity are balanced. The reference to Article 5 in Article 9 indicates that this should be achieved through the licensing framework.

42. In my view, these observations, taken together, constitute the standard for assessing whether the waste directive has been properly implemented in the Member States.

C — *Structural infringement of a directive*

43. As I pointed out in paragraph 19, the Commission's application raises the question as to what must be understood as a general and structural infringement by a Member State of its Community law obligations and how it is to be established that such a situation exists. The two aspects converge in a number of criteria which may be used to describe what constitutes a structural infringement. If it is shown that these conditions are fulfilled it may be concluded that the infringement has a structural character. In this respect, I would distinguish between three different dimensions which taken together may point to the general and structural character of an infringement: a dimension of scale, a dimension of time and a dimension of seriousness.

44. The dimension of scale refers to the number of instances in which it is established that the Community law obligations have been infringed. Although isolated cases may in themselves be sufficient to establish an infringement, as is borne out by *Commission* v *Greece* [18] and *Commission* v *Italy* (hereinafter: *San Rocco*), [19] a structural infringement suggests that there is a more general practice or a pattern of non-compliance which is also likely to keep recurring. In the case of a directive it implies that the substantive content of the directive, for whatever reason, is not brought into practice and that the result of the directive is not attained within the Member State. An indication of this might be that the practice is not restricted to a particular locality in a Member State, but is more widespread in that more situations which are contrary to the terms of the directive occur simultaneously within the territory of the Member State.

45. The dimension of time obviously relates to the fact that the situation of non-

18 — Cases C-45/91 *Commission* v *Greece* [1992] ECR I-2509 and C-387/97 *Commission* v *Greece* [2000] ECR I-5047.

19 — Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773.

compliance has existed for a longer period of time after the particular Community obligation has become effective, including reasonable delays for newly introduced instruments, such as a licensing system, becoming fully operational. What is long for the purposes of the application of this criterion cannot be fixed with any precision. I do not consider this to be necessary. Generally speaking, it is quite evident from the particular Community obligation and the result to be attained by the Member States what may be considered to be a reasonable period for complying with an obligation and what circumstances may explain delays in complying with that obligation, even though they may not formally justify the non-observance of a time-limit. At some point in time it becomes manifestly clear that a situation of non-compliance has become persistent. One illustration of such a structural situation of non-compliance which comes to mind is the situation which gave rise to the Court's Judgment in *Commission* v *France,* otherwise known as the *Spanish strawberry* Case. [20] In this case, one of the factors taken into account by the Court in finding that France had infringed its Treaty obligations was the fact that it had failed to take action against citizens obstructing the free movement of goods for a period lasting some 10 years. [21]

46. The dimension of seriousness refers to the degree to which the actual situation in the Member State deviates from the result intended to be achieved by the Community obligation. It is implicit in this aspect that maintaining a situation which is contrary to the Community obligation will have certain adverse effects on the interests protected by the Community law provision concerned and that these effects significantly undermine the attainment of the objectives of the directive. In the case of the waste directive two types of negative effects are conceivable, both of which are related to the basic objectives of the directive. First, quite evidently, not complying with essential provisions of the waste directive entails the risk of damage being inflicted on the environment and thereby, possibly on human health as well. It may not be excluded that this damage is irreparable. The second type of negative effects is that there is a risk of significant distortions of competition on the internal market. Undertakings operating from Member States which fully respect the waste directive most probably will be confronted with higher costs related to the disposal of waste under conditions which comply with Article 4 of the directive than undertakings which are not subject to the same regime. Compliance with the directive implies significant costs being made by both public bodies and private operators, particularly at the initial stages of the introduction of the waste disposal system. This obviously has effects on the competitive position of undertakings.

47. Given the consequences of a finding of general failure to comply with Community obligations, I therefore consider the extent to which such an infringement has had a

20 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959.

21 — At paragraphs 40 to 43. See, too, Advocate General Lenz's Opinion at paragraph 58.

negative effect on the attainment of the objectives of the Community measure concerned to be a factor which should be taken into account. This does not detract from the fact that the Court in its case-law on Article 226 EC has made clear that the fact that non-compliance with Community obligations has not resulted in damage is not a reason to conclude that Community law has not been breached by the Member State. [22] A general situation of non-compliance with Community law obligations necessarily implies the incidence of negative effects.

48. In short, a general and structural infringement may be deemed to exist where the remedy for this situation lies not merely in taking action to resolve a number of individual cases which do not comply with the Community obligation at issue, but where this situation of non-compliance can only be redressed by a revision of the general policy and administrative practice of the Member State in respect of the subject governed by the Community measure involved. Restricting the remedial action to identified cases of non-compliance would after all leave other situations of non-compliance intact until they too have been identified and challenged either by the Commission in new infringement proceedings or by persons affected at national level in proceedings before the national courts. In the meantime a situation contrary to that envisaged by the Community measure persists.

D — *Questions of proof*

49. In this case, which is characterised by an abundance of factual material presented by both parties, the question of proof is of particular importance, particularly in view of the Commission's claim that the various instances of alleged non-compliance with the waste directive testify to a general failure by Ireland to comply with its obligations in this field. Before examining the substance of the present case and given the contestation by Ireland of the veracity of the majority of the Commission's allegations it should, therefore, be considered how the burden of proof is to be divided in this situation, how a situation of general infringement can be established and what moment in time must be used for gauging whether this general failure exists.

50. The Irish Government states that in infringement proceedings under Article 226 EC the burden of proof falls squarely upon the Commission and that it may not rely on presumptions to show that a Member State has failed to fulfil its Community law obligations. It submits that, where a bare allegation is met with a denial, the Commission's case cannot succeed because the

22 — As the Court puts it: 'failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute the breach, and [...] the fact that such a failure had no adverse effects is irrelevant'. See, Case C-209/88 *Commission* v *Italy* [1990] ECR I-4313, paragraph 14 and Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 37.

burden of proof lies at all times upon the applicant. Furthermore, it objects to the Commission's attempt to draw general conclusions as to Ireland's compliance with its Treaty obligations by reference to the specific complaints which form the basis of its application. The Irish Government points out that the Commission has not furnished evidence in the form of studies or figures demonstrating its failure to comply with its obligations under the waste directive. It asserts that the evidence adduced by the Commission does not satisfy the requisite standard of proof demanded by the Court in its judgment in *San Rocco*. [23]

51. The Commission maintains that it has produced compelling evidence in support of the claims which it makes in its application and that this evidence discloses administrative practices and omissions by the Irish authorities which amount to a systematic failure by Ireland to comply with its obligations under the waste directive. The Commission indicates that its approach in this case corresponds to that alluded to by Advocate General Mischo in paragraph 63 of his Opinion in the *San Rocco* Case cited above. After having stated in paragraph 62 of his Opinion that 'where it appears that a directive has been transposed solely in terms of legislation and that the Member State is not ensuring, with the necessary diligence, that it is complied with, the Commission cannot be denied the right to bring an action for failure to comply with obligations under the Treaty', Mr Mischo goes on to observe: 'Such a situation would certainly exist if the Commission established a series of cases of non-application of a directive spread over a certain period'.

52. According to settled case-law, the basic rule on evidence in infringement proceedings under Article 226 EC is that it is incumbent upon the Commission to prove the allegation that a Member State has not complied with its Community obligations. It is the Commission which must provide the Court with the evidence necessary for the Court to establish that the obligation has not been fulfilled, and in doing so it may not rely on any presumption. [24]

53. This basic rule constitutes the point of departure for the examination by the Court of the allegations contained in the Commission's application. The Commission must indeed present convincing evidence of the infringement of the Community law obligations by the Member State concerned and indeed it is logical that a finding of an infringement of Treaty obligations may not be based on a mere presumption. However, it must be realised that when it comes to proving the existence of factual situations

23 — Case C-365/97 cited in footnote 19, paragraphs 78-79.

24 — See, inter alia, Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34; Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6 and Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 26.

within a Member State, such as those at issue in the present proceedings, the Commission depends to a large degree on information from extraneous sources. Unlike a policy area such as the common fisheries policy, the Commission does not possess any powers of verification in the field covered by the waste directive and can only test the veracity of such information by confronting the Member State with this information in the context of the pre-litigation proceedings. In such circumstances I do not think it is reasonable to place the burden of proof wholly on the Commission, as advocated by the Irish Government. Rather, the established rule of evidence in infringement proceedings must be understood as meaning that at the initial stage of proceedings the Commission's application must be substantiated in a credible and convincing manner. If that is the case, then the responsibility shifts to the Member State concerned to present sufficient counter-evidence to refute the Commission's allegations. In other words, the basic rule of evidence is not absolute.

54. This, I believe, is also the approach followed by the Court in *San Rocco*. In this case the Commission had indeed adduced sufficient evidence to prove the allegation of environmental pollution. Where this evidence was based on reports of the national authorities, the Court considered that it was up to the Italian Government to challenge the data produced by the Commission in substance and in detail. As it did not succeed in doing so, the facts alleged were regarded as proven. [25] The burden of proof shifted to the defending Government, not so much because the source of the evidence were national reports, as was argued by the Irish Government, but because that evidence was considered to be sufficient. There is no reason why evidence produced by the Commission based on other sources may not be just as convincing, as a result of which the burden of proof may pass to the defending Government. [26]

55. The second point concerns the question of establishing a general failure to comply with Community obligations on the basis of a series of complaints. Here the focus must be on the three elements set out above. In order to be able to establish a general infringement of the waste directive on the basis of the factual situations raised in complaints to the Commission, assuming that they have indeed been shown to exist, it would be necessary to discern elements common to these complaints which are indicative of a persistent underlying practice. It would have to be demonstrated that the existence of the factual situations which are

25 — Case C-365 97, cited in footnote 19, paragraphs 84 to 87.

26 — Cf., too, Case 272 86 *Commission* v *Greece* [1988] ECR 4875, paragraphs 17-21.

the subject of the various complaints, given their number and nature, can only be explained by a pattern of non-observance of Community law obligations on a larger scale. In such a situation, taken together and seen in context, the various instances complained of cannot be regarded as mere isolated incidents, they are symptomatic of a policy or (administrative) practice which does not comply with the obligations resting on the Member States. In other words, as there is a direct relationship between the policy and the factual situation, the existence of the latter necessarily presupposes the existence of the former.

56. I would suggest that the Court has already applied a similar approach in cases in the fisheries sector, where it accepted on the basis of the scale of figures presented by the Commission and the repetition of the situation they describe, that instances of overfishing could not but have been the consequence of a failure of the Member State concerned to comply with their monitoring obligations. [27]

57. I would add that this approach does not amount to establishing an infringement on the basis of a presumption. Rather it is a reasoning based on the causality of related facts, applied retrospectively.

58. The third aspect relates to the moment in time to be used for determining whether a situation of general and structural infringement exists. I raise this issue, because it may be queried whether the Court's settled case-law establishing that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion issued by the Commission, [28] is suited to assessing the existence of such a general failure, as this, by definition, is a lasting and ongoing situation. Moreover, there may be an evolution in the general factual situation which forms the basis of the application, where the Member State has taken steps to improve compliance with its obligations, particularly in response to the observations made by the Commission during the pre-litigation procedure.

59. As to this question, I would point out that the function of the time-limit laid down in the reasoned opinion is to give a Member State a final opportunity to comply with its Treaty obligations before the Commission requests the Court to give a ruling on the matter. From the time of the first letter of formal notice till the expiry of that time-limit, the Member State is formally aware of the fact that the Commission, in its role of guardian of the Treaty, is of the opinion that the Member State concerned is in breach of its obligations. Although there may be doubt as to whether or not this is the case and this doubt can only be resolved by the Court, the pre-litigation procedure is intended to permit the Member State, in dialogue with the Commission, to consider the situation and to

27 — Case C-333/99, cited in footnote 22, paragraph 35 and Case C-140/00 *Commission* v *United Kingdom* [2002] ECR I-10379, paragraph 40.

28 — See, e.g., Case C-365/97, cited in footnote 19, paragraph 89.

adopt the necessary measures to ensure full compliance with its obligations. It is true that though from a formal point of view an infringement can only be established as from the date indicated in the reasoned opinion, from a substantive point of view that infringement will have existed for some period of time prior to that date. I am, therefore, of the opinion that in assessing whether a Member State is in general and structural infringement of its Community obligations at the date set by the Commission in the reasoned opinion, the Court necessarily must take account of that situation as the outcome of a continuous development and assess it in the perspective of its evolution.

60. Finally, as has been stated by the Court on many occasions, it is clear that no account can be taken of developments subsequent to the expiry of the deadline imposed on the Member State for complying with the reasoned opinion. [29]

VII — Assessment: the situation in Ireland

61. As I indicated in my discussion of the waste directive, it is necessary to adopt what I would call a holistic approach to the directive, i.e. that it should be seen as a complete system and that that system is more than its constituent parts. However, as much of the debate between the parties has concentrated on the implementation of various provisions of the directive in Ireland, I will first discuss these aspects before taking up my discussion of Ireland's compliance with the directive as a system. In my assessment of these arguments I will focus attention on the most important arguments advanced by the Commission and the Irish Government, following the sequence of the discussion in the case documents.

A — *Permits (Articles 9 and 10)*

62. According to Articles 9 and 10 of the waste directive, establishments or undertakings carrying out disposal operations or recovery operations must obtain a permit from the competent national authority. Permits granted under Article 9 are aimed at ensuring the implementation of Articles 4 (general obligation), 5 (network of disposal installations) and 7 (waste management plans), whereas permits under Article 10 are granted for purposes of implementing Article 4 only.

63. In its application in respect of these two provisions, the Commission distinguishes

29 — See, e.g. Case C-214/96 *Commission* v *Spain* [1998] ECR I-7661, paragraph 25 and Case C-60/01 *Commission* v *France* [2002] ECR I-5679, paragraph 36.

between municipal disposal operations (carried out by local authorities) and private disposal operations. Where the latter have been subject to a licensing requirement under Irish law since 1980, the municipal operations were only required to be licensed by the Waste Management Act of 1996 (hereinafter: WMA 1996), which was adopted after infringement proceedings were opened (and subsequently withdrawn) by the Commission. This Act provided for the orderly phasing in of licences for existing facilities between May 1997 and March 1999.

64. As to the first category, the Commission claims that the situation in respect of the licensing of municipal disposal operations is unacceptable in Ireland. It maintains that certain facilities continue to operate without a licence more than 20 years after the licensing requirement was introduced by Directive 75/442. The Commission substantiates this claim by reference to complaint 4 (Powerstown). Applications to the Irish Environmental Protection Agency (hereinafter: EPA) for licences for landfills take considerable time to process which itself leads to a deferment of the Community obligation to hold a licence and often results in environmental harm, as is the case with certain wetlands (complaint 7, Kilbarry and Tramore, County Waterford). It points out that in some cases, municipal facilities are never made subject to a licence where they are closed before the licence is granted or where a licence has not been applied for by the local authorities (complaint 11, County Donegal). The Commission accuses the EPA of being prepared to interpret flexibly the requirement under the WMA 1996 to submit applications for permits before certain deadlines (again, complaint 11).

65. As far as private disposal installations are concerned, the Commission asserts that the Irish authorities have displayed a de facto tolerance to such facilities operating without a licence, that the complaints received show that this is not confined to specific geographical or administrative areas and that in some cases this situation has been allowed to exist for extended periods of time (complaints 1, Limerick; 2, Ballard; 5, Cullinagh; 6, Poolbeg; 8, County Laois; 9, Greenore and 12, County Waterford). In addition, enforcing the permit requirement of the waste directive is made subordinate to the application of national land-use legislation which allows subsequent authorisation to be given to unlawful situations by means of retention permissions (complaint 2). The Commission objects to the fact that where licenses have been applied for in respect of unauthorised operations, the Irish authorities do not insist on the cessation of these operations pending the outcome of the licensing procedure (complaints 5, 6 and 8). A further complaint is that penalties and sanctions are not generally imposed on those conducting unauthorised waste operations and, where they are, they do not have a deterrent character (complaints 2 and 3, Pembrokestown). It also claims that EPA relied on national legislation to justify inaction in respect of illegal waste opera-

tions. In particular, EPA relied on a national definition of the concept 'recovery', which was not subject to a permit at the time under national law, thus permitting the disposal of inert waste in sensitive wetlands (complaint 1).

66. In response to the Commission's allegations concerning municipal disposal installations, the Irish Government first observes that it appears from a report by EPA of 5 June 2002 that at that point in time all but one municipal landfill had been licensed. Secondly, it acknowledges that the licence application procedure can be lengthy, but states that this can be explained by various factors including the complexity of the subject-matter, the time involved with public consultation and, in the case of municipal landfills, the need to license existing facilities retrospectively and to process large numbers of applications simultaneously. The Commission has not demonstrated that these delays caused any environmental harm. Third, where the Commission objects to facilities remaining unlicensed when they are closed before the deadline for making an application, the Irish Government maintains that this is an inevitable consequence of the system which prevailed before the enactment of the WMA 1996. When a facility closes pending the outcome of the licensing procedure, it remains in that procedure so that conditions in respect of after-care and remediation can be imposed. At any rate, the directive does not require waste operations which have been closed to be licensed retroactively. This requirement was only introduced by the landfill directive [30] (complaint 7). The situations which are the subject of complaint 11 were atypical and not indicative of flexibility in respecting the deadlines of the WMA 1996. Ireland finally refers to other measures it has taken to ensure that landfills operated without a licence after 1977 do not cause environmental harm contrary to the objectives of the directive.

67. The Irish Government does not accept that there has been de facto tolerance towards unauthorised waste activities by private undertakings. It refers to the EPA report of 5 June 2002 mentioned above from which it appears that, at that date, out of 70 private operations 43 had been licensed and 27 applications were being processed. It claims on this basis that – at that time — all private waste activities were subject to permits in accordance with the waste directive. Addressing the Commission's point on the use of land-use legislation to regulate unauthorised development, it suggests that this is irrelevant and the real question is whether the waste directive requires an existing operation to be discontinued until it is authorised, which it denies is the case. The directive contains no explicit provision to that effect. Ireland recognises its obligation to ensure adequate enforcement of the provisions prohibiting dumping and uncontrolled disposal of waste. It refers to figures

30 — Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, OJ 1999 L 182, p. 1.

demonstrating that in a large number of cases the cessation of unauthorised activities had been issued under Article 55 of the WMA 1996 and that, where appropriate, these cases are brought before a court. It rejects the Commission's assertion that in practice no penalties and sanctions are imposed in respect of unauthorised waste operations. Equally, it rejects the claim that under Irish law no enforcement action can be taken after more than five years have elapsed. This rule does not apply, in its view, to ongoing unauthorised activities. It finally observes that the reliance by EPA on national law in the case in complaint 1 (Limerick) was justified at the material time.

68. Besides these general remarks, more specifically, the Irish Government contests the Commission's appreciation of the factual situations underlying various complaints which form the basis of its application and the general conclusions it draws from them (complaints 1, 6 and 9). In some of these situations it acknowledges that an operation took place without being properly authorised, but it points out that in these cases the situation was remedied before the expiry of the time-limit in the reasoned opinion (complaints 2 and 6). Where the Commission asserts that the Irish authorities have displayed a disregard for environmentally sensitive wetlands, it observes that licences granted for landfills at Kilbarry and Tramore impose conditions aimed at protecting these areas (complaint 7). Furthermore, it asserts that it vigorously prosecutes instances of unauthorised waste activities and that the instances referred to by the Commission cannot be seen as exemplary of a general lax attitude towards enforcement (complaint 3). Though recognising the tardiness of the applications for licences in the cases of the landfills at Muckish and Glenalla, the Irish Government states that these were the only such cases and that they are atypical (complaint 11).

69. This complaint by the Commission and the arguments advanced in response by the Irish Government raise various questions concerning compliance with the licensing requirement laid down in Articles 9 and 10 of the waste directive. On the one hand there is the general issue regarding the adequacy and the efficacy of the Irish waste licensing system as a whole. On the other hand there are a number of more specific questions relating to the scope of the obligations under these provisions.

70. First it should be pointed out that the Irish waste licensing system has been in operation for waste activities undertaken by private entities since 1980 and for public authorities since 1996, whereas the time-limit for implementing the waste directive, in its original version, expired in July 1977 and, in its amended version, in April 1993. The licensing requirement has been a central

element of the waste directive from its inception. From whatever perspective the case is viewed, it is abundantly clear that full implementation of the licensing provisions in Ireland was late and, in the case of public entities, exceedingly late, despite the fact that the latter failure may be ascribed to some uncertainty as to the personal scope of the licensing requirement.

71. However, the main question under this heading is whether the Irish authorities had ensured that the licensing requirement of the waste directive was to be regarded as fully operational and effective at the end of the time-limit of two months following receipt by Ireland of the Commission's reasoned opinion of 26 July 2001 and, if this is not the case, whether this failure may be considered to be a general and structural infringement of the obligations pursuant to Articles 9 and 10 of the waste directive.

72. The Irish Government refers principally to the situation described in an EPA report dated 5 June 2002 from which it appears that, as of that date, all but one of the 46 municipal landfills then in operation were licensed in accordance with the directive. Figures in the same report on non-landfill waste activities indicate that at the same date, of 88 existing and prospective waste activities, 70 of which were private, licences had been issued in 56 cases, whilst 32 applications were being processed. By reference to these figures Ireland claims that all private waste activities were subject to permits at that time.

73. The figures presented by the Irish Government to demonstrate that it has complied with its obligations under Articles 9 and 10 are not convincing for a number of reasons. First of all, these figures represent the situation some eight months after the expiry of the deadline in the reasoned opinion. Secondly, the Irish Government erroneously equates an application for a permit with the grant of a permit. Third, it is not clear from these figures how many of the licences and applications concerned existing activities. However, in order to gain a more accurate impression of the degree of compliance with Articles 9 and 10 at the relevant moment of assessment, it is more elucidating to refer to EPA figures relating to the situation in November 2001, which Ireland mentions in its defence in the context of the discussion of delays in ensuring that municipal waste operations hold permits (complaint 4). There it states that in 181 cases in which permits had been applied for, 93 licences had been granted, 17 proposed decisions had been issued, 60 were being processed and 11 had been withdrawn. This, it was said, marked significant progress since the entry into force of the WMA 1996. These figures, together with the qualification that the situation had improved, clearly show that at the date of expiry of the deadline set in the reasoned opinion not all waste activities were licensed

in accordance with the requirements of the waste directive.

74. The Commission points out in respect of municipal facilities that delays of up to four years occurred in processing the applications for landfill facilities. During that time compliance with the waste directive was deferred even further.

75. It is quite obvious that processing applications for permits takes time and can involve complex evaluations of a technical nature. In that respect the various factors indicated by the Irish Government to explain the delays are as such understandable and reasonable. Nevertheless, where a licensing system is introduced for the attainment of objectives laid down in a Community measure full and adequate implementation requires that, following a reasonable period for starting up, this system operates effectively and efficiently. Even though the waste directive is silent on this matter, this requirement implies that the processing of applications takes place within reasonable delays. Furthermore, in a situation in which a Member State is already clearly in breach of its obligation to introduce a licensing system, it may be expected to remedy this situation expeditiously, not only by creating the necessary legislative basis, but also by taking all measures necessary for the full implementation and application of the licensing requirement at the shortest delay. In addition, it is settled case-law that a Member State may not invoke difficulties of an administrative or technical nature to justify its failure to comply with its Community law obligations. [31] The Commission's criticism of the sluggish operation of the licensing system in respect of municipal landfills is therefore justified.

76. The Commission and Ireland disagree as to the scope of the obligations under Articles 9 and 10 in a number of specific situations. These points concern the obligation to retroactively license installations and facilities which have closed before an application has been submitted and the obligation to terminate activities pending the outcome of the licensing procedure.

77. As to the first point, the Commission asserts that licensing of municipal landfills in Ireland was inadequate where facilities which had closed before the expiry of the deadline under the WMA 1996 for applying for a permit, remained unlicensed. The question whether Ireland was obliged to license facilities in these circumstances should be answered from the perspective of the general objective of the directive. Here, it must be recognised that where waste facilities, such as landfills or other forms of waste storage, have been closed, they still may present a danger to public health and to the environment. In order to prevent these dangers from

31 — Case C-52/91 *Commission* v *Netherlands* [1993] ECR I-3069 at paragraph 36.

materialising, such facilities must be managed and monitored. Licensing is the most appropriate instrument to impose conditions to that effect. There is no reason to treat a facility which has been closed before being licensed differently from a facility which was licensed prior to its becoming operational. In both cases the need for after-care and remediation are, in principle, the same. Moreover, where these situations involved facilities which became operational after 1977, it would be unacceptable for them to escape licensing on the basis of a condition laid down in national legislation, the WMA 1996. Finally, Ireland's argument that the licensing of existing landfills was only introduced by the landfill directive 1999/31 cannot be accepted. Although this directive provided for a specific permit procedure in respect of landfills, it does not imply that existing landfills did not fall within the ambit of Article 9 of the directive. This directive was clearly intended to supplement the provisions of the waste directive. Where Article 14 of this directive prohibits landfills which were in operation (without a permit) at the date of transposition, this does not imply that they were previously exempt from the permit requirement of the waste directive. The Commission's interpretation of Articles 9 and 10 of the directive, according to which facilities which have been closed before being licensed should still obtain a licence in respect of their after-life, is therefore correct.

78. The second point which the Commission raises in respect of unlicensed private waste undertakings, is that Ireland failed to order the cessation of their activities pending the outcome of the licence application procedure and that this, too, contravened Articles 9 and 10 of the directive. From a formal point of view an undertaking carrying out waste activities without a permit is operating illegally, so that as soon as the national authorities are aware that these activities are taking place they are under an obligation to take all necessary measures to end them. This also applies to situations in which such activities have come to the attention of the authorities through an application for a licence. In my view there are only two possible exceptions to this. The first is that where a licensing system is newly introduced, legal certainty requires that existing activities should benefit from a *terme de grâce* while their regularisation is sought. The second is that there may be considerable disadvantages to closing down facilities for which a permit has been applied for, where there are no immediate and practicable alternatives for treating the waste concerned. In such a situation, the objectives of the directive may be better served if the operation, by way of exception, is permitted to continue to function under such temporary conditions as may be deemed fitting in the circumstances. It is for the Member State concerned to demonstrate that this condition has been fulfilled. In the light of the foregoing, I agree with the Commission that the primary course of action to be taken in respect of unlicensed activities for which a permit has been applied for is that they should cease pending the outcome of the application procedure.

79. The Commission claims that Ireland has not taken sufficient action to enforce the

provisions implementing the waste directive and that where penalties are imposed these do not have deterrent value. Ireland objects to this and refers to figures on enforcement action taken and to certain judgments of Irish courts in which severe penalties were imposed. As the Commission has shown in a number of situations (inter alia complaints 2, 3, 5 and 8), a fact which was not expressly denied by the Irish Government, either penalties were not imposed or these were so low as not to be considered to act as a deterrent. On the other hand the Irish Government has emphasised the increased enforcement and sanctioning powers under the WMA 1996, that on that basis offences are being prosecuted vigorously and, in its rejoinder of January 2003, that various other measures were in preparation at that time. Although it can be accepted on the basis of these submissions that enforcement effort has improved gradually, as I observed in paragraph 28, the ultimate test in this respect, must be whether that effort together with the threat of repressive action has created sufficient pressure to incite those carrying out waste activities to comply with the national provisions transposing the directive, thus ensuring that the situation envisaged by the directive is realised in practice. At the end of the period set in the Commission's reasoned opinion it was clear, as I established earlier, that not all waste operations were subject to licence and that unlicensed waste activities were therefore being conducted. The necessary implication of this situation is that the enforcement measures available at that time either were not of a nature as to encourage compliance with the licensing provisions or were not applied to that effect. They were not, in other words, adequate with a view to attaining the result envisaged by the directive.

80. The Commission contends furthermore that in certain cases the enforcement of the permit requirement was made subordinate to the application of land-use legislation (complaint 2) and that this requirement was misapplied as a result of the term 'recovery' being interpreted differently in Irish law at the material time than it is now (complaint 1). Ireland denies the former allegation and states as to the latter that national authorities cannot be indicted for the correct application of the law as it stands. I consider both these aspects to be ancillary to the main arguments advanced by the Commission in support of its allegation of Ireland's non-compliance with Articles 9 and 10 of the waste directive. I would only observe as to the first that the application of national land-use legislation should also respect the objectives of the waste directive. In the circumstances of the given case the activity concerned was at any rate not subject to a waste permit within the meaning of Article 9, as was acknowledged by the Irish Government. As to the second, it is obvious that a diverging interpretation under national law of a Community concept, such as 'recovery' cannot be invoked to justify the erroneous application of a Community provision.

81. In paragraph 35, I indicated that the licensing system is the central instrument for

achieving the objectives set out in Article 4 of the Directive and that it therefore must meet certain standards to ensure that it is indeed effective. Effectiveness in this respect means that the system has both a preventive and a corrective effect in the sense that it ensures that the factual result to be obtained by the system is realised in practice, i.e. that waste is recovered, disposed of or treated in a manner which does not adversely affect human health or the environment. In addition, this objective must be secured in a structural manner. By this I mean that the level of compliance with the provisions aimed at securing these objectives is such that infringements may be considered to be merely incidental.

82. In assessing Ireland's compliance with Articles 9 and 10 of the waste directive at the time of the expiry of the two-month deadline set in the Commission's reasoned opinion in the light of the evolution of the situation, it is clear that it had not yet succeeded in introducing a fully operative licensing system for controlling waste treatment. It has been demonstrated that at that gauging moment not all waste operations covered by the directive were subject to licence. The licensing system operated in Ireland at that moment could not be regarded to be effective so as to ensure that the objectives of the directive are achieved in practice. Taken together the various complaints listed in paragraph 8 disclose a pattern of events which can only be explained by deficiencies in the licensing system. Given the period of time for which this situation has lasted and the fact that instances of failure to impose the permit requirement were widespread in Ireland, covering different regions and administrative units, I would conclude that this situation of non-compliance was both of a general and structural nature as of October 2001.

B — *Waste collectors, carriers and brokers (Article 12)*

83. Article 12 of the waste directive requires professional collectors and transporters of waste and those who arrange for disposal or recovery of waste on behalf of others, where they are not subject to authorisation, to be registered with the competent authorities.

84. The Commission claims that this provision has not been correctly transposed by Ireland and that consequently this provision was not correctly applied in Ireland. It states that this is borne out by the situation which gave rise to complaint 10 (Bray, County Wicklow).

85. Ireland concedes that it had not fully transposed this provision in time, but con-

tends that this omission has been cured by the Waste Management (Collection Permit) Regulations which were notified to the Commission within the two-month period laid down in the reasoned opinion. It observes that these regulations go much further than Article 12 as they require waste collectors to be licensed which subjects them to more stringent controls. It submits that lodging an application for a collection permit amounts to a de facto registration in that it brings the collector formally to the attention of the authorities. Registration does not require or empower authorities to impose pre-conditions.

86. The Commission observes that this licensing system was introduced belatedly in respect of the implementation date of Directive 91/156 and was not fully operational by that time-limit set in the reasoned opinion or even at the time of its introduction. It contests that the application for a licence can be equated with registration. An application alone does not subject the applicant to inspections under Article 13.

87. Here, I would point out that Article 12 imposes a requirement of registration on collectors and other intermediaries in the chain of waste processing, where the Member States have not subjected them to a licensing system. In this sense the waste directive imposes a minimum requirement. It is quite clear that Ireland has opted for the latter instrument and that the regulations concerned were notified to the Commission within the time-limit of the reasoned opinion. Nevertheless, it is equally clear that from the implementation date till the entry into force of the licensing system for collectors of waste, Article 12 had not been properly implemented in Ireland. Be that as it may, as the question of compliance must be determined by reference to the date laid down in the reasoned opinion and Ireland had by that time set a licensing system in place, it follows that it was no longer under an obligation to subject collectors of waste to registration. It is evident that this only applies where the licensing system itself is adequate and that all intermediaries coming within the scope of Article 12 are covered by it. However as the main focus of the Commission's argument remains on the absence of a system of registration and it has not, in my view, presented sufficient evidence to substantiate that the licensing system for collectors is inadequate as to its substance or its personal scope, I conclude that the Commission's application under this heading must be rejected.

C — *An adequate and integrated network of disposal installations (Article 5)*

88. Article 5 of the waste directive has as its ultimate objective to establish an integrated network of disposal installations in the Member States which enables the Community as a whole to become self-sufficient in waste disposal. It also requires the Member

State to take measures which allow them to move towards the aim of self-sufficiency individually.

89. Referring to the close link between Articles 9 and 5 of the waste directive, the Commission states firstly that, as in its view there is a seriously incomplete application of Article 9 of the directive, this in itself is evidence that Ireland has not taken appropriate measures to establish an adequate and integrated network of waste disposal installations. Mandatory aspects addressed in permits make it possible for disposal installations to function collectively. The Commission observes that in view of the conditions imposed by EPA in licensing facilities it can be seen that significant improvements are necessary in disposal methods in Ireland and that given the number of facilities still awaiting licence, it will take some considerable time before Irish waste facilities can operate collectively in the way intended by Article 5. The Commission also points to the deficiencies of the Kilbarry and Tramore landfills (complaint 7). It remarks that as certain regions rely on such unsatisfactory facilities and do not have an alternative, Ireland's network must be regarded as inadequate. It also indicates that in certain cases landfill capacity is exhausted or close to exhaustion (complaint 11).

90. The Irish Government retorts that because of the mere fact that waste licences often require technical improvements to landfills, it cannot be concluded that Article 5 was not previously complied with. It states that prior to the adoption of the landfill directive no Community standards applied in respect of landfills. Furthermore the events which were the subject of complaint 11 were atypical. The Commission has not identified any occasion where waste could not be disposed of because of capacity problems, nor does it take account of possibilities for extending landfill capacity.

91. In my view, proper implementation of this obligation entails the Member States taking measures both of a technical nature ensuring that there is sufficient physical capacity within the Member State to absorb waste being produced within its territory and of an administrative nature ensuring that the various facilities operate in a coordinated manner. This is a field of economic activity in which the supply of capacity is relatively inflexible, whereas as a result of economic growth demand is ever-increasing. This means that a network of disposal installations can only be deemed to be adequate where the supply of capacity is sufficient to absorb the increase in quantities of waste

being produced within the Member State's territory.

92. The Commission correctly emphasises that the reference to Article 5 in Article 9 indicates that in the system of the directive waste permits are envisaged as a mechanism for giving full effect to the requirements of Article 5. Having established that Article 9 was not implemented correctly by Ireland implies that there was no formal basis requiring disposal installations within Ireland to operate as a network within the meaning of this provision. In addition, the frequent occurrence of disposal of waste outside the licensing framework testifies to the inadequacy of the network in Ireland. Further evidence for this inadequacy may be drawn from a number of reports in the case-file including a report of December 2001, drawn up by Forfás (Ireland's National Policy Board for Enterprise, Trade, Science, Technology, and Innovation) referred to by the Commission in its request. This report notes against the background of a sharp increase in waste generation since 1995 that waste management in Ireland is at a critical point and warns of further deterioration if no measures are taken. Although in its rejoinder Ireland seeks to downplay the relevance of these documents, taken together they provide a consistent picture of the state of disposal capacity and the lack of coordination in this field at the time of the expiry of the deadline set in the Commission's reasoned opinion. I therefore conclude that Ireland has failed to adopt adequate measures for the full and proper implementation of Article 5 of the directive.

D — *The central obligation of the waste directive (Article 4, first paragraph)*

93. Article 4, first paragraph, imposes the basic obligation on the Member States to ensure that waste is recovered or disposed of without endangering human health and without using methods which could harm the environment in certain named respects in particular.

94. The Commission contends that by allowing a significant amount of waste disposal and recovery operations to take place outside any permit framework, Ireland cannot be considered to have taken all the necessary measures for the implementation of Article 4, because without permits disposal and recovery methods are not properly conditioned and controlled. Various complaints submitted to it provide evidence of actual environmental harm (complaints 6, Poolbeg; 7, Kilbarry and Tramore and 9, Greenore). In view of the objectives set out in Article 4, waste which has been deposited contrary to the terms of the directive must be rendered safe, which means that it must effectively be cleaned up. It is therefore not sufficient in this light to limit action to bringing about a cessation of such waste operations. Although licences granted by EPA do contribute to the rehabilitation of certain sites, the Commission states that it is not evident that the grant of such licences is

comprehensive or satisfactory in respect of unlawful Irish waste operations.

95. Ireland states that, as the Commission has not established that it did not have a permitting framework in place nor adduced proof that actual environmental harm has occurred, there is no basis for a finding that it has contravened Article 4 of the directive. It denies that Irish authorities have taken no action to remediate the problems arising from past waste activities and affirms that the Commission has not demonstrated that the grant of EPA waste licences will not lead to the satisfactory remediation and after-care of closed facilities.

96. In its reply the Commission refers to the wording of Article 4 which prohibits measures processes and methods of waste treatment which 'could' harm the environment. This implies that the Commission need not prove that actual environmental harm has occurred, since this would undermine the preventive purpose of this provision. The absence of a fully effective permitting system represents strong evidence that the necessary measures required by Article 4, have not been taken.

97. Ireland retorts that where the Commission has undertaken to demonstrate actual environmental harm, it has not succeeded in providing the necessary evidence to that effect. Accepting that permits issued by EPA provide for the phasing in of environmental protection measures, Ireland states that the Commission's suggestion that facilities ought to be closed pending the determination of the licensing process is unrealistic.

98. In *San Rocco* the Court considered that Article 4, paragraph 1, of the waste directive does not specify the actual content of the measures to be taken in order to ensure that waste is disposed of without endangering human health and without harming the environment, but that it none the less is binding as to the objective to be achieved, whilst leaving to the Member States a margin of discretion in assessing the need for such measures. [32] It would seem to me, however, that this margin of discretion allowed to the Member States is restricted if the directive is regarded as a complete system. Article 4, first paragraph, is closely linked to Articles 9 and 10, which in the system of the directive constitute the main instruments for achieving the objectives set in this provision. The explicit statement in Articles 9 and 10 that the permit requirement was introduced for the purpose of implementing Article 4 indicates that this requirement is one of the 'necessary measures' prescribed by Article 4, first paragraph. The necessary implication is that if Articles 9 and 10 are not complied with, this entails that Article 4, first paragraph, too, has been breached.

32 — *San Rocco*, cited in footnote 19, at paragraph 67

99. In the absence of a fully operational licensing system in respect of waste treatment there is no guarantee that the waste activities will be conducted in a manner which does not adversely affect human health or the environment. Where part of the argument focused on the question on whether it had been shown that actual environmental damage had occurred as a result of unlicensed waste activities, it is clear from the wording of this provision, as was pointed out by the Commission, that it is sufficient to establish that potential damage may result from these activities. Anyhow, in the case-file there is sufficient evidence of actual damage of the kind specified in Article 4, first paragraph, as a result of unlicensed waste operations. I refer inter alia to the situations underlying complaints 7, 9 and 11. It must therefore be established that Ireland has infringed its obligations under Article 4, first paragraph, of the waste directive.

E — *Dumping of waste (article 4, second paragraph)*

100. Article 4, second paragraph, enjoins the Member States to take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.

101. The Commission considers that this provision complements the first paragraph of Article 4, as the prohibition of dumping helps to ensure that waste operations take place within a properly regulated framework. It claims that Ireland has failed and is failing effectively to prohibit the dumping of waste as is evident from the extent to which waste is dumped outside the regulatory framework envisaged by Articles 9 and 10. It also states that Ireland has consistently failed to respond to instances of dumping with sanctions that are effective, proportionate and dissuasive. It refers to the arguments it submitted in respect of the non-compliance with the latter provisions.

102. Ireland refutes this allegation by the Commission and states that it has failed to adduce evidence that this was the case as of the expiry of the deadline set down in the reasoned opinion. It is not for Ireland to prove a negative.

103. As I observed in paragraph 36, in my Opinion, the standard for measuring compliance with Article 4, second paragraph, is that the prohibition of dumping is laid down in national law, adequate sanctions are provided for in case of offences and compliance with this provision is monitored in an effective manner. Various of the complaints which form the basis of the present application testify to uncontrolled disposal or dumping of waste in different regions in Ireland. I refer inter alia to complaints 1, 6, 9 and 12. The Irish Government has not produced evidence to the effect that these situations were resolved before the expiry of

the deadline in the reasoned opinion. In the light of the conclusions in respect of the non-compliance with Articles 9 and 10 and Article 4, first paragraph, I have no hesitation in concluding that Ireland has infringed its obligations under Article 4, second paragraph, of the waste directive.

F — *Holders of waste (Article 8)*

104. Article 8 of the waste directive obliges the Member States to take the necessary measures to ensure that a holder of waste, as defined in Article 1 of the directive [33] has it handled by a private or public waste collector or an undertaking which carries out disposal or recovery operations or that he recovers or disposes of it himself in accordance with the provisions of the directive.

105. The Commission, referring to the Court's judgment in *San Rocco*, [34] considers that Ireland has failed to comply with Article 8 of the directive. It has not ensured that those who hold waste as a result of unlicensed waste operations have that waste handled by any of the operators indicated in that provision or that the holders of waste recover or dispose of the waste themselves in accordance with the directive. This latter aspect refers, in its view, to handling within the framework of permits. It stresses that the operations to be carried out pursuant to Article 8 must respect other obligations under the directive, in particular Article 4. In its reply it refers to the situation which was the subject of complaint 1 (Limerick), where illegally deposed construction and demolition waste was removed to a facility that did not and at the time the reply was written still did not possess a permit. A similar sequence of events allegedly occurred in the situations referred to in complaints 2 (Ballard), 6 (Poolbeg), 8 (CountyLaois) and 9 (Greenore).

106. The Irish Government submits that the Commission has failed to adduce any factual evidence supporting its allegation that Ireland has failed to comply with Article 8 in the light of the Court's judgment in *San Rocco*.

107. Article 8 is the first link in the chain of responsibility referred to by the Commission.

33 — See footnote 16.

34 — Cited in footnote 19, at paragraphs 105 to 110 of the judgment.

Processing of waste in a controlled manner starts with the obligation of the holder to dispose of it or treat it in a way which is compatible with the objectives of the directive, i.e. Article 4 in particular. Either the holder can do this himself or he must ensure that it is handled by an establishment which carries out the disposal or recovery operations listed in Annexes II A and II B to the directive. In the system of the waste directive, this can only be an operator who is licensed under Articles 9 or 10 of the directive. In *San Rocco* the Court confirmed that the operator of an illegal tip is the holder of waste within the meaning of Article 8 and that it is up to the Member State to ensure that that waste is handed over to a private or public waste collector or waste disposal undertaking where it is not possible for that operator himself to recover or dispose of that waste. [35] In addition, as indicated earlier, Article 8 presumes that sufficient operational capacity is available within a Member State for the absorption and processing of waste so that holders of waste can comply with their obligations under this provision. Viewed from this dual perspective it is apparent from the factual evidence presented to the Court that in various situations (complaints 1 and 12) waste was handled by an operator outside the licensing framework, so that the holders of that waste either did not comply with their obligations under Article 8 or were not in a position to do so. Ireland has therefore failed properly to implement Article 8 of the directive.

35 — At paragraph 108 of the judgment.

G — Inspections and records (Articles 13 and 14)

108. Article 13 provides that establishments or undertakings carrying out the operations referred to in the Articles 9 to 12 shall be subject to appropriate periodic inspections by the competent authorities. Stated briefly, Article 14 requires all undertakings which fall within the scope of Articles 9 and 10 of the waste directive to keep records of the waste they process and how it is treated. This information must, on request, be made available to the competent authorities.

109. The Commission considers that as an extension of the failure to respect the licensing requirements of the waste directive, Ireland does not respect Articles 13 and 14 of the directive. It understands that whereas EPA is responsible for inspecting compliance with waste licences it issues, it does not have responsibility for inspecting facilities which are as yet unlicensed. As long as Irish waste operators are not brought within a licensing framework, they enjoy a de facto exemption from the obligation to keep records.

110. In response to both charges, Ireland refers to the submissions it makes in respect of the state of licensing of municipal landfills in its defence to the effect that, as of 5 June 2002, all significant waste facilities were licensed and therefore, by implication, subject to inspection. Ireland further submits that the directive does not indicate that inspections may only take place in respect of undertakings holding a permit and denies that there is an automatic link between issuing permits and keeping records.

111. As to Article 13, it must be recognised that there is an obvious implicit connection between the presence of a fully operative licensing framework and the controls that go with it. At the same time having granted a permit for an activity does not necessarily imply that inspections are carried out, whilst the absence of a permit does not necessarily imply that no inspections are carried out. As the Commission has not provided any concrete evidence to the effect that no inspections were conducted and relies solely on the non-compliance with Articles 9 and 10 of the waste directive, I conclude that this head of the Commission's application must be rejected.

112. The same considerations apply to the Commission's assertion that Ireland has not fully complied with the obligation to keep records under Article 14 of the directive. As, here too, it relies solely on the absence of a fully operational licensing system and has not otherwise proven that this provision has not been complied with this complaint too must be rejected.

VIII — General and structural infringement of the waste directive by Ireland

113. The Commission's application is aimed at obtaining a declaration that Ireland has infringed the waste directive in a structural and general manner and has not ensured that the seamless chain of responsibility had been fully recognised and made effective, rather than on establishing that the 12 complaints which form the factual basis of its application are well founded.

114. This case is different from the *San Rocco* Case [36] in terms of scale. There the question was whether an infringement of Article 4 of the waste directive could be established on the basis on a single instance of non-compliance. In the present proceedings, by contrast, the question is whether several instances of non-compliance can constitute the basis for a finding of a general infringement by a Member State of its

36 — Cited in footnote 19.

obligations under the waste directive. However, the principle established in that case is also relevant to a case such as the present one. In *San Rocco* the Court considered first that 'from the fact that a situation is not in conformity with the objectives laid down in the first paragraph of Article 4 of the amended directive, [...] the direct inference may not in principle be drawn that the Member State concerned has necessarily failed to fulfil its obligation under that provision'. It then went on to state that, 'if that situation persists and leads in practice to a significant deterioration in the environment over a protracted period without any action being taken by the competent authorities, it may be an indication that the Member States have exceeded the discretion conferred on them by that provision'. [37]

115. In discussing the notion of a general and structural infringement I indicated that there are three dimensions to such an infringement: dimensions of scale, time and seriousness. In *San Rocco* concerning a single instance of non-compliance with the waste directive, the Court assessed the alleged infringement by reference to the conditions of time ('a persistent situation') and seriousness (a 'significant deterioration of the environment'). If, according to the same consideration, in such a situation a Member State fails to take any action to resolve the problem, it may be established that Article 4 has been breached.

116. In applying these criteria to the present case I would like to make two observations in respect of this consideration of the Court. The first I already made in paragraph 98 where I indicated that if the directive is viewed from a systematic perspective, the room for manoeuvre which the Member States enjoy under Article 4 is restricted. The second is that if these two conditions are fulfilled an infringement can only be established if the Member State concerned has taken no action to remedy the situation. The Irish Government invoked this consideration during the oral hearing to assert that it indeed had taken vigorous action to redress the problems of waste treatment within Ireland and had thus complied with the *San Rocco* judgment. In my opinion, particularly in the setting of the present case, what is relevant is not only that action should be taken by the Member State, but it that must demonstrate that this action is effective in the sense indicated in paragraph 29.

117. I have already concluded that at the time of the expiry of the deadline set in the Commission's reasoned opinion, on the one hand, Ireland was in breach of its obligations under Articles 4, 5, 8, 9 and 10 of the

37 — At paragraph 68 of the judgment.

directive and that, on the other hand, the Commission has not demonstrated adequately that Articles 12, 13 and 14 have been infringed.

118. In considering whether it is possible to establish a general infringement on this basis I would observe that the non-compliance with the first group of provisions concerns the core of the implementation of the waste directive. As I have emphasised more than once in this Opinion, the directive should be regarded as a complete system in which the fundamental obligations of the Member States and the objectives of the directive are laid down in Article 4 and in which the licensing requirements of Articles 9 and 10 have a pivotal function. It is through licensing that the Member State can monitor the processing of waste and impose conditions with a view to attaining the objectives of the directive. A prerequisite for attaining these objectives obviously is that the infrastructure for waste disposal is geared towards absorbing waste generated within the territory of the Member State as required by Article 5 of the directive. Full and proper implementation of these provisions is vital to the attainment of the objectives of the directive. The various other provisions which are at issue in these proceedings, though essential elements of the system, are more ancillary in character. The fact that, with the exception of Article 8, the Commission has not adduced sufficient evidence to establish the non-compliance with these provisions does not, in my view, affect the basis for establishing a general infringement.

119. It must therefore be considered whether the infringements of these core provisions of the waste directive are of such a scale, duration and seriousness that they may be qualified as general and structural.

120. In paragraph 82 I already reached this conclusion in respect of the licensing requirements of Articles 9 and 10. Although the provisions requiring permits for disposal and recovery operations within the meaning of the directive have been in force since 1977, it was clear that by October 2001 the licensing system in Ireland still did not fully and effectively implement them. The many examples in the case-file of unlicensed deposition of waste in various parts of Ireland illustrate that waste treatment was not adequately controlled by the Irish authorities through the years. It must also be recognised that the situation regarding the licensing of waste operations has evolved in Ireland and that particularly in the second half of the 1990s important improvements have been made. However, the action taken by the Irish authorities was not sufficient to attain the objectives of the directive within the time-limit set in the reasoned opinion. Given the time that has elapsed since the introduction of the licensing requirement, it is wholly justified to conclude that the failure to comply with Articles 9 and 10 of the

directive has been persistent and of long duration.

121. The evidential material contained in the 12 complaints also illustrates that the problems of illegal, i.e. unlicensed, waste operations were not confined to certain localities but that these were widespread in Irish territory. They also took place within the remit of various local authorities which is indicative of an administrative problem of a more general character. Such a situation can only be resolved by a change of policy at the level of central government.

122. Finally, in looking at the seriousness of the infringement, the test is the extent to which the practical situation deviates from that which is prescribed by the directive. Having regard to the situations leading to the 12 complaints, it is evident that these do not conform to the objectives listed in Article 4. They contain many examples of serious environmental pollution and damage to wetlands and other environmentally sensitive areas.

123. It follows from these observations that I do indeed consider that the failure to comply with Articles 4, 5, 9 and 10, which constitute the core of the waste directive, has been persistent, widespread and serious so that there are sufficient grounds for establishing that Ireland has infringed the waste directive in a general and structural manner.

IX — Article 10 EC

124. Ireland acknowledges that it failed to provide the information requested by the Commission on 20 September 1999 in respect of a complaint relating to a waste facility at Fermoy, County Cork, and that it therefore failed to observe its obligations under Article 10 EC. Consequently, this aspect of the action brought by the Commission must be allowed.

X — Costs

125. According to Article 69(3) of the Court's Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Considering that the core of the Commission's application, in my opinion, must be upheld and the heads which must be rejected are of a more ancillary nature to the main substance of the case, I would suggest that in the application of Article 69(2) of the Rules of Procedure Ireland should be ordered to pay the costs.

XI — Conclusion

126. In the light of the foregoing observations, I am therefore of the opinion that the Court should:

— declare that by failing throughout its territory for a protracted period of time firstly to establish an adequate and fully operational licensing framework for the disposal and recovery of waste, secondly to ensure that holders of waste have it handled by a public or private waste collector, by an undertaking authorised to carry out waste disposal or recovery operations or that they recover or dispose of it themselves, thirdly to prevent the abandonment, dumping and uncontrolled disposal of waste, thereby endangering human health and causing environmental harm, and fourthly by failing to establish an adequate network of disposal installations Ireland has infringed its obligations under Articles 4, 5, 8, 9 and 10 of Council Directive 75/442/EEC on waste;

— reject the application in so far as the alleged infringement of Articles 12, 13 and 14 is concerned;

— declare that by not providing information requested by the Commission on 20 September 1999 Ireland has failed to observe its obligations under Article 10 EC;

— order Ireland to bear the costs.