Case C-418/97

1. *It may not be inferred from the mere fact that a substance such as LUWA-bottoms undergoes an operation listed in Annex IIB to Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of that directive.*

2. *For the purpose of determining whether the use of a substance such as LUWA-bottoms as a fuel is to be regarded as constituting discarding, it is irrelevant that that substance may be recovered in an environmentally responsible manner for use as fuel without substantial treatment.*

   The fact that that use as fuel is a common method of recovering waste and the fact that that substance is commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.

   The fact that a substance used as fuel is the residue of the manufacturing process of another substance, that no use for that substance other than disposal can be envisaged, that the composition of the substance is not suitable for the use made of it or that special environmental precautions must be taken when it is used may be regarded as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of that directive. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.

Case C-419/97

1. *It may not be inferred from the mere fact that a substance such as wood chips undergoes an operation listed in Annex IIB to Directive 75/442, as amended by Directive 91/156, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of the directive.*

2. *The fact that a substance is the result of a recovery operation within the meaning of Annex IIB to that directive is only one of the factors which must be taken into consideration for the purpose of determining whether that substance is still waste, and does not as such permit a definitive conclusion to be drawn in that regard. Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of Directive 75/442, as amended by Directive 91/156, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.*

   For the purpose of determining whether the use of a substance such as wood chips as fuel is to be regarded as constituting discarding, it is irrelevant that that substance may be recovered in an environmentally responsible manner for use as fuel without substantial treatment.

   The fact that that use as fuel is a common method of recovering waste and the fact that that substance is commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of that directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.

([1]) OJ C 41 of 7.2.1998. OJ C 55 of 20.2.1998.

Reference for a preliminary ruling by the Hessisches Finanzgericht by order of that court of 21 February 2000 in the case of Lohmann GmbH & Co. KG v Oberfinanzdirektion Koblenz

(Case C-262/00)

(2000/C 273/10)

Reference has been made to the Court of Justice of the European Communities by order of the Hessisches Finanzgericht (Finance Court, Hessen) of 21 February 2000, received at the Court Registry on 28 June 2000, for a preliminary ruling in the case of Lohmann GmbH & Co. KG v Oberfinanzdirektion Koblenz (Principal Revenue Office, Koblenz) on the following questions:

1. Does the description 'orthopaedic appliances' within the meaning of CN Code No 9021 cover an elbow bracelet, called *epX Elbow Basic*, and an elbow support, called *epX Elbow Dynamic*, made of 1 mm-thick three-layer material in a single colour, with a synthetic central layer enclosed between two elastic membranes; tubular in shape and manufactured by sewing together, with a length of 8 cm (elbow bracelet) and 22 cm (elbow support, the latter being also anatomically sewn), each being pulled over the lower arm below the elbow and worn as a sleeve, with an integrated insert, over which is passed a circular strap with an elastic and a non-elastic part and a Velcro fastening?

2. Does the term 'solely', used in Note 1(b) to CN Chapter 90 and in Note 2(b) to CN Chapters 61 and 62 allow the elasticity of the material to be regarded as the sole relevant criterion even if the supportive function is strengthened by other factors (in this case the insert)?

3. If Question 2 is answered in the affirmative:

   Is General Rule A.3(b) in the General rules for the interpretation of the combined nomenclature suitable for determining the question when the supportive function of the other factors, not made of elastic material, is predominant, or what other criteria should be used to determine the question?

Action brought on 11 July 2000 by the Federal Republic of Germany against the Commission of the European Communities

(Case C-277/00)

(2000/C 273/11)

An action against the Commission of the European Communities was brought before the Court of Justice of the European Communities on 11 July 2000 by the Federal Republic of Germany, represented by Wolf-Dieter Plessing, Ministerialrat in the Federal Ministry of Financial Affairs, 108 Graurheindorfer Straße, D-53117 Bonn, and Dr Michael Schütte, Rechtsanwalt, of Bruckhaus Westrick Heller Löber, 99-101 Rue de la Loi, B-1040 Brussels.

The applicant claims that the Court should:

1. Annul Commission Decision C(2000) 1063 fin. of 11 April 2000 on aid to System Microelectronic Innovation GmbH of Frankfurt an der Oder;

2. Order the Commission to pay the costs.

Pleas in law and main arguments

Procedural errors

— Breach of the principle of the right to a hearing and of the procedural rule in Article 88(2) EC in so far as the Federal Republic of Germany is required to recover aid of DEM 140.1 million also from Silicium Microelectronic Integration GmbH (SiMI), Microelectronic Design and Development GmbH (MD&D) and other unnamed undertakings: at no time was an inquiry procedure carried out against aid in favour of those undertakings. The inquiry procedure which led up to the contested decision was at no time extended by the Commission to the other undertakings described in the contested decision as 'recipients'. They could not therefore be aware, on the basis of the decision of 5 August 1997 opening the inquiry procedure, that they would one day be regarded in a Commission decision as 'recipients' of aid which certainly never flowed to them directly.

Compatibility with the common market of the aid granted to System Microelectronic Innovation GmbH i.GV (SMI) and Silicium Microelectronic Integration GmbH (SiMI)

— Breach of essential procedural requirements (errors in ascertaining the facts, defective statement of reasons): findings that Synergy Semiconductor Corporation (Synergy) was to take over, and did take over, management and control of Halbleiterelektronik Frankfurt/Oder GmbH (HEG), later renamed SMI, cannot be found at all in the contested decision, since the Commission incorrectly assumed that the acquisition of 49 % of the shares excluded acquisition of control.

The Commission failed to find that the loan by the Land of Brandenburg to SMI is based on the privatisation agreement and is to be regarded as part of the consideration from the public authorities on the occasion of privatisation.

The decision is also vitiated by considerable defects in the reasoning. In particular there are no reasons at all for the Commission's failure to take account of the statutory exception in Article 87(2)(c) EC. There are no findings whatever as regards the effects of possible aid on the relevant market. The Commission incorrectly assumes only that there is a 'semiconductor market'. However, SMI operated only in a very restricted market for customer-specific and application-specific circuits.

— Breach of Article 87(1) EC: the decision infringes *substantive law*, in so far as it declares the financial measures of the Treuhandanstalt and its successor BvS to be incompatible with the common market. The Commission incorrectly considered that the Treuhand scheme, that is, an existing aid scheme, did not apply to the payments by the Treuhandanstalt of DEM 64,8 million, because it obviously made a wrong assessment of the privatisation. In fact Synergy, by acquiring its holding in SMI, took over management of the undertaking and comprehensive rights of control over the company. In addition, the agreements also include all the other elements of a typical privatisation agreement, such as a jobs guarantee, know-how transfer, surplus earnings transfer, excess profit transfer and an environmental contamination clause.