

OPINION OF ADVOCATE GENERAL  
TIZZANO  
delivered on 28 October 2004<sup>1</sup>

1. These cases concern actions brought by the Commission of the European Communities against the Republic of Austria and the Portuguese Republic, respectively, for failing to fulfil their obligations under Article 3(1) of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils,<sup>2</sup> as amended by Council Directive 87/101/EEC of 22 December 1986<sup>3</sup> (hereinafter 'Directive 75/439' and 'Directive 87/101' or, collectively, 'the Directive').

oils' (third recital), the Council adopted Directive 75/439, which requires Member States to take the necessary measures to ensure the safe collection and disposal of waste oils.

**I — Relevant legislation**

3. Taking the view that, of the various existing methods of disposal, the regeneration method, which achieves greater 'energy savings', is 'the most rational way of re-using waste oils' (second recital), the Council subsequently adopted Directive 87/101, which amends Directive 75/439, specifically in order to give priority to that type of process.

*A — Community law*

2. In order to protect the environment 'against the harmful effects caused by the discharge, deposit or treatment of [waste]

4. According to the definition used in the Directive, regeneration means 'any process whereby base oils can be produced by refining waste oils, in particular by removing the contaminants, oxidation products and additives contained in such oils' (Article 1, fourth indent).

1 — Original language: Italian.

2 — OJ 1975 L 194, p. 23.

3 — Council Directive 87/101/EEC of 22 December 1986 amending Directive 75/439/EEC on the disposal of waste oils (OJ 1987 L 42, p. 43).

5. Of particular relevance for present purposes is Article 3, which provides as follows:

B — *National law*

The Austrian legislation

'1. Where technical, economic and organisational constraints so allow, Member States shall take the measures necessary to give priority to the processing of waste oils by regeneration.

6. The requirement under Article 3(1) of the Directive to give priority to regeneration was transposed into Austrian law by Paragraph 1 (1) and Paragraph 22(1) of the Waste Management Law of 1990 (Abfallwirtschaftsgesetz 1990; hereinafter the 'AWG 1990').<sup>4</sup>

7. Under Paragraph 1(1):

2. Where waste oils are not regenerated, on account of the constraints mentioned in paragraph 1 above, Member States shall take the measures necessary to ensure that any combustion of waste oils is carried out under environmentally acceptable conditions, in accordance with the provisions of this Directive, provided that such combustion is technically, economically and organisationally feasible.

'Waste management shall be so directed as:

1. to minimise such effects on humans, animals or plants and on their habitat or natural environment as are harmful or prejudicial or as otherwise diminish the general well-being of humanity;

2. to conserve resources of raw materials and of energy;

3. Where waste oils are neither regenerated nor burned, on account of the constraints mentioned in paragraphs 1 and 2, Member States shall take the measures necessary to ensure their safe destruction or their controlled storage or tipping'.

...'.<sup>5</sup>

<sup>4</sup> — BGBl. 325/1990.

<sup>5</sup> — Unofficial translation.

8. Paragraph 22(1) provides:

*The Portuguese legislation*

'Waste oils may be re-used only by way of recycling (refining, treatment or processing) or energy recovery'.<sup>6</sup>

10. In order to transpose the Directive into domestic law, Portugal adopted the following legislative measures:

9. In order better to clarify the importance of regeneration, Austria subsequently enacted Federal Waste Management Law 2002 (Abfallwirtschaftsgesetz 2002; hereinafter the 'AWG 2002').<sup>7</sup> Paragraph 16(3)(1) of that law, which entered into force on 2 November 2002, provides:

'Waste oils shall be recycled ... when it is technically possible to produce base oil from the waste oil and it is economic for the waste holder to do so taking into account the volume produced, transport distances and costs. Petroleum products from recycled waste oils must not contain more than 5 ppm of PCB/PCT or 0.03% of halogens by mass.'<sup>8</sup>

— Legislative Decree No 88/91 of 23 February 1991 regulating the storage, collection and combustion of waste oils;

— Ministerial Decree No 240/92 of 25 March 1992 approving the regulation on the collection, storage, preliminary treatment, regeneration, recovery, combustion and incineration of waste oils;

— Ministerial Decree No 1028/92 of 5 November 1992 on safety and identification standards for the transport of waste oils;

— the Joint Order of the Ministries of Industry and the Environment of 18 May 1993 on the application of the regulation governing the grant of licences for the management of waste oils.

6 — Unofficial translation.

7 — BGBl. I 102/2002.

8 — Unofficial translation.

11. With a view to the amendment of the above legislation, on 19 March 2001 the Portuguese authorities approved a document entitled ‘New National Waste-Oil Management Strategy’ in which priority for regeneration is set as one of the objectives of the new waste-oil management policy.

‘by failing to adopt the legal and practical measures necessary to give priority to the processing of waste oils by regeneration, where technical, economic and organisational constraints so allow, the Republic of Austria has failed to fulfil its obligations under Article 3(1) of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils’.

## II — Facts and procedure

### *Case C-15/03, Commission v Austria*

12. On 7 April 2001, having considered the answers received to a questionnaire devised to monitor implementation of the Directive, the Commission sent Austria a letter of formal notice, alleging, inter alia, that it had failed to transpose Article 3(1) into national law.

15. By order of 17 June 2003, the Court granted the Republic of Finland and the United Kingdom leave to intervene in support of the forms of order sought by Austria, in accordance with Article 93(1) of the Rules of Procedure.

13. That letter was followed, on 21 December 2001, by a reasoned opinion.

16. The Commission and the Republic of Austria took part in the hearing before the Court on 16 September 2004.

### *Case C-92/03, Commission v Portugal*

14. Not satisfied with Austria’s replies and explanations, the Commission then brought an action before the Court of Justice, by application lodged on 14 January 2003, for a declaration that:

17. In the case of Portugal, too, the Commission alleged by letter of formal notice of 11 April 2001 that it had failed to transpose the Directive.

18. In this case too, the Commission was not convinced by the information and observations submitted in reply by the Member State and therefore pursued the matter further by issuing a reasoned opinion on 24 October 2001, followed, on 21 December 2001, by a supplementary reasoned opinion.

19. Finally, as in the case of Austria, the Commission brought an action before the Court, by application lodged on 28 February 2003, for a declaration that: ‘by failing to adopt the measures necessary to give priority to the processing of waste oils by regeneration although technical, economic and organisational constraints so allowed, the Portuguese Republic has failed to fulfil its obligations under Article 3(1) of Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, as amended by Directive 87/101/EEC of 22 December 1986’.

20. Having been granted leave for that purpose by order of the President of the Court of 11 September 2003, the Republic of Finland intervened in this case also, in support of the forms of order sought by Portugal.

### III — Legal analysis

21. As we have seen, the Commission makes a single complaint against the defendant Member States in both cases, which is that

they failed to adopt, in accordance with Article 3(1) of the Directive, the measures necessary to give priority to the processing of waste oils by regeneration.

22. Since the grounds on which the complaint is based and the defences raised against it are broadly identical in the two cases, I propose to examine them together, pointing out — where the need arises — the features specific to each.

23. First, however, I think it well to recall the judgments in *Commission v Germany* (1999) and *Commission v United Kingdom* (2004),<sup>9</sup> two cases in which the Court has already considered the extent of the obligation laid down in Article 3(1). From those judgments, I believe, can be derived principles that are useful to resolving the questions raised in the present cases.

24. In those judgments, the Court above all clarified the effect of the ‘reference to “technical, economic and organisational con-

<sup>9</sup> — Case C-102/97 *Commission v Germany* [1999] ECR I-5051, and Case C-424/02 *Commission v United Kingdom* [2004] ECR I-7249.

straints” in Article 3(1) of the Directive’ as a possible limit on the obligation of Member States to give priority to the processing of waste oils by regeneration.

25. In the view of the Court, that reference ‘forms part of a provision giving general expression to the obligation imposed on Member States’. Accordingly, ‘the Community legislature did not intend thereby to provide limited exceptions to a rule having general application’ but rather ‘to define the scope and content of a positive obligation to give priority to the processing of waste oils by regeneration’.<sup>10</sup>

26. The Court therefore held that ‘the technical, economic and organisational circumstances obtaining in a Member State’ could not of themselves be considered ‘to constitute constraints making it impossible to adopt the measures provided for in Article 3(1)’. Such an interpretation would deprive ‘that provision ... of all practical effect, since the obligation imposed on Member States would be limited by maintenance of the status quo, with the result that Article 3(1) would not impose a genuine obligation to take the measures necessary for the processing of waste oils by regeneration’.<sup>11</sup>

27. What those measures should be, the Court held, ‘is not for the Court to determine’. It was however its responsibility ‘to consider whether it was possible to adopt measures aimed at giving priority to the processing of waste oils by regeneration and satisfying the criterion of technical, economic and organisational feasibility’.<sup>12</sup>

28. In considering that question, in both the cases concerned, the Court held that in order to comply with the obligation laid down by Article 3(1) of the Directive, it was not sufficient to put in place ‘a legal context creating the conditions necessary for processing by regeneration’,<sup>13</sup> nor merely to ‘carry out studies and draw up reports in order to determine how waste oils should be disposed of’.<sup>14</sup>

29. Those steps must be followed, subject to the aforesaid limit of technical, economic and organisational feasibility, ‘by tangible measures aimed at giving priority to regeneration’,<sup>15</sup> which can be either ‘compulsory measures’ or ‘incentives’,<sup>16</sup> and which could take the form *inter alia* of a regeneration subsidy, authorised by Article 14 of the

12 — *Commission v United Kingdom*, paragraph 24.

13 — *Commission v Germany*, paragraph 34.

14 — *Commission v United Kingdom*, paragraphs 25 and 26.

15 — *Commission v United Kingdom*, paragraph 25.

16 — *Commission v Germany*, paragraph 34.

10 — *Commission v United Kingdom*, paragraph 20. Emphasis added.

11 — *Commission v United Kingdom*, paragraph 22.

Directive, or a specific duty, authorised by Article 15.<sup>17</sup>

30. It is therefore in the light of the above statements that the arguments put forward by the Commission and the defendant Governments should be analysed.

31. Austria and Portugal, supported on this point by the Finnish and United Kingdom Governments, rely precisely on the fact that the Directive makes the obligation to give priority to regeneration conditional on the absence of 'technical, economic or organisational constraints'. In their view, there were constraints of just such a kind in their countries, making it necessary to resort to the alternative methods of processing waste oils (combustion, destruction or tipping) permitted under the Directive.

32. In particular, according to the Austrian Government, it would be uneconomic, either for the State or for private parties, to set up their own regeneration facilities, because of the low volume of waste oil collected in Austria.

33. That constraint obtains in the case of Portugal too, according to the Portuguese Government; indeed, it was made worse there by the introduction of free movement of waste under Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within the Community.<sup>18</sup> In the view of the Portuguese Government, that regulation meant that the Portuguese authorities were unable to stop waste oils being shipped to centres in other Member States for combustion. This further reduced the scope for requiring the already low volume of waste oils collected to be regenerated in domestic facilities, making the operation of such facilities even more difficult and less attractive for private parties.

34. Moreover, the Portuguese Government continues, the technologies currently available have not yet advanced to the point where it is possible to produce high-quality regenerated oils capable of competing with base oils, which were already in oversupply on the market.

35. I agree with the Commission, however, when it observes, citing the judgments referred to above, that the matters relied upon by the defendant Governments (the low volume of waste oils collected and the inefficiency of current technologies) are part of 'the technical, economic and organisational circumstances *obtaining*' in those

17 — *Commission v Germany*, paragraphs 45 and 46.

18 — Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1).

countries and cannot, therefore, be regarded of themselves as a 'constraint' capable of suspending the obligation arising under Article 3(1).

36. As was rightly stated in the judgments concerned, to have the scope of that provision limited by maintenance of the status quo would be to deprive it of its content and to set at nought, or at least greatly diminish, the 'positive' obligation on the Member State to adopt the measures necessary to give priority to regeneration. That obligation obviously falls equally on the 'small' Member States, which have no exemption from it despite the lower volume of waste oils produced.

37. According to the test laid down by the Court, what therefore needs to be considered is not whether regeneration is or is not attractive in the circumstances obtaining in Austria and Portugal, but whether those States have taken steps to overcome such difficulties as exist so as to make the priority use of that processing option economic (or at least viable). In other words, to echo the language used by the Court, it has to be seen whether the Member States, given the possibility of so doing, took 'positive measures' to give regeneration priority, by establishing a 'legal context' to create the necessary conditions and by furthermore adopting 'tangible measures' aimed at giving effect to the priority.

38. Leaving aside the difficulties obtaining in the respective countries, both Austria and Portugal claim to have adopted measures that satisfy the test.

39. The Austrian Government argues that priority for regeneration is implemented in its national law by the combined effect of Paragraph 22(1) of the AWG 1990, which requires waste oils to be recycled, and Paragraph 1(1) of the same law, which stipulates that waste management must be directed so as to conserve reserves of raw materials and of energy. The AWG 2002 stated the priority in even clearer terms, making regeneration mandatory if technically possible and economic for the wasteholder.

40. The Austrian Government further argues that priority for regeneration was also being implemented by means of tangible measures such as projects to promote regeneration within undertakings and through the provision of environmental subsidies for the disposal and recovery of dangerous waste, which were also available for the disposal of waste oils.



41. The Portuguese Government, on the other hand, acknowledges that a reform of its national legislation in this domain is required. However, it claims to have taken the measures necessary to give priority to regeneration by approving the document entitled 'New National Waste-Oil Management Strategy', which established the general framework on which the reform would be based.

42. In my view, however, those arguments do not suffice to rebut the Commission's complaints.

43. Beginning with Austria, I note first of all that that Member State based its defence primarily on arguments relating to the AWG 2002. But without entering into the merits of those arguments, which the Commission disputes, I would simply observe that that law did not enter into force until 2 November 2002, well after the expiry of the two-month time-limit set in the reasoned opinion of 21 December 2001.

44. It is settled case-law however that 'the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid

down in the reasoned opinion'.<sup>19</sup> That means that in this case we are concerned only with Paragraph 1(1) and Paragraph 22 (1) of the AWG 1990, the law in force at the time of the Commission's complaints.

45. With reference to those articles, therefore, I share the Commission's view that they do not constitute a legal context calculated to ensure priority for regeneration. The provisions in question authorise the disposal of waste oils by recycling 'or' by energy recovery, thereby placing regeneration and combustion on exactly the same footing in disregard of the order of precedence laid down by the Directive.

46. That ambiguity in the Austrian legislation is also reflected, in my view, in the 'tangible measures' adopted by Austria. The subsidies mentioned by the Austrian Government are not aimed *specifically* at promoting regeneration since they are available for any method of disposal or recovery of hazardous waste.

47. As regards the Austrian Government's promotion of regeneration projects within undertakings, it seems to me that in the

19 — See in particular Case C-147/00 *Commission v France* [2001] ECR I-2387, paragraph 26, Case C-173/01 *Commission v Greece* [2002] ECR I-6129, paragraph 7, and Case C-114/02 *Commission v France* [2003] ECR I-3783, paragraph 9.

absence of legislation making such projects compulsory or of targeted financial incentives to give them an advantage over other methods of processing, for operators they simply represent one more option for dealing with waste oils, and one which is more expensive and technically complicated at that.

50. In short, it seems to me that as things stand the Portuguese Republic has not undertaken any action to fulfil the obligation laid down by Article 3(1) of the Directive.

48. Moving on to the Portuguese position, it does not seem to me that Portugal has seriously disputed the Commission's complaint concerning the deficiency of its national legislation. The Portuguese Government itself acknowledges that in this area a 'reform of the legislation [is needed] ... to establish the framework of conditions necessary for effective priority to be given to regeneration' and that the relevant bill 'is still in the process of being approved by the Government'.<sup>20</sup>

51. In those circumstances, I cannot see merit in the Portuguese Government's argument that in Portugal the management of regeneration plants by private parties has been made unattractive by the introduction of free movement of waste under Regulation No 259/93 (see paragraph 33 above), particularly as the second indent of Article 7(4)(a) of the regulation in question permits the competent national authorities to raise objections to the shipment of waste for recovery in another Member State 'if it is not in accordance with national laws and regulations relating to environmental protection'.

49. Nor, moreover, can it be argued that the deficiency has been remedied by virtue of the document entitled 'New National Waste-Oil Management Strategy'. That is merely a policy paper, which does no more than appraise and identify the legislative and practical options available, to be adopted by the Government only at some future date.<sup>21</sup>

52. As the Commission rightly observed, if Portugal had established, as required by the Directive, priority for regeneration over combustion, it could very well have raised objections to the shipment of such waste to other Community countries. Were such a rule in force, the export of waste oils for combustion would be contrary to national environmental protection legislation and, hence, capable of being objected to under the provision cited. On a proper view,

<sup>20</sup> — Paragraph 48 of the defence. Unofficial translation.

<sup>21</sup> — See Annex V to the Commission's application, pages 10 to 12.

therefore, the fact that that provision cannot be relied upon is the effect rather than the cause of the prolonged failure by the Portuguese Republic to comply with its obligations under the Directive.

so allowed, the Republic of Austria and the Portuguese Republic have failed to fulfil their obligations under Article 3(1) of Directive 75/439, as amended by Directive 87/101.

#### IV — Costs

53. For the reasons set out above, I therefore take the view that the complaint brought by the Commission against the defendant Governments should be upheld and that the Court should accordingly declare that, by failing to adopt the measures necessary to give priority to the processing of waste oils by regeneration, despite the fact that technical, economic and organisational constraints

54. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for. Since the Commission has applied for costs and since, as we have seen, I am of opinion that the Republic of Austria and the Portuguese Republic have been unsuccessful, I propose that they be ordered to pay the costs.

#### V — Conclusion

In the light of the foregoing considerations, I am therefore of the opinion that the Court should:

— in Case C-15/03

- (1) declare that by failing to adopt the legal and practical measures necessary to give priority to the processing of waste oils by regeneration, where technical,

economic and organisational constraints so allow, the Republic of Austria has failed to fulfil its obligations under Article 3(1) of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils;

- (2) order the Republic of Austria to pay the costs;

— in Case C-92/03

- (1) declare that by failing to adopt the measures necessary to give priority to the processing of waste oils by regeneration although technical, economic and organisational constraints so allowed, the Portuguese Republic has failed to fulfil its obligations under Article 3(1) of Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, as amended by Directive 87/101/EEC of 22 December 1986;

- (2) order the Portuguese Republic to pay the costs.