

OPINION OF ADVOCATE GENERAL  
POIARES MADURO  
delivered on 18 May 2004<sup>1</sup>

1. The present action seeks a declaration from the Court that the Italian Republic has failed to fulfil its obligations under Articles 1, 9, 10 and 11 of Directive 75/442/EEC,<sup>2</sup> as amended by Directive 91/156/EEC,<sup>3</sup> and under Article 3 of Directive 91/689/EEC<sup>4</sup> by adopting the 'decreto 5 febbraio 1998 sull'individuazione dei rifiuti non pericolosi sottoposti alle procedure semplificate di recupero ai sensi degli articoli 31 e 33 del decreto legislativo 5 febbraio 1997, no 22' (Decree of 5 February 1998 relating to the identification of non-hazardous waste subject to simplified recovery procedures under Articles 31 and 33 of Legislative Decree No 22 of 5 February 1997).<sup>5</sup>

aim to limit the production of waste, of promoting the recovery of waste, and where that is not possible, of arranging for its disposal.<sup>6</sup> The directive provides that any establishment or undertaking wishing to carry out recovery operations must first obtain a permit from the competent authority.<sup>7</sup> Exemption from the requirement to obtain a permit is possible subject to the conditions laid down by Article 11 of the directive.

## I — The relevant legal provisions

2. Directive 75/442 has the objectives of encouraging the adoption of measures which

3. The objective of Directive 91/689 is to approximate the laws of the Member States on the controlled management of hazardous waste.<sup>8</sup> Hazardous waste is subject to more stringent controls than non-hazardous waste, be it in connection with its recovery or its disposal.<sup>9</sup> It is, therefore, important that the dividing line between hazardous and non-hazardous waste is drawn correctly. Article 1(4) of Directive 91/689 defines

1 — Original language: Portuguese.

2 — Council Directive of 15 July 1975 on waste (OJ 1975 L 194, p. 39).

3 — Council Directive of 18 March 1991 amending Directive 75/442 (OJ 1991 L 78, p. 32) (hereinafter 'Directive 75/442').

4 — Council Directive of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20).

5 — GURI No 88 of 16 April 1998, 'the disputed decree'.

6 — Fourth recital in the preamble to Directive 75/442.

7 — Article 10 of Directive 75/442.

8 — Article 1 of Directive 91/689.

9 — Fourth recital in the preamble to Directive 91/689.

hazardous waste as waste 'featuring on a list' drawn up in particular by reference to Annexes I to III to that directive. The list was adopted by Decision 94/904/EC.<sup>10</sup>

Republic had failed to fulfil its obligations under Articles 1, 9 10 and 11 of Directive 75/442 and Article 3 of Directive 91/689 by enacting the disputed decree.

4. The concepts of waste disposal and waste recovery are defined in Article 1(e) and (f) of Directive 75/442 and are given more precise definition by, respectively, Annexes II A and II B, in the versions resulting from Decision 96/350/EC.<sup>11</sup>

7. In its letters of reply dated 3 and 26 May 2000, the Italian Republic responded to only three of the four complaints raised by the Commission. The Commission decided to defer any decision on the third complaint, which relates to recovery operations and in respect of which the information provided by the Italian Republic is being examined.

5. The disputed decree transposes Directives 75/442 and 91/689 into national law.

8. On 11 April 2001 the Commission sent a reasoned opinion to the Italian Government calling on it to adopt the measures necessary to comply with the opinion within a two-month time-limit. The Italian authorities replied to the opinion by letter dated 17 August 2001.

## II — The facts and the pre-litigation procedure

6. On 28 February 2000 the Commission of the European Communities sent a letter of formal notice in accordance with Article 226 EC to the Italian authorities informing them that it was of the opinion that the Italian

9. As it was not persuaded by this response, the Commission commenced the present action, based on three complaints. First of all, the Italian Republic is alleged to allow establishments and undertakings which recover non-hazardous waste to be exempt from the obligation to obtain a permit without such exemption being dependent on compliance with the conditions laid down by Articles 4, 10 and 11(1) of Directive 75/442. The Commission also complains that the Italian Government has not defined with precision the types of waste covered by

<sup>10</sup> — Council Decision of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689 (OJ 1994 L 356, p. 14). This decision was repealed with effect from 1 January 2002 by Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Directive 75/442 and Decision 94/904 (O) 2000 L 226, p. 3).

<sup>11</sup> — Commission Decision of 24 May 1996 (O) 1996 L 135, p. 32).

a permit exemption, resulting in a breach of Article 3 of Directive 91/689. Finally, the Italian Republic has categorised as ‘environmental recovery’ certain operations which in fact constitute disposal activities, in breach of Articles 9 and 11 of Directive 75/442, read in light of Article 1(e) and (f) thereof. I shall study these three complaints in turn, detailing the legal provisions relevant to each one.

### III — Assessment

10. It is appropriate to mention at the outset that the Italian Republic allusively puts in issue the admissibility of the present action, stating that it concerns only ‘procedures and methods’ falling within the exclusive competence of the Member States when they are implementing a directive. Given the fact that the dispute pertains, in reality, to the interpretation to be given to specific provisions of Directive 75/442, the admissibility of this action for failure to fulfil obligations does not seem to be in doubt.

#### *A — The concept of quantity under Article 11 of Directive 75/442*

11. The relevant provisions so far as the first complaint is concerned are Articles 4 and 11 of Directive 75/442 and Article 7 of the disputed decree.

12. Article 11(1) of Directive 75/442 provides for the possibility of exempting undertakings or establishments from the requirement to obtain prior authorisation in order to carry out recovery operations:

‘— if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirements,

and

— if the types or quantities of waste and methods of disposal or recovery are such that the conditions imposed in Article 4 are complied with’.

13. Article 4 of Directive 75/442 states in a general way that ‘waste [is to] be 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’.

14. Article 7 of the disputed decree transposes the conditions under which an exemption can be granted in the following terms: 'without prejudice to the provisions specifically laid down in the annexes, the maximum annual quantities of waste which can be used in the course of recovery activities regulated by this decree shall be determined by the annual capacity of the installation in which the activity is carried out, after deduction of any raw material used, while ensuring that the activity poses no risk to human health or to the environment. ... In the case of energy recovery activities ... the maximum quantity of waste shall be defined by reference to the calorific value of the waste, the nominal thermal rating of the installation where the energy recovery operation is carried out and the estimated period of operation for each recovery installation. The quantities of waste intended to be recovered each year must be indicated in the notice of commencement of activity, stating that the conditions laid down in the present article will be observed.'

15. Therefore, the disputed decree sets out a method of calculation according to the characteristics of each undertaking and not an absolute threshold. This is precisely what is criticised by the Commission, which argues that, under Article 11 of Directive 75/442, the threshold must be fixed activity by activity.

16. The Commission makes several criticisms of the decree. The decree leads to a situation where the ordinary procedure cannot apply, as every undertaking is able to obtain an exemption from the requirement for a permit, whatever the quantity of waste which it recovers. Compliance with the conditions of Article 4 of Directive 75/442 cannot therefore be assured. Furthermore, the Commission would find it impossible to check whether Member States have implemented the directive correctly if overly varied permit exemption systems were adopted by them.

17. According to the Commission, Article 11 of Directive 75/442 must be interpreted as enabling Member States to put in place a *de minimis* threshold below which recovery installations would not in principle harm the environment. Such a threshold would be expressed as a maximum quantity applicable to all establishments or undertakings in the same sector. Compliance with Article 4 of Directive 75/442 requires such a threshold to be fixed. The general scheme of the directive also requires a threshold to be fixed beyond which an exemption cannot be obtained, as the ordinary procedure demands that a permit be obtained in advance. Such a system may be compared to that which exists in the sphere of accounts, for example, where undertakings are subject to different obligations depending on their size. Accord-

ing different treatment to undertakings of different sizes cannot, therefore, constitute discrimination between them.

18. The Italian Republic set out two principal arguments in its defence. First, its implementation of Article 11 of Directive 75/442 is compatible with the directive because the test established by Article 7 of the disputed decree is clear and contributes to the encouragement of waste recovery in accordance with the objectives of the directive. Second, it disputes the Commission's interpretation demanding that there be a *de minimis* threshold, on the basis that the directive does not expressly require absolute maximum quantities to be determined. What is more, a system of prior exemption based on an absolute threshold would unjustly penalise large undertakings, even though their activities are often better regulated and less harmful to the environment than those of smaller undertakings.

19. As to these submissions, if regard is had to the general scheme of Directive 75/442, Article 11 constitutes an exception to the ordinary procedure for obtaining prior authorisation pursuant to Article 10. Article 11 refers unambiguously to the fact that exemption from the permit requirement must be dependent upon 'general rules for each type of activity laying down the types and quantities of waste'. The system put in place by the decree does not appear to

correspond to such a definition, as it lays down a limit not by reference to the type or the quantity of waste recovered but according to the capacity of each particular undertaking to carry out recovery operations. Furthermore, the fact that the maximum limits put in place by the Italian decree are set at different levels for each undertaking means that they cannot properly be regarded as limits. Therefore, the Italian Republic's implementation of Article 11 of Directive 75/442 is not in compliance with that provision.

20. It is true that the EC Treaty permits Member States to adopt more stringent environmental protection measures.<sup>12</sup> However, the exemption system put in place by the Italian Republic does not necessarily, contrary to its submissions, protect the environment to a greater extent than the exemption system under Directive 75/442, because it in fact allows undertakings to carry out waste treatment operations which are potentially polluting without subjecting them to any prior controls. The requirement to obtain a permit in advance does not prejudice the possibility of carrying out waste treatment activities. What is more, the Italian system runs counter to the prior authorisation mechanism introduced by Directive 75/442 which is designed to prevent environmental harm. Also, the arguments to the

<sup>12</sup> — Articles 176 and 95(4) EC.

effect that requiring that a permit be obtained in advance gives rise to discrimination can only be dismissed: an undertaking which cannot obtain exemption from the requirement for authorisation in advance will still be able to carry out the waste recovery operations which it wishes to if it demonstrates that they will not be harmful to the environment.

*B — The incorrect classification of hazardous waste as non-hazardous waste*

21. The Commission criticises the use of overly vague definitions of waste in the disputed decree, resulting in a lack of legal certainty as to the distinction between hazardous and non-hazardous waste. Furthermore, the Commission criticises the Member State for having left out the codes of the European Waste Catalogue (EWC) and for having used codes which were incorrect or which did not correspond to the type of the waste concerned.

22. The Commission does not specify in what way the Italian legislation lacks precision. In accordance with settled case-law, it is for the Commission to substantiate the

failures to fulfil obligations which it is alleging.<sup>13</sup> If it does not do so, the failure which is alleged cannot be found to have been established.

23. It is also worthy of note that on 13 November 2002 the Commission itself adopted Decision 2002/909/EC on Italian rules waiving permit requirements for undertakings and establishments recovering hazardous waste under Article 3 of Directive 91/689,<sup>14</sup> where it states that 'the typology of the waste involved is appropriately identified according to [EWC] reference' in the Italian legislation.

24. Therefore, I shall limit my examination of the failure to fulfil obligations alleged against the Italian Republic to the three matters which the Commission supports by specific references to the disputed decree.

25. Point 5.9 of Annex 1 to the disputed decree makes reference to pieces of dielectric, semi-dielectric and metallic covered optical fibre cable. The Commission points out that there is no reference to the EWC

<sup>13</sup> — See, inter alia, Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraph 45.

<sup>14</sup> — OJ 2002 L 315, p. 16. The Commission makes reference to the procedure which was to culminate in the adoption of this decision at points 11 and 12 of its reply.

codes. The Italian Republic maintains that it introduced the relevant identification codes in Annex C to the Directive of 9 April 2002.<sup>15</sup> However, since this internal provision was adopted after the time-limit laid down in the reasoned opinion had expired, the alleged failure to fulfil obligations appears proven.

26. So far as point 7.8 of Annex 1 to the disputed decree is concerned, the Commission argues that the reference to waste comprising refractory material from furnaces in which high-temperature processes are carried out does not allow it to be determined whether or not waste coating from metallurgical processes involving aluminium falls within that provision, which could lead to hazardous and non-hazardous waste being confused. Since this failure is not disputed, the only option available to the Court is to rule that it has taken place.

27. So far as concerns point 3.10 of Annex 1 to the disputed decree, which relates to spent silver oxide batteries, the Commission argues that the reference in the decree to EWC Code 160605 (other batteries and accumulators) is incorrect as it effectively categorises these batteries as non-hazardous. Given the mercury content of the batteries, the correct code is EWC Code 160603 (mercury dry

cells), which leads to a classification as hazardous waste. The Italian Republic argues, on the other hand, that the classification of the waste in question as ‘non-hazardous’ corresponds fully to the chemical and physical characteristics referred to in point 3.10: a steel casing containing silver oxides and/or silver salts exceeding 1%, zinc and nickel not exceeding 9% and 55% respectively. The inevitable conclusion is that, since silver oxide batteries do not contain mercury, the classification suggested by the Commission does not appear to prevail. Therefore, the failure to fulfil obligations has not been established in relation to this point.

28. In light of the observations above, points 5.9 and 7.8 of Annex 1 to the disputed decree conform neither to Article 11(1) of Directive 75/442 nor to Article 3 of Directive 91/689.

*C — The distinction between waste recovery and waste disposal operations*

29. The Commission alleges that the Italian Republic has breached Articles 9 and 11 of

<sup>15</sup> — Direttiva 9 aprile 2002 che ricodifica i rifiuti individuati nel D. M. 5/2/98, ai sensi della decisione 2000/532/EC (directive which recodes the waste defined in the ministerial decree of 5 February 1998, pursuant to Decision 2000/532).

Directive 75/442, read in light of Article 1(e) and (f) and Annexes II A and II B, by incorrectly classifying certain operations as 'waste recovery' when they consist in waste disposal. Under those provisions of Directive 75/442, only waste disposal operations require a permit to be obtained first.

30. Article 1(e) of Directive 75/442 defines disposal as 'any of the operations provided for in Annex II A'. Article 1(f) defines recovery as 'any of the operations provided for in Annex II B'.

31. Article 5(1) of the disputed decree provides that 'environmental recovery activities defined in Annex 1 consist in restoration of damaged areas for productive or social purposes through measures of morphological remodelling'. Annex 1 to the disputed decree sets out 'general technical standards for the recovery of non-hazardous waste', including the type of waste by reference to the EWC, the origin of the waste, its characteristics, the envisaged

recovery operations and the characteristics of the raw materials and the products obtained.

32. The Italian Republic argues that these recovery operations correspond to point R 10 of Annex II B to Directive 75/442, which is entitled 'land treatment resulting in benefit to agriculture or ecological improvement'. The operations are to be classified as recovery operations because they include the re-use of certain waste. Furthermore, environmental recovery also includes the restoration of areas.

33. The Commission initially applied a different classification, being of the view that landfill covering, which is sometimes referred to under the recovery activities contemplated by the technical standards in Annex 1 to the disputed decree, amounts to a disposal operation falling within point D 1 of Annex II A to Directive 75/442, entitled 'Deposit into or onto land (e.g. landfill, etc.)'. None the less, in its reply the Commission admitted in light of the *ASA* judgment<sup>16</sup> that certain morphological remodelling opera-

16 — Case C-6/00 [2002] ECR I-1961. See also the judgments in Case C-228/00 *Commission v Germany* [2003] ECR I-1439, in Case C-458/00 *Commission v Luxembourg* [2003] ECR I-1553 and in Case C-116/01 *SITA* [2003] ECR I-2969 and the order in Joined Cases C-307/00 to C-311/00 *Oliehandel Koewiet and Others* [2003] ECR I-1821).

tions, and certain landfill-cover operations, contemplated by Article 5 of the disputed decree could be considered to be recovery operations. Nevertheless, the Commission has maintained its criticisms in relation to points 7.14 and 7.15 of Annex 1 to the disputed decree, which, it submits, cannot be classified as recovery operations as they envisage using drilling mud and waste which may contain up to 50 kg/t of hydrocarbons and 300 kg/t of diesel oil/oil which is slightly toxic.

34. On this point, it was established at paragraph 68 of the judgment in *ASA* that 'it does not follow from Article 3(1)(b) or from any other provision of [Directive 75/442] that the hazardous or non-hazardous nature of the waste is, of itself, a relevant criterion for assessing whether a waste treatment operation must be classified as recovery within the meaning of Article 1(f) of the Directive'.<sup>17</sup>

35. In order to conclude that an operation amounts to waste recovery it simply needs to be determined whether 'its principal objective is that the waste serve a useful purpose

in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources'.<sup>18</sup>

36. Point 7.14 of Annex 1 to the disputed decree provides for the re-use of waste in cement works, for the purpose of environmental restoration, if need be after desalination, or for the purpose of solid urban waste landfill cover. The waste to which point 7.15 refers may be re-used in the brick-making industry, to produce expanded clay, by cement works, for environmental restoration if need be after dehydration and desalination, or as solid urban waste landfill cover. The Commission has admitted that landfill covering may be considered to be a recovery operation for the purposes of points 4.4.3(g), 11.2.3(e), 12.1.3(g), 12.3.3(i) and 12.4.3(g) of Annex 1 to the disputed decree.<sup>19</sup> However, the landfill covering operations described at points 7.14 and 7.15 of the annex are strictly identical to those operations. It is therefore clear that the Commission has not proved that the waste reclamation operations envisaged by points 7.14 and 7.15 of Annex 1 to the disputed decree could not be considered to be recovery operations within the meaning of Directive 75/442.

18 — *ASA*, paragraph 69; see also *Commission v Germany*, paragraph 45; *Commission v Luxembourg*, paragraph 36.

19 — Point 24 of the Commission's reply.

17 — *ASA*, paragraph 68.

**IV — Conclusion**

37. In view of the foregoing, I propose that the Court should:

- (1) declare that by granting, under Article 7 of the decreto 5 febbraio 1998 sull'individuazione dei rifiuti non pericolosi sottoposti alle procedure semplificate di recupero ai sensi degli articoli 31 e 33 del decreto legislativo 5 febbraio 1997, No 22 (the disputed decree), an exemption from the permit granted in advance necessary in order to carry out waste disposal and waste recovery operations, without having adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirements, in such a way that human health is not endangered and the environment is not harmed, the Italian Republic has failed to fulfil its obligations under Articles 4 and 11(1) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991;
- (2) declare that by not making it possible to establish whether waste referred to at points 5.9 and 7.8 of Annex 1 to the disputed decree is hazardous or non-hazardous waste, the Italian Republic has failed to fulfil its obligations under Article 11(1) of Directive 75/442, as amended by Directive 91/156, and under Article 3 of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste;
- (3) dismiss the remainder of the application of the Commission of the European Communities.