

Case C-458/00**Commission of the European Communities**
v
Grand Duchy of Luxembourg

«(Failure of a Member State to fulfil obligations – Article 7(2) and (4) of Regulation (EEC) No 259/93 – Classification of the purpose of a shipment of waste (recovery or disposal) – Incinerated waste – Point R1 of Annex II B to Directive 75/442/EEC – Concept of use principally as a fuel or other means to generate energy)»

Opinion of Advocate General Jacobs delivered on 26 September 2002

I - 0000

Judgment of the Court (Fifth Chamber), 13 February 2003

I - 0000

Summary of the Judgment

- 1.. *Environment – Waste – Regulation No 259/93 on shipments of waste – Classification of the proposed shipment by the notifier – Competence of the authorities to which notification of a proposed shipment is addressed to check classification (recovery or disposal) and to object to a shipment which is wrongly classified*
(Council Regulation No 259/93, Art. 7(2) and (4))
 - 2.. *Environment – Waste – Directive 75/442 on waste – Annex II B – Distinction between a disposal operation and a recovery operation – Combustion of waste – Classified as a recovery operation – Conditions*
(Council Directive 75/442, as amended by Commission Decision 96/350, Annex II B)
1. Under the system established by Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, all the competent authorities to which notification of a proposed shipment of waste is addressed must check that the classification by the notifier is consistent with the provisions of the regulation. If that classification is incorrect, those authorities must object to a shipment on the ground of that classification error, without reference to one of the specific provisions of the regulation setting out the objections which the Member States may raise. It is not, however, for the competent authority to reclassify *ex officio* the purpose of the shipment of waste. see paras 21-22
 2. The combustion of waste constitutes a recovery operation under point R1 of Annex II B to Directive 75/442, as amended by Decision 96/350, where its principal objective is for the waste to fulfil a useful function as a means of generating energy, replacing the use of a source of primary energy which would have had to have been used to fulfil that function. In particular, the combustion of household waste may be classified as a recovery operation if the main purpose is to enable the waste to be used as a means of generating energy, it takes place in conditions which give reason to believe that it is indeed a means to generate energy, the greater part of the waste is consumed during the operation and the greater part of the energy generated is reclaimed and used. It follows that an operation whose principal objective is the disposal of waste must be classified as a disposal operation where the reclamation of the heat generated by the combustion constitutes only a secondary effect of that operation. see paras 31-37, 43

JUDGMENT OF THE COURT (Fifth Chamber)

13 February 2003 [\(1\)](#)

((Failure by a Member State to fulfil its obligations – Article 7(2) and (4) of Regulation (EEC) No 259/93 – Classification of the purpose of a shipment of waste (recovery or disposal) – Incinerated waste – Point R1 of Annex II B to Directive 75/442/EEC – Concept of use principally as a fuel or other means to generate energy))

In Case C-458/00,

Commission of the European Communities, represented by H. Støvlbaek and J. Adda, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by J. Faltz, acting as Agent,

defendant,

supported by **Republic of Austria**, represented by C. Pesendorfer, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that by raising unjustified objections to certain shipments of waste to another Member State to be used principally as a fuel, in breach of Article 7(2) and (4) of 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), and of Article 1(f) in conjunction with point R1 of Annex II B to Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 2, 6 and 7 of that Regulation and under Article 1(f) in conjunction with point R1 of Annex II B to that Directive,

THE COURT (Fifth Chamber),,

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), D.A.O. Edward, P. Jann and S. von Bahr, Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 April 2002, at which the Commission was represented by J. Adda, the Grand Duchy of Luxembourg by N. Mackel and R. Schmit, acting as Agents, and the Republic of Austria by E. Riedl, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,
gives the following

Judgment

- 1 By application lodged at the Court Registry on 19 December 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that by raising unjustified objections to certain shipments of waste to another Member State to be used principally as a fuel, in breach of Article 7(2) and (4) of 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, the Regulation), and of Article 1(f) in conjunction with point R1 of Annex II B to Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32, the Directive), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 2, 6 and 7 of that Regulation and under Article 1(f) in conjunction with point R1 of Annex II B to the Directive.
- 2 By order of the President of the Court of Justice of 7 June 2001 the Republic of Austria was granted leave to intervene in support of the forms of order sought by the Grand Duchy of Luxembourg.

Legal background

Community legislation

The Directive

- 3 The essential objective of the Directive is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. In particular, the fourth recital of the Directive states that the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources.
- 4 In Article 1(e) of the Directive *disposal* is defined as any of the operations provided for in Annex II A and in Article 1(f) *recovery* is defined as any of the operations provided for in Annex II B.
- 5 Article 3(1) of the Directive reads: Member States shall take appropriate measures to encourage:
 - (a) firstly, the prevention or reduction of waste production and its harmfulness ...
 - (b) secondly:
 - the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or
 - the use of waste as a source of energy.

- 6 Annex II A to the Directive, entitled Disposal operations, refers in point D10 to [i]ncineration on land.
- 7 Annex II B to the Directive, entitled Recovery operations, refers in point R1 to [u]se principally as a fuel or other means to generate energy.

The Regulation

- 8 The Regulation lays down rules governing *inter alia* the supervision and control of shipments of waste between Member States.
- 9 According to Article 2(i) of the Regulation, disposal is as defined in Article 1(e) of Directive 75/442/EEC and, according to Article 2(k), recovery is as defined in Article 1(f) of Directive 75/442/EEC.
- 10 Title II of the Regulation, headed Shipments of waste between Member States, contains two separate chapters, one of which (Articles 3 to 5) concerns the procedure applicable to shipments of waste for disposal and the other (Articles 6 to 11) the procedure applicable to shipments of waste for recovery. The procedure prescribed for the second category of waste is less restrictive than the procedure for the first category.
- 11 Under Article 6(1) of the Regulation, when a waste producer or holder intends to ship waste for recovery as listed in Annex III to the Regulation from one Member State to another Member State and/or pass it in transit through one or several other Member States (the amber list of waste), he is to notify the competent authority of destination and send copies of the notification to the competent authorities of dispatch and transit and to the consignee.
- 12 Article 7(2) of the Regulation lays down the time-limits, conditions and procedures which must be observed by the competent authorities of destination, dispatch and transit to raise an objection to a notified, planned shipment of waste for recovery. It provides in particular that objections must be based on Article 7(4).
- 13 Article 7(4)(a) of the Regulation provides: The competent authorities of destination and dispatch may raise reasoned objections to the planned shipment:
- in accordance with Directive 75/442/EEC, in particular Article 7 thereof, or
 - if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection, or
 - if the notifier or the consignee has previously been guilty of illegal trafficking. In this case, the competent authority of dispatch may refuse all shipments involving the person in question in accordance with national legislation, or
 - if the shipment conflicts with obligations resulting from international conventions concluded by the Member State or Member States concerned, or
 - if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.

The national measures

- 14 In early 1998 the company J. Lamesch Exploitation SA, established in Bettembourg (Luxembourg), submitted two notifications to the competent Luxembourg authority seeking authorisation to ship to France household and similar waste coming under Annex III to the Regulation. According to the notifications, the waste, which came from two waste producers established in Luxembourg, was to be recovered by incineration at the incinerator of the municipality of Strasbourg, and the energy generated thereby would be reclaimed. An undertaking operating under the name of Négoces de tous matériaux réutilisables (NTMR), established in Metz (France), was to act as charterer in shipping the waste concerned.
- 15 By two decisions of 1 October 1998 (the contested decisions), the competent Luxembourg authority reclassified the shipments ex officio as shipments of waste intended for disposal. It added that such shipments could be carried out only on proof that for technical reasons or because of insufficient capacity the waste could not be delivered to a disposal plant in Luxembourg.
- 16 The competent Luxembourg authority justified the ex officio reclassification on the basis that incineration of waste in a plant the primary purpose of which is thermal treatment with a view to the mineralisation of the waste, whether or not there is reclamation of the heat produced, is considered in Luxembourg to be a D10 disposal operation under Annex II A to Directive 75/442/EEC as amended.

Pre-litigation procedure

- 17 Following a complaint referred to it by NTMR, the Commission sent a letter of formal notice to the Grand Duchy of Luxembourg on 22 October 1999 requesting that Member State to submit its observations within a period of two months on the charge that the competent Luxembourg authorities had infringed the provisions of the Regulation and the Directive by refusing to classify as a recovery operation incineration of waste in a non-industrial incineration plant where the energy generated during incineration is recovered in full or in part.
- 18 As the Grand Duchy of Luxembourg had not responded to that letter of formal notice, the Commission sent it a reasoned opinion by letter of 4 April 2000 in which it found that that Member State had failed to fulfil its obligations under Articles 6 and 7 of the Regulation, Article 1(f) and point R1 of Annex II B to the Directive and, where appropriate, Article 34 of the EC Treaty (now, after amendment, Article 29 EC). In the same letter the Commission called upon the Grand Duchy of Luxembourg to take the necessary measures in order to comply with the reasoned opinion within a period of two months from the date of notification of the reasoned opinion.
- 19 In a letter of 28 April 2000 the Grand Duchy of Luxembourg maintained that a waste processing operation could be classified as an operation under point D10 of Annex II A to the Directive even if energy generated by it may be recovered and that, in addition, the Luxembourg authorities had reclassified the operations in question with the agreement of the French authorities of destination.
- 20 In those circumstances, the Commission brought the present proceedings.

Substance

- 21 It should be noted first of all that under the system established by the Regulation all the competent authorities to which notification of a proposed shipment of waste is addressed must check that the classification by the notifier is consistent with the provisions of the Regulation and object to a shipment which is incorrectly classified

(Case C-6/00 ASA [2002] ECR I-1961, paragraph 40).

- 22 If the competent authority of dispatch considers that the purpose of a shipment has been incorrectly classified in the notification, the ground for its objection to the shipment must be the classification error itself, without reference to one of the specific provisions of the Regulation setting out the objections which the Member States may make to a shipment of waste (ASA , cited above, paragraph 47). In any event, it is not for the competent authority to reclassify ex officio the purpose of the shipment of waste (ASA , cited above, paragraph 48).
- 23 Article 7(2) of the Regulation, which provides that the competent authorities of the Member States may not object to a shipment of waste intended for recovery except in the cases exhaustively listed in Article 7(4), does not therefore in principle preclude those authorities from objecting to a particular shipment on the ground that it is in reality a shipment of waste intended for disposal.
- 24 However, such an objection accords with the provisions of Article 7(2) and (4) of the Regulation only where there exist criteria for distinguishing between the disposal and recovery of waste which comply with the criteria laid down by the provisions of the Directive to which Article 2(i) and (k) of the Regulation refer in order to define those terms.
- 25 By the contested decisions, the Luxembourg authorities reclassified the shipments ex officio as shipments of waste for disposal and objected to them being carried out. Those decisions must be regarded as having been intended to raise the objection that the classification referred to in the notifications of the shipments concerned was incorrect.
- 26 Consequently, in order to determine whether, in taking the contested decisions, the Grand Duchy of Luxembourg failed to fulfil its obligations under Article 7(2) and (4) of the Regulation, it is necessary to consider whether the objection raised in those decisions is in accordance with the distinction between disposal operations and recovery operations established by the Directive in Annexes II A and II B.
- 27 The Commission contends that the shipments to which the contested decisions objected concerned waste intended for use as a means of generating energy, which is a recovery operation under point R1 of Annex II B to the Directive.
- 28 The Commission considers that waste may be regarded as being used as a means of generating energy where the operation generates surplus energy and a substantial proportion of the energy contained in the incinerated waste is reclaimed for use.
- 29 The Luxembourg Government maintains that incineration of the waste in question, and reclamation of the energy, in the incinerator of the municipality of Strasbourg did not constitute a recovery operation under point R1 of Annex II B to the Directive. The only operations covered by that provision are operations which not only allow the generation and use of surplus energy, but also, in the light of the purpose of the waste processing plant, have as their objective the use of the waste as a fuel or other means of generating energy. In the view of the Luxembourg Government, that conclusion results from the use of the words use principally in that provision.
- 30 The Luxembourg Government therefore maintains that the contested decisions were correct in considering that the waste shipments in question related to waste that was in reality intended for a disposal operation under point D10 of Annex II A to the Directive.
- 31 In that regard, it should be observed that point R1 of Annex II B to the Directive includes

among waste recovery operations their [u]se principally as a fuel or other means to generate energy.

- 32 That provision should be interpreted as meaning that it covers the combustion of household waste if, first, the main purpose of the operation concerned is to enable the waste to be used as a means of generating energy. The term use in point R1 of Annex II B to the Directive implies that the essential purpose of the operation referred to in that provision is to enable waste to fulfil a useful function, namely the generation of energy.
- 33 Second, the combustion of household waste constitutes an operation referred to in point R1 of Annex II B to the Directive where the conditions in which that operation is to take place give reason to believe that it is indeed a means to generate energy. This assumes both that the energy generated by, and reclaimed from, combustion of the waste is greater than the amount of energy consumed during the combustion process and that part of the surplus energy generated during combustion is effectively used, either immediately in the form of the heat produced by incineration or, after processing, in the form of electricity.
- 34 Third, it follows from the term principally used in point R1 of Annex II B to the Directive that the waste must be used principally as a fuel or other means of generating energy, which means that the greater part of the waste must be consumed during the operation and that the greater part of the energy generated must be reclaimed and used.
- 35 That interpretation is in accordance with the concept of recovery which comes from the Directive.
- 36 It follows from Article 3(1)(b) and the fourth recital of the Directive that the essential characteristic of a waste recovery operation is that 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 (*ASA* , cited above, paragraph 69).
- 37 The combustion of waste therefore constitutes a recovery operation where its principal objective is that the waste can fulfil a useful function as a means of generating energy, replacing the use of a source of primary energy which would have had to have been used to fulfil that function.
- 38 In the light of those criteria, the Commission has failed to establish that the objection raised in the contested decisions does not accord with the distinction between disposal operations and recovery operations laid down by the directive in Annexes II A and II B thereto.
- 39 In the contested decisions the competent Luxembourg authorities refused to consider the shipment of the waste concerned to an incinerator situated in France as recovery, on the grounds that the primary purpose of that plant was thermal processing with a view to the mineralisation of the waste.
- 40 The objection thus raised by those authorities is based therefore on the consideration that the principal objective of the operation in question is the disposal of waste, a consideration which constitutes appropriate grounds for objecting to the shipment of waste to that plant being classified as a recovery operation.
- 41 The shipment of waste in order for it to be incinerated in a processing plant designed to dispose of waste cannot be regarded as having the recovery waste as its principal objective, even if when that waste is incinerated all or part of the heat produced by the

combustion is reclaimed.

- 42 Certainly, such reclamation of energy is in accordance with the Directive's objective of conserving natural resources.
- 43 However, where the reclamation of the heat generated by the combustion constitutes only a secondary effect of an operation whose principal objective is the disposal of waste, it cannot affect the classification of that operation as a disposal operation.
- 44 The Commission has not adduced any evidence in the context of its action which shows that, contrary to what the competent Luxembourg authorities considered in the contested decisions, the principal objective of the operation in question was the recovery of waste. It has not provided any evidence at all of this, such as the fact that the waste in question was intended for a plant which, unless it was supplied with waste, would have had to operate using a primary energy source, or that the waste was to have been delivered to the processing plant in exchange for payment by the plant operator to the producer or holder of the waste.
- 45 The Commission only maintained in that regard that the shipments were of waste intended for use as a means of generating energy and that the purpose of the processing plant to which the waste was to be shipped did not constitute a relevant criterion for the purposes of classifying an operation for the shipment of waste.
- 46 Consequently, the Commission's application is unfounded and must therefore be dismissed.

Costs

- 47 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 in the successful party's pleadings. Since the Grand Duchy of Luxembourg has asked for costs against the Commission, which failed in its submissions, the latter must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Republic of Austria, which has intervened in the proceedings, is to bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

- 1. Dismisses the application;**
- 2. Orders the Commission of the European Communities to pay the costs;**
- 3. Orders the Republic of Austria to bear its own costs.**

Wathelet
Jann

Timmermans
von Bahr

Edwarc

Delivered in open court in Luxembourg on 13 February 2003.

R. Grass

M. Wathele

Registrar

President of the Fifth Chambe

1 – Language of the case: French.