

OPINION OF ADVOCATE GENERAL

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delivered on 30 May 2006¹**I — Introduction**

1. In the present proceedings, brought under Article 226 EC, the Commission of the European Communities seeks from the Court of Justice a declaration that the Italian Republic has failed to fulfil its obligations under Articles 2(1) and 4(1) to (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,² as amended by Council Directive 97/11/EC of 3 March 1997.³

2. It is alleged that, by authorising the operation of recycling plants without subjecting them to an impact investigation, the Member State has committed two infringe-

ments. The first, abstract, infringement derives from the national legislation, which exempts from that requirement premises carrying out the recovery (valorización)⁴ of waste authorised by a simplified procedure. The other, specific, infringement relates to a facility, located in Massafra in the province of Taranto, for generating electricity from the incineration of combustible material derived from waste and biomass.

3. In order to resolve the dispute, it is also necessary to take account of Council Directive 75/442/EEC of 15 July 1975 on waste,⁵ as amended by Council Directive 91/156/EEC of 18 March 1991.⁶

4 — This term (valorización) describes the action and effect of recovering (waste) (valorizar: literally, to value). According to the dictionary of the Real Academia Española de la Lengua, 'valorizar' has only three meanings: to indicate the price of things, to recognise the merit of individuals and to increase the value of something. In Community law, it has acquired another meaning in connection with waste, in that it refers to any operation intended to ensure that waste materials serve a useful purpose and replace other materials which would have had to be used for that purpose, thereby encouraging the conservation of natural resources.

1 — Original language: Spanish.

2 — OJ 1985 L 175, p. 40.

3 — OJ 1997 L 73, p. 5.

5 — OJ 1975 L 194, p. 39.

6 — OJ 1991 L 78, p. 32.

II — The legal framework

6. Under Article 2(1):⁷

A — *Community law*

‘Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.’

1. Directive 85/337

7. Article 4⁸ provides that:

4. This directive is aimed at preventing environmental degradation, by ensuring that every project is subject to a preventive assessment of its effects (recitals 1 and 6; Article 1(1)).

‘1. Subject to Article 2(3),^[9] projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

5. ‘Project’ means the execution of construction operations or other installations or schemes, as well as interventions in the environment and landscape, including those involving the extraction of mineral resources. The ‘developer’ is the applicant for consent for a private project or the authority which promotes a public project. Finally, development consent is the decision which entitles the developer to carry out the works (Article 1(2)).

(a) a case-by-case examination,

7 — As amended by Directive 97/11.

8 — Again, following the 1997 amendment.

9 — Article 2(3) makes it permissible, in exceptional cases, not to apply the directive.

or

dangerous wastes', whereas point 11(c) of Annex II covered '[i]nstallations for the disposal of industrial and domestic waste (unless included in Annex I)'.

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

9. Since its amendment by Directive 97/11, point 9 of Annex I has referred to '[w]aste disposal installations for the incineration, chemical treatment as defined in Annex IIA to Directive 75/442/EEC under heading D9, or landfill of hazardous waste (i.e. waste to which Directive 91/689/EEC^[10] applies)'. Point 10 includes '[w]aste disposal installations for the incineration or chemical treatment as defined in Annex IIA to Directive 75/442/EEC under heading D9 of non-hazardous waste with a capacity exceeding 100 tonnes per day'.

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

10. The content of point 11(c) of Annex II was moved to (b), and became the following: '[i]nstallations for the disposal of waste (projects not included in Annex I)'.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

2. Directive 75/442

8. Point 9 of Annex I to the original text of the directive was concerned with '[w]aste-disposal installations for the incineration, chemical treatment or land fill of toxic and

11. This directive, concerned, as is clear from the second, fifth and seventh recitals in

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

its preamble, with the environment and the quality of life, encourages the prevention, recycling and processing of waste, and the extraction from it of raw materials and energy (Article 3).

that, in accordance with Article 4, waste must be disposed of without endangering human health and without the use of processes or methods likely to harm the physical environment.¹¹

12. Article 1(a) provides a definition of 'waste' and Article 1(b) of the initial version extends the definition of 'disposal' to:

- 'the collection, sorting, transport and treatment of waste as well as its storage and tipping above or under ground';
- 'the transformation operations necessary for its re-use, recovery or recycling'.

15. Articles 9 and 10 make the activities referred to in the two annexes subject to a prior permit requirement from which Article 11 exempts undertakings which dispose of their own waste *in situ* and those which recover waste, whether it is their own or someone else's. The exemption is subject to the adoption by the authorities of general rules for each activity laying down the types and permissible quantities of waste, and to compliance with the conditions in Article 4 of the directive. Moreover, such undertakings must be registered with the competent authorities.

13. Directive 91/156 amended the definition of 'management' to include, under the new Article 1(d), 'collection, transport, *recovery* and *disposal* ...'.

B — *Italian law*

16. Directive 85/377 was transposed into Italian law by Article 6 of Law 349 of

14. Article 1(e) and (f) describe recovery and disposal by reference to Annexes IIA ('disposal operations') and IIB ('operations which may lead to recovery'). Both annexes state

¹¹ — Article 4 provides that waste is to be recovered, 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'.

8 July 1986¹² and the provisions implementing it.

17. Several years later, Article 40(1) of Law 146 of 22 February 1994¹³ required the Government to lay down within 60 days of its entry into force the conditions, criteria and technical rules for measuring the environmental impact of the works listed in Annex II to the directive.

18. That requirement was satisfied by the Decree of the President of the Republic of 12 April 1996,¹⁴ Article 1(3) of which made subject to those precautionary provisions the operations listed in Annex A, including facilities for the incineration and treatment of urban waste with a capacity exceeding 100 tonnes per day [(i)].

19. Article 3 of the Decree of the President of the Council of Ministers of 3 September 1999¹⁵ changed some aspects of Annex A; the wording of points (i) and (l) became:

'(i) Installations for the disposal and the recovery of hazardous waste through the operations in Annex B and points R1 to R9 of Annex C to Legislative Decree No 22 of 5 February 1997,^[16] excluding recovery installations subject to the simplified procedures of Articles 31 and 33 of that legislative decree.

...

(1) Installations for the disposal and the recovery of non-hazardous waste, with a capacity exceeding 100 tonnes per day, through the incineration and treatment operations in points D2 and D8 to D11

12 — Law on the *Istituzione del Ministero dell'ambiente e norme in materia di danno ambientale* (*Gazzetta Ufficiale della Repubblica Italiana* — hereinafter, 'GURI' —, ordinary supplement No 59 of 15 July 1986).

13 — That law is entitled *Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee — Legge comunitaria 1993* (GURI, ordinary supplement to No 52 of 4 March 1994).

14 — *Atto di indirizzo e coordinamento per l'attuazione dell'art. 40, comma 1, della legge 22 febbraio 1994, n. 146, concernente disposizioni in materia di valutazione di impatto ambientale* (GURI, general series, No 210 of 7 September 1996, p. 28).

15 — *Atto di indirizzo e coordinamento che modifica ed integra il precedente atto di indirizzo e coordinamento per l'attuazione dell'art. 40, comma 1, della legge 22 febbraio 1994, n. 146, concernente disposizioni in materia di valutazione dell'impatto ambientale* (GURI, general series, No 302 of 27 December 1999).

16 — *Attuazione delle direttive 91/156/CEE sui rifiuti, 91/689/CEE sui rifiuti pericolosi e 94/62/CE sugli imballaggi e sui rifiuti di imballaggio* (Decreto Ronchi). *Testo coordinato* (GURI, ordinary supplement to No 33 of 15 February 1997).

of Annex B and points R1 to R9 of Annex C to Legislative Decree No 22 of 5 February 1997, excluding recovery installations subject to the simplified procedures of Articles 31 and 33 of that legislative decree.’

the first an installation for preselecting solid urban waste and producing fuel from its remains; the other an installation for generating electricity from that fuel and biomass by incineration.

20. The latter articles, which describe the characteristics of the materials and activities to which that special procedure applies, were implemented by the Decree of the Ministry of the Environment of 5 February 1998.¹⁷ In its judgment in *Commission v Italy*,¹⁸ the Court of Justice held that Italy had failed to fulfil its obligations under Directive 75/442, by failing to fix in that decree the maximum permissible quantities of waste.

22. As a result of those requests, which were discussed at a meeting held in Rome on 24 and 25 January 2002 and in two subsequent letters of 30 January 2002 and 20 February 2002 from delegates of the Italian Government, the Directorate-General for the Environment at the Commission formed the view that the electric plant, the production of which exceeded 100 tonnes per day, did not treat hazardous materials.

III — Prior administrative procedure

21. On 22 August and 12 November 2001, the Commission requested from the Italian authorities information regarding the compliance with Directive 85/337 of two installation projects in the municipality of Massafra:

23. According to the clarifications provided, an assessment of the environmental impact of the two plants had not been required because they had been deemed to fall within the exemption in Annex A(1) to the Decree of the President of the Republic of 12 April 1996, as amended by Article 3(1) of the Decree of the President of the Council of Ministers of 3 September 1999, and the simplified procedure provided for in Articles 31 and 33 of the Legislative Decree of 5 February 1997 had been applied to them.

¹⁷ — *Individuazione dei rifiuti non pericolosi sottoposti alle procedure semplificate di recupero ai sensi degli articoli 31 e 33 del D.Lgs. 5 febbraio 1997, n. 22* (GURI, ordinary supplement to No 88 of 16 April 1998).

¹⁸ — Case C-103/02 [2004] ECR I-9127.

24. On 18 October 2002 and 11 July 2003, the Commission sent two letters of formal notice to the Italian Republic, having found

the explanations given by the latter to be unconvincing. On 16 December 2003, the Commission therefore sent the Italian Republic a reasoned opinion in which it alleged that the latter had failed to fulfil its obligations under Article 2(1) and Article 4(1) to (3) of Directive 85/337 and gave it a period of two months to comply with the terms of that provision.

- exempts from assessment certain projects included in Annex I to Directive 85/337 (projects for the recovery of waste with a capacity exceeding 100 tonnes per day) if they qualify for the simplified procedure provided for in Article 11 of Directive 75/442;

IV — Procedure before the Court of Justice and arguments of the parties

25. The Commission brought this action on 25 November 2004, seeking from the Court of Justice a declaration that the Italian Republic has infringed the aforementioned articles by:

- uses an inadequate test for determining whether it is necessary to assess the impact of a project in Annex II to Directive 85/337, in that it allows activities having significant effects to be excluded from assessment.

- not assessing the effects of an activity in Annex I to Directive 85/337 (the Massafra incinerator);

26. The Italian Government lodged its defence on 3 March 2005; the reply and rejoinder were lodged on 18 April and 8 June 2005.

- adopting legislation [Annex A(i) and (l) to the Decree of the President of the Republic of 12 April 1996, as amended by Article 3(1) of the Decree of the President of the Council of Ministers of 3 September 1999] which:

27. At the hearing, held on 25 April 2006, the representatives of the Commission and the defendant Member State confirmed their respective positions.

28. The applicant considers that the Massafra incinerator, with a capacity exceeding 100 tonnes per day, falls within point 10 of Annex I to Directive 85/337, whereas the other plant falls within point 11(b) of Annex II to Directive 85/337. In those circumstances, authorisation for the first should have been made subject to an assessment of its environmental impact and authorisation for the second should have been made subject, at least, to an examination under Article 4(2) of that directive.

29. In its view, the origin of the dispute lies in the Italian legislation, which allows recovery operations to circumvent the directive on the basis that they are subject to the special procedure provided for in Articles 31 and 33 of the Legislative Decree of 5 February 1997.

30. It argues that Directive 85/337 applies to waste treatment facilities capable of having a significant effect on the environment, whether they eliminate or recover that waste; it adds that Directive 75/442, in its original version, used the term 'disposal' to mean both disposal in the strict sense and recycling; and it points out that, in Directive 85/337, that term has an autonomous meaning which also includes 'recovery'.

31. It draws attention to Directive 75/442, which is intended to protect health and ecosystems from 'disposal' or 'recovery'.

32. The Italian Government denies the allegations and requests that the applicant's claim be dismissed. It submits that 'disposal' activities fall outside the scope of Directive 85/337, and argues that, in the light of Directive 75/442, they cannot be treated in the same way as 'recovery' activities. In support of that proposition, it refers to the technical nature of both directives, in particular their annexes, and the linguistic coordination between the various Community provisions in the field of environmental protection.

33. The defendant also contends that, where emissions from recovery activities comply with the limits laid down by Community law, their effects on the environment need not be measured, since the very purpose of those activities is to protect the environment.

34. It argues that, whereas the harmonised provisions of Community law exempt all recovery activities from an impact assessment, the Italian system exempts only those activities capable of being authorised by the abridged procedure and is therefore more restrictive.

V — Analysis of the infringements complained of

35. In order to resolve the dispute in these proceedings, it is necessary to consider the relationship between the directive on environmental impact assessments and the directive on waste. The question is whether, as Italy contends, Directive 85/337 does not apply to recovery operations, with the result that the Member States are free to exclude such operations from the preliminary assessment provided for under that directive.

36. The dispute concerns the two directives cited in the versions applicable following their amendment. However, in the light of the issues raised in this case, it is not possible to disregard the original texts of those directives, which shed light on how to resolve the case and provide relevant guidance on interpretation.

37. The analysis must begin with an examination of the objective pursued by Directive 85/337 in order thus to define its scope.

A — *The basis of Directive 85/337: environmental protection*

38. Environmental protection was placed at the heart of the competences of the Union by

the Single European Act and it inspires and shapes those competences¹⁹ to such a degree that it has deservedly been described as an 'essential objective of the Community system'.²⁰ That protective aim paved the way for the recognition, under the first subparagraph of Article 174(2) EC, of principles which, like the precautionary principle and the principle that preventive action should be taken, underpin large areas of Community law.

39. Directive 85/337 serves both those principles²¹ by making the authorisation of activities likely to affect the environment subject to prior assessment²² in two stages, the first being an investigation of whether the planned works have significant effects, the second being an assessment of that impact.²³

19 — As the Court held in the judgment in Case C-300/89 *Commission v Council* [1991] ECR I-2867, paragraphs 22 and 24.

20 — I use this phrase in point 59 of the Opinion in Case C-176/03 *Commission v Council* [2005] ECR I-7879.

21 — Referred to in the second recital in the preamble to Directive 97/11, as the Court pointed out in the judgment of 16 March 2006 in Case C-332/04 *Commission v Spain*, not published in the ECR, paragraph 57. I am surprised at the 'watered down' interpretation of Directive 85/337 put forward at the hearing by the representative of the Italian Government, for whom, it would seem, the Single European Act and the resulting amendments to the EC Treaty and Directive 97/11 are purely incidental and insignificant.

22 — This follows from the judgments in Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 45, and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 42.

23 — I express these ideas in my Opinions in Case C-87/02 *Commission v Italy* [2004] ECR I-5975 and Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003 respectively.

40. There is a legal presumption that certain activities listed in Annex I to the Directive, and referred to in Article 1(4), have significant effects on the natural environment, and their impact must for that reason always be assessed.

41. However, the impact of other activities is less readily apparent, and it is for the Member States to decide whether those activities have to comply with Articles 5 to 10. This is true of the activities listed in Annex II, from which the Member States must select those that need to be assessed, either on a case-by-case basis, by reference to appropriate criteria or thresholds, or by other methods, in accordance with the parameters laid down in Annex III (Article 4(2) and (3)); the Member States therefore have a degree of autonomy in selecting which activities in Annex II merit an environmental impact assessment, having particular regard to their size, nature and location.²⁴

42. In any event, that discretion is limited by Article 2(1) of Directive 85/337, which sets out the fundamental objective pursued by that directive, in so far as activities having a

significant impact are always subject to an assessment of their effects.²⁵ For that reason, where a prior assessment is made in accordance with abstract criteria or thresholds, there is an obligation, when it comes to applying those criteria or thresholds, to determine whether the characteristics of the project are such that it will have significant effects on the environment. In those circumstances, the general rule applies again: after the appropriate examination, an assessment of significant effects is necessary.

43. In other words, the effectiveness of Directive 85/337 requires that no operation of the type in question should be excluded from the appropriate analysis,²⁶ with the result that, however extensive the discretion enjoyed by the national public authorities may appear, Community law precludes the exercise of any such activity without prior screening and, where appropriate, an impact assessment.

44. It is with reference to the broad ambit of the legislation in question, emphasised in the case-law of the Court,²⁷ that it is necessary

²⁴ — Judgments in Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraphs 65 to 67; Case C-474/99 *Commission v Spain* [2002] ECR I-5293, paragraph 31; and *Commission v Spain*, cited in footnote 21, paragraph 76.

²⁵ — The Court takes the same view in the judgments in Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; Case C-301/95 *Commission v Germany* [1998] ECR I-6135, paragraph 45; *WWF and Others*, cited above, paragraphs 36 and 45; Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraph 64; and *Commission v Italy*, cited in footnote 23, paragraph 44.

²⁶ — Judgments in *WWF and Others*, paragraph 45; and *Commission v Italy*, paragraph 44, both referred to in the preceding footnote.

²⁷ — In the judgments in *Kraaijeveld and Others*, cited above, paragraphs 31 and 39, and Case C-227/01 *Commission v Spain* [2004] ECR I-8253, paragraph 46, the Court emphasises the extent of the scope of the directive.

to resolve the issue raised, which, as I have pointed out, concerns whether the recovery of waste requires an analysis of its environmental impact.

The defendant relies on this fact to argue that, where Directive 85/337 refers to 'waste-disposal installations', it uses that term in a strict sense, that is to say with reference only to installations for the disposal (literally, elimination) of waste.

B — Terminological evolution of Directives 85/337 and 75/442

45. The original wording of the annexes to [the Spanish version of] Directive 85/337 used the term 'instalaciones de eliminación' in reference to waste, but, after the 1997 amendment, this was replaced by the synonymous term 'instalaciones para deshacerse'.²⁸

46. In turn, the initial [Spanish] text of Directive 75/442 used the term 'gestión' (literally, management) [Article 1(b)] of waste, which includes its collection, sorting, transport, treatment, storage, and tipping, as well as the transformations necessary for its re-use, recovery or recycling. However, other versions, such as the French ('élimination'), Italian ('smaltimento'), English ('disposal') and German ('Beseitigung'), used terms having the same meaning as the Spanish term 'eliminación' (literally, elimination).

47. I do not share that view. To begin with, a strictly literal interpretation of the provisions in question leads to the opposite conclusion. In the first version of Directive 75/442, 'gestión' ('élimination', 'smaltimento', 'disposal' or 'Beseitigung') encompasses activities relating specifically to disposal as well as other activities of a different nature, such as re-use, recovery and recycling, which, several years later, Directive 91/156 classifies as 'recovery'.

48. Directive 75/442, as amended by Directive 91/156, uses the term 'gestión' ('gestion' in French; 'gestione' in Italian; 'management' in English; 'Bewirtschaftung' in German) as referring to collection, transport, 'valorización' and 'eliminación' ('valorisation' and 'élimination'; 'ricupero' and 'smaltimento'; 'recovery' and 'disposal'; 'Verwertung' and 'Beseitigung'), and defines recovery and disposal by reference to the activities listed in Annexes IIB and IIA respectively.

²⁸ — The original French, English and German versions used the term 'installations d'élimination', 'disposal installations' and 'Abfallbeseitigungsanlagen' respectively, which were retained in the 1997 versions. The Italian version changed the noun 'eliminazione' to 'smaltimento', which has the same meaning.

49. Consequently, the interpretation put forward by the Italian Government, which

is based on a linguistic amalgamation of the original texts of the two directives, must be rejected because it leads to a result contrary to that sought, since 'disposal' ('gestión' in the Spanish translation) within the meaning of Directive 75/442 also covers 'recovery' operations.

50. It could be argued that, in the light of the distinction drawn between 'disposal' and 'recovery' in the 1991 amendment to the waste directive, the fact that the directive on environmental impact assessment, following its amendment in 1997, referred only to 'disposal' is an indication that the legislature did not intend that term to include 'recovery'.

51. Nevertheless, it is my view that such an understanding would not only hamper the implementation of Directive 85/337, the scope of which I have already defined, but would also run counter to the very essence of Directive 75/442 as interpreted by the Court of Justice.

C — 'Recovery' versus 'disposal'

52. The distinction between these two terms lies at the heart of Community legislation in

this field.²⁹ Any activity relating to waste must be designated as 'disposal' or 'recovery', which terms are defined in Annexes IIA and IIB. While, logically, a single operation will often fall within the ambit of both lists, legally it cannot be classified as both at the same time. Each case must be analysed on an individual basis, in the light of the objectives of the directive, in order to determine the correct option.³⁰

53. 'Recovery' aims to ensure that waste materials serve a useful purpose and replace other materials which would have been used for that purpose, thereby encouraging the conservation of natural resources.³¹ 'Disposal' evokes the idea of 'dispensing with' or 'discarding' something in an orderly manner with no view to reclaiming it.³²

54. The difference lies in the end, not the means, with the result that a simplistic approach such as that proposed by the

29 — Advocate General Jacobs emphasises this point in his Opinion in Case C-6/00 *ASA* [2002] ECR I-1961, paragraphs 5 and 77.

30 — In the judgment in *ASA*, the Court expressed a similar view (paragraphs 63 and 64). See also the judgment in Case C-116/01 *SITA* [2003] ECR I-2969, paragraphs 40 and 41.

31 — Paragraph 69 of the judgment in *ASA*. See to the same effect the judgments in Case C-228/00 *Commission v Germany* [2003] ECR I-1439 and Case C-458/00 *Commission v Luxembourg* [2003] ECR I-1553, paragraphs 45 and 36 respectively.

32 — 'Disposal' must not be confused with 'abandonment', which the second paragraph of Article 4 of Directive 75/442 mentions and prohibits, together with dumping and 'uncontrolled disposal'. See the judgment in Case C-457/02 *Niselli* [2004] ECR I-10853, paragraphs 38 and 39.

Italian Government, to the effect that recovery activities, in principle less harmful to the physical environment, fall outside the scope of Directive 85/337, must be rejected. A mere reading of Annexes IIA and IIB shows that such a suggestion is incorrect; for example, techniques such as solvent reclamation or regeneration, potentially more harmful than other techniques treated as 'disposal', such as certain biological treatments or tipping above or underground, are regarded as 'recovery'.

56. Accordingly, although 'recovery' is likely to be more environmentally friendly than 'disposal', it is not harmless, which is why it too requires precautionary measures such as those laid down in Directive 85/337.

57. There is no authority for the proposition advanced by the defendant Member State, which, by leaving a category of potentially harmful activities outside the scope of that directive, without establishing the significance of each of them individually, on the inadequate ground that, as a rule, they do not harm the quality of life, may have consequences at odds with that directive.³⁵

55. Environmental protection is the justification for Directive 75/442 and its amendment in 1991,³³ which promotes 'recovery' as being more beneficial than 'disposal' not because the former is innocuous but because the re-use of materials provides better protection for natural resources.³⁴

D — *The Massafra incinerator*

58. This plant generates electricity from the burning of biomass and waste-derived fuel and has a capacity exceeding 100 tonnes per day; it falls within point 10 of Annex I to

33 — In the judgment in Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, the Court pointed out that the objective of Directive 75/442 is 'the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste'; it also refers to the role of Article 174(2) EC, which is to ensure that Community policy provides a high level of protection for ecosystems on the basis of the precautionary principle and the principle that preventive action should be taken. The Court used an identical form of words in the judgment in *Niselli*, paragraph 33.

34 — For those reasons, Article 3(1)(b) of Directive 75/442, in its 1991 wording, encourages the Member States to promote 'the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials', as well as its use as a source of energy.

35 — In the judgment in Case C-127/02 *Landelijke Vereniging and Others* [2004] ECR I-7405, the Court, by reference to the precautionary principle, held that, if there is uncertainty as to the significance of the effects of an activity, they must be calculated (paragraph 44).

Directive 85/337, as amended in 1997, and should therefore have been made subject to an impact assessment, in accordance with Article 4(1).

of waste and the circumstances in which the exemption operates; and (2) compliance with the conditions contained in Article 4 of the directive, that is to say, the requirement not to endanger human health or harm the environment.

59. In those circumstance, I take the view that the first infringement alleged by the Commission is indisputable, since the Italian authorities consented to the construction and operation of an installation which required an investigation into its environmental impact.

61. In order for the exemption to apply, both conditions must be satisfied,³⁷ although it is the latter which is relevant to these proceedings.

62. The Commission complains that, by exempting from an effects analysis or assessment establishments carrying out recovery which benefit from the abbreviated procedure, the Italian Republic is in breach of its obligations under Directive 85/337.

E — Recovery installations governed by the simplified procedure

60. The 1991 amendment of Directive 75/442 provided for a special procedure in Article 11 and exempted from the permit requirement both establishments and undertakings carrying out ‘recovery’,³⁶ subject to (1) the adoption of general rules for each activity laying down the types and quantities

63. That simplified procedure, governed by Articles 31 and 33 of Legislative Decree No 22 of 5 February 1997, transposes Article 11 of Directive 75/442 into Italian law. I have just pointed out that the simplified procedure is intended for installations which do not deplete natural resources, in particular, according to Article 4, those which do not create risks to water, air, soil, plants and

³⁶ — It also exempts those which dispose of their own waste at the place of production.

³⁷ — Judgment in *Commission v Italy*, cited in footnote 18, paragraph 27.

animals, and neither cause a nuisance through noise or odours nor adversely affect the countryside or places of special interest.

64. At first sight, and without closer scrutiny, it would seem that, in this respect, the defendant Member State is correct.

65. Waste operations must be authorised and the precondition for this is that their impact must be assessed, the relevant opinion being issued where appropriate (Articles 8 and 9 of Directive 75/442, in conjunction with Article 2(1) of Directive 85/337, both as amended). Nevertheless, in exceptional circumstances,³⁸ that preliminary examination does not apply to certain recovery activities, predetermined in a general way, which comply with the thresholds, likewise envisaged in an abstract manner, and at the same time satisfy predefined stipulations, provided that those activities do not harm the environment.

66. No purpose would be served by analysing an activity which is already known to be harmless, as it would not qualify for the special procedure if it were otherwise.

67. That view, however, takes no account of the fact that, in this field, different categories of permits are involved: on the one hand, operating consents, referred to in Articles 9 and 10 of Directive 75/442, and Article 2(1), *in fine*, of Directive 85/337; on the other hand, a development licence, referred to in the first indent of the latter article and described in Article 1(2). The simplified procedure makes the consents superfluous, but not the licence.

68. Under Article 2 of Directive 85/337, before a development licence is granted for a project likely to have a significant impact on the environment, the effects of that project must be assessed and the relevant approval obtained. Under the above special procedure, if those effects have been shown to be insignificant, the operating consent is not required, but the same is not true of the development licence where an assessment as to the impact of the project is required, on account of its 'nature, size or location',³⁹ directly, if it is listed in Annex I, or once its effects have been established, if it is listed in Annex II.⁴⁰

³⁹ — Terms of Article 2(1) of Directive 85/337, as amended.

⁴⁰ — In the judgment in Case C-117/02 *Commission v Portugal* [2004] ECR I-5517, the Court pointed out that, even if it does not reach the thresholds laid down in the provision, an activity may still have effects on the environment by virtue of 'its nature, size or location', in which case the relevant checks must be carried out (paragraph 82).

³⁸ — In the judgment in *Commission v Italy*, cited in the preceding footnote, the Court explains the special nature of that simplified procedure (paragraph 31).

69. In other words, the facility in which an ‘environmentally’ friendly activity is carried out is not exempt from an examination if, on account of its size or location, it may have an adverse effect on the environment. Even if the content is known to be innocuous, the container must be shown to be so on a case-by-case basis. Nobody would dispute that an environmental impact study is appropriate for the installation of a water purification plant in a protected natural area.

70. I pointed out in point 42 of this Opinion that, where the thresholds and criteria for compulsory assessment are laid down *ex ante*, it is necessary, when it comes to applying such parameters, to ascertain whether the characteristics of a specific operation have significant effects.

the Italian Republic infringed the provision at issue by omitting to set, in the Decree of 5 February 1998 implementing Articles 31 and 33 of Legislative Decree No 22 of 5 February 1997, acceptable maximum quantities of waste with respect to qualification for the simplified procedure, and, as a result, failing to fulfil one of the conditions for the application of that procedure.

72. In short, there are in Italy recovery installations falling within Annexes I and II to Directive 85/337 which are authorised without the conduct of an environmental impact assessment, which fact constitutes an infringement of Articles 2(1) and 4(1) to (3) of that directive. Consequently, the second claim in the application is likewise well founded.

VI — Costs

71. In any event, even where the summary approach described in points 64 to 66 of this Opinion is considered appropriate, the Member State may commit errors, by using incorrect parameters or circumventing the conditions contained in Article 11 of Directive 75/442 by classifying as harmless operations whose effects are unknown. That is the situation in the present case, since, as the Court held in the judgment in Case C-103/02 *Commission v Italy*, cited above,

73. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs, if, as in the present case, they have been applied for in the other party’s pleadings. Accordingly, since the Commission’s action has been successful, the defendant should be ordered to pay the costs.

VII — Conclusion

74. In the light of the foregoing, I propose that the Court of Justice should:

- (1) Grant the Commission's application in full.
- (2) Declare that the Italian Republic has failed to fulfil its obligations under Articles 2(1) and 4(1) to (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, by:
 - (a) exempting from the environmental impact assessment procedure a plant for the incineration of combustible material derived from waste and biomass with a capacity exceeding 100 tonnes per day, located in Massafra in the province of Taranto, which is an installation included in point 10 of Annex I to the directive;
 - (b) adopting legislation [Article 3 of the Decree of the President of the Council of Ministers of 3 September 1999 amending points (i) and (l) of Annex A to the Decree of the President of the Republic of 12 April 1996] which exempts from that assessment certain activities in Annex I to the above directive and uses an inadequate test to determine whether an activity in Annex II to the same provision may be exempted from that assessment.
- (3) Order the Italian Republic to pay the costs.