OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 14 November 2002 [1]

1. In the present case, brought by the Commission of the European Communities under Article 226 EC, the Court has to find whether, by imposing compulsory contributions to a 'Solidarity Fund' on shipments of waste to other Member States, the Federal Republic of Germany has infringed the prohibition on imposing charges having an effect equivalent to customs duties which is laid down in Articles 9 and 12 of the EC Treaty (now Articles 23 EC and 25 EC).

I — Relevant law

A — *International and Community legislation on transfrontier movements of waste*

2. Within the Community legal system, transfrontier movements of waste are governed by Council Regulation (EC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (hereinafter, 'Regulation No 259/93' or 'the Regulation'). [2] In particular, the Regulation gives effect to the obligations undertaken by the Community in its accession to the international convention on the control of transboundary movements of hazardous wastes and their disposal, adopted at Basel on 22 March 1989 (hereinafter, the 'Basel Convention', or 'the Convention'), to which all the Member States also are party. The Convention was approved for the Community in Council Decision 93/98/EEC of 1 February 1993. [3]

3. For the purposes of this case, it should be noted firstly that the system set out in the Convention hinges upon a requirement to give notification of each transboundary movement of waste. Under Article 6 of the Convention, exports of waste are to be notified to the competent authorities of the State of import, which may consent to them or not. For its part, the State of export is not to allow the waste to be shipped until it has received proof of consent issued by the State of import and of the existence of a

1 — Original language: Italian.

2 — OJ 1993 L 30, p. 1.

3 — OJ 1993 L 39, p. 1.

contract between the exporter and the disposer under which the waste in question is to be managed in an environmentally sound manner.

4. When a transboundary movement of waste to which the consent of the States concerned has been given under Article 6 of the Convention cannot be completed as intended, then Article 8 of the Convention requires the State of export to ensure that the exporter brings the waste in question back into its territory, if alternative arrangements cannot be made to dispose of it in an environmentally sound manner within a given period.

5. Article 9 of the Convention, on the other hand, governs cases of transboundary movements of waste carried out in breach of the requirements of prior notification and consent laid down in Article 6 or with the intention of disposing of the waste by methods which contravene the Convention and the general principles of international law. Article 9(1) defines such cases as 'illegal traffic' in waste. Where illegal traffic is the result of conduct on the part of the generator or exporter of the waste, Article 9(2) requires the State of export to ensure that the generator or exporter takes back the waste concerned or, if necessary, to take it back itself into its territory; where that is not possible, the State of export must, within a prescribed period, dispose of the illegally exported waste in accordance with the provisions of the Convention.

6. At the Community level, Regulation No 259/93 provides for a mechanism of notification and consent, for transfrontier movements of waste between Member States, similar to that established by the Convention. [4]

7. The requirement to take back the waste that is laid down in Article 8 of the Convention has been implemented in Article 25(1) of the Regulation, which states:

'[w]here a shipment of waste to which the competent authorities concerned have consented cannot be completed in accordance with the terms of the consignment note or the contract referred to in Articles 3 and 6, the competent authority of dispatch shall, within 90 days after it has been informed thereof, ensure that the notifier returns the waste to its area of jurisdiction or elsewhere within the State of dispatch unless it is satisfied that the waste can be disposed of or recovered in an alternative and environmentally sound manner'.

4 — In this Opinion, I shall not take account of the effect of the Basel Convention or of Regulation No 259/93 on movements of waste to and from non-Member countries, since these matters are not relevant to the present case.

8. For its part, Article 26(1) of the Regulation reflects Article 9 of the Convention by giving the following definition of illegal traffic in waste:

'Any shipment of waste effected:

(a) without notification to all competent authorities concerned pursuant to the provisions of this Regulation; or

(b) without the consent of the competent authorities concerned pursuant to the provisions of this Regulation; or

(c) with consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud; or

(d) which is not specified in a material way in the consignment note; or

(e) which results in disposal or recovery in contravention of Community or international rules...

...

shall be deemed to be illegal traffic.'

9. As regards the consequences of illegal traffic of waste, Article 26(2) provides:

'If such illegal traffic is the responsibility of the notifier of the waste, the competent authority of dispatch shall ensure that the waste in question is:

(a) taken back by the notifier or, if necessary, by the competent authority itself, into the State of dispatch, or if impracticable;

(b) otherwise disposed of or recovered in an environmentally sound manner,

... .'

10. Furthermore, under Article 27(1) of the Regulation:

'All shipments of waste covered within the scope of this Regulation shall be subject to the provision of a financial guarantee or equivalent insurance covering costs for shipment, including cases referred to in Articles 25 and 26, and for disposal or recovery'.

11. On administrative costs and costs arising from the return, shipment, disposal or recovery of waste, Article 33 of the Regulation provides as follows:

'1. Appropriate administrative costs of implementing the notification and supervision procedure and usual costs of appropriate analyses and inspections may be charged to the notifier.

2. Costs arising from the return of waste, including shipment, disposal or recovery of the waste in an alternative and environmentally sound manner pursuant to Articles 25(1) and 26(2), shall be charged to the notifier or, if impracticable, to the Member States concerned.

... .'

B — *Relevant German legislation*

12. The Federal Republic of Germany made provision for supervision and control of transfrontier shipments of waste in the *Gesetz über die Überwachung und Kontrolle der grenzüberschreitenden Verbringung von Abfällen* (Law on supervision and control of transboundary shipments of waste) of 30 September 1994 (hereinafter, 'the Law establishing the Fund' or 'the Law');[5] Paragraph 8(1) of the Law created a public organisation with legal personality, with the name *Solidarfonds Abfallrückführung* (Solidarity fund for the return of waste; hereinafter, 'the Solidarity Fund' or 'the Fund').

13. The effect of the fifth sentence in Paragraph 8(1), read together with Paragraph 6(3), is that the Solidarity Fund bears the cost of returning waste to German territory and of disposal or recovery of the waste by the competent authority of the Federal Republic, as laid down in Article 33(2) of Regulation No 259/93, where those responsible for discharging these obligations fail to do so. Paragraph 8(4) of the Law empowers the Fund to charge the costs so borne to those persons.

5 — BGBl. I 1994, page 2771.

14. The detailed arrangements for financing the services provided by the Solidarity Fund and the administrative costs which it incurs are set out in the sixth sentence of Paragraph 8(1) of the Law, requiring every operator notifying an export of waste under Regulation No 259/93 [6] to pay a pecuniary contribution to the Fund, calculated from the quantities and the nature of the waste to be exported. Under the seventh sentence of this paragraph, contributions paid to the Fund but not used within three years are to be repaid to the contributors in proportion to the payments made.

15. It should also be noted, as may be seen from Paragraph 7(1) of the Law, that the requirement to contribute to the Solidarity Fund does not replace, but accompanies, the provision of a financial guarantee or insurance when notifying an export of waste under Article 27 of Regulation No 259/93.

16. The operation of the Fund is governed by the *Verordnung über die Anstalt Solidarfonds Abfallrückführung (Regulation on the Solidarity Fund for the return of waste)* of 20 May 1996 [7] (hereinafter, 'the Fund Regulation'); Paragraph 17 of that regulation provides that the obligation to contribute to the Fund arises at the same time as that imposed on the exporter of waste to give notice. Paragraph 18 establishes the amounts, which differ according to the nature of the waste, due to the Fund for each tonne of waste exported.

II — Facts and pre-litigation procedure

17. In a letter of formal notice of 25 May 1998, the Commission informed Germany that, in its opinion, the requirement to contribute to the Solidarity Fund, apart from not being laid down in Regulation No 259/93, constituted the imposition of a charge having an effect equivalent to a customs duty, contrary to Articles 9 and 12 of the EC Treaty (now Articles 23 EC and 25 EC), and consequently called on the German Government to submit its observations on the matter.

18. Germany answered the letter of formal notice on 11 September 1998, disputing the complaints made by the Commission. In that regard, the German Government claimed in particular that the contribution to the Solidarity Fund was the appropriate remuneration for a specific service actually and individually provided to exporters of waste and thus could not be assimilated to a charge having equivalent effect.

6 — Under the terminology used in Regulation No 259/93, 'exports' of waste properly means the shipment of waste outside the Community, while the term 'shipment' is used for transfrontier movements of waste within the Community. However, that terminological distinction is not particularly useful in the present case and, for simplicity, in this discussion I shall also use the term 'export' for intra-Community movements of waste, showing, where necessary, when the destination of those movements is a non-member country.

7 — BGBl. I 1996, page 694.

19. The Commission was not convinced by these arguments and, on 16 August 1999, sent a reasoned opinion to the Federal Republic of Germany, re-stating its position and, in particular, insisting on the fact that Community law recognises the special nature of waste as goods only with reference to the needs of environmental protection, for the purposes of Articles 174 EC and 176 EC. According to the Commission, the requirement to contribute to the Solidarity Fund imposed a condition on the free movement of goods which was additional to, and more restrictive than, those already laid down by Community legislation but for which there was no justification in Article 176 EC.

20. Germany replied to the reasoned opinion in a letter of 21 January 2000, contesting again the points put forward by the Commission. In the letter, the German Government, apart from giving information relating to the objectives, functioning and detailed arrangements for financing of the Solidarity Fund, stressed, in particular, that the system of contributions to the Solidarity Fund had contributed to a reduction both in the number of interventions by the Fund and also, more generally, in the volume of illegal traffic of waste coming from Germany.

21. In the light of the objections from the Federal Republic of Germany, the Commission decided to bring the matter before the Court of Justice and, by application lodged on 20 October 2000, brought the present action.

III — Legal analysis

A — *Ambit of the dispute*

22. As we have seen, in the present case the Commission charges the Federal Republic of Germany with having subjected shipments of waste to other Member States to a compulsory contribution to the Solidarity Fund. Since, in the Commission's opinion, such a contribution constitutes a charge having an effect equivalent to a customs duty on the export of waste, the defendant government had infringed Articles 23 EC and 25 EC, which prohibit such charges.

23. The Commission supports its own view by noting, firstly, that the Court has consistently held that 'any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier' [8] constitutes a charge having effect equivalent to a customs duty. That, according to the Commission, is precisely the case with the contribution to the Fund, which is

8 — The definition is taken from the judgment in Joined Cases 2/69 and 3/69 *Sociaal Fonds voor de Diamantarbeiders* [1969] ECR 211, paragraph 18), but it repeats aspects already stated in the judgment in Joined Cases 2/62 and 3/62 *Commission* v *Luxembourg and Belgium* ('*Gingerbread*') [1962] ECR 425. This definition has been repeated consistently in subsequent case-law, including the judgments in Case 18/87 *Commission* v *Germany* [1988] ECR 5427 and in Case 340/87 *Commission* v *Italy* [1989] ECR 1483, which the applicant also refers to.

in fact a pecuniary charge imposed unilaterally by the Federal Republic and is intended to be charged on waste when it crosses the German frontier.

24. Moreover, the Commission continues, this case does not involve any of the circumstances in which the Court has held that a pecuniary charge, even where levied in respect of a transfrontier movement of goods, does not fall within the definition of a charge having effect equivalent effect within the meaning of Articles 23 and 25 EC. As we know, such is the case where a pecuniary charge is part of a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike, [9] or where it represents the payment for a service actually and individually rendered to an economic operator in an amount proportionate to the cost of that service [10] or, lastly, where it is an amount levied by reason of inspections carried out to meet obligations laid down by Community provisions. [11] According to the applicant, the contribution in question here has none of those characteristics.

25. The Federal Republic of Germany of course holds an opposing view, namely that, although a contribution to the Fund has in appearance the characteristics of a charge having an effect equivalent to a customs duty, it does not in fact infringe the prohibition laid down by the Treaty. In the German Government's view, such a contribution falls within the second and/or third examples set out in the foregoing paragraph, meaning that it represents payment for a service rendered to exporters of waste and, in any event, should be treated as amounts levied in connection with inspections carried out to meet obligations laid down by Community law.

26. For my part, I would observe, first of all, that it is not denied that, at least in the abstract, the contribution at issue does match the definition of a charge having effect equivalent to a customs duty as set out in the case-law of the Court. In determining whether the application is well founded, therefore, there is no need to dwell on that point. On the other hand, it is necessary to make a detailed analysis of the justifications which the German Government has given to support its contention, and of the objections raised against them by the Commission.

B — *Whether the contribution to the Solidarity Fund constitutes remuneration*

1. Arguments of the parties

27. To show that a contribution to the Solidarity Fund represents proportionate

9 — In this regard, the Commission cites the judgment in Case 132/78 *Denkavit* [1979] ECR 1923.

10 — On this, the Commission refers to the judgment in Case 158/82 *Commission* v *Denmark* [1983] ECR 3573.

11 — As in Case 46/76 *Bauhuis* [1977] ECR 5, cited among many others by the Commission.

payment for a service rendered to exporters of waste, in the sense contemplated in the case-law of the Court, [12] the German Government starts from a particular premiss. That is to say, it assumes that Regulation No 259/93 (and, before that, the Basel Convention), while intended to protect the environment and health, is at the same time also intended to further the free movement of waste by setting down the conditions on which transfrontier movements of waste can be carried out. From that standpoint, the measures established by the Regulation must be regarded as measures to open up the markets, [13] and among these, there must specifically be numbered the secondary liability placed upon the Member States by Article 33(2) of the Regulation, for costs arising from the return, disposal or recovery of the waste in the cases of exports that are not completed or of illegal traffic, as contemplated in Article 25(1) and Article 26(2) of the Regulation. By assuming that liability, the Federal Republic of Germany thus contributed to making possible the free movement of the waste, so offering a service to economic operators with an interest in exporting waste from German territory.

28. But, as we have seen, it is not sufficient in terms of the case-law of the Court for the contribution to be payment for a service: it is also necessary for the service to be one actually and individually rendered to the economic operators. In this case, according to the defendant government, an individual service is actually rendered because, at the time of an export of waste, every individual exporter enjoys the opportunity afforded for that purpose by the existence of the secondary liability of the State. It is therefore justified that, through the contribution to the Solidarity Fund, the costs attaching to that liability should be transferred to the exporters of waste, particularly since Regulation No 259/93 leaves the Member States free to establish the relevant financing arrangements.

29. Nor can it be objected, the German Government continues, that the Fund is intended to intervene, pursuant to Article 33(2) of the Regulation, essentially in instances of illegal traffic in waste. It has in fact been objected that this intervention primarily benefits those operators who have failed to follow the notification procedure and have also failed to contribute to the Fund, while the contribution affects those operators who have complied with the procedure and have also provided the compulsory guarantee referred to in Article 27 of the Regulation, and whose compliance with the requirements of return, disposal or recovery is therefore already assured in principle by that guarantee. [14]

30. The German Government's response to that objection is, first of all, that the person

12 — In addition to the case-law cited also by the Commission (see footnote 10), the German Government refers in particular to the judgments in Case 89/76 *Commission* v *Netherlands* [1977] ECR 1355, and in Case 1/83 *IFG* v *Freistaat Bayern* [1984] ECR 349.

13 — The German Government's representative spoke in these terms at the hearing in the Court on 27 June 2002.

14 — See points 10 and 11.

liable for any illegal export of waste, if identified, is required to bear the whole of the cost of return, disposal or recovery of the waste, and is in addition subject to penal sanctions. But the important point, the German Government stresses, is that, were there no secondary State liability, the operators in the industry would have no market for their activity, since other States would not readily consent to the import of waste. In the end, therefore, it is in fact the operators who export in compliance with the Regulation — those who contribute to the Solidarity Fund — who benefit from that liability.

31. Next, the proportionality of the payment is guaranteed in that the Law establishing the Fund, and the Fund Regulation provide for the amount of the contribution paid by each operator to be adjusted to the type and the quantities of waste exported; they also require repayment of sums not used to meet the costs borne by the Fund. And, the German Government notes, the amount of the resources available to the Fund, originally planned to be DEM 75 million, was later reduced to DEM 16 million, precisely in order to match the level of contribution asked of exporters to the costs actually incurred by the Fund.

32. To these arguments, the Commission objects that the assumption of secondary liability is no more than the fulfilment of a specific obligation incumbent upon the Federal Republic under the Basel Convention and Regulation No 259/93 and that it therefore cannot be regarded as a service rendered to the operators concerned. In any event, even were it so, the beneficiary — if there were one — would be the industry as a whole and not each operator taken individually. Such a shared benefit to the exporters of waste would not, therefore, in the light of the *Lamaire* judgment, [15] be sufficient for contributions to the Solidarity Fund to escape the prohibition laid down by the Treaty on imposing charges having equivalent effect.

2. Assessment

33. In substance, those objections seem to me to be well founded. I, too, do not believe that the Federal Republic of Germany's assumption of the secondary liability, referred to in Article 33(2) of the Regulation, gives a specific and clearly defined advantage — actually and individually conferred on exporters of waste, in the sense contemplated in the case-law of the Court [16] — and that the contribution to the Fund can be regarded as appropriate payment for that advantage.

15 — Judgment in Case C-130/93 [1994] ECR I-3215.

16 — Among many others, see the judgments in Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraph 16) and in Case 63/74 *Cadsky* [1975] ECR 281, paragraph 6.

34. I believe that a number of arguments can be put forward in support of this view. Firstly, it seems to me to be necessary to put in perspective the significance of the German Government's assertion that the State's secondary liability is intended to further the free movement of waste and may even be regarded as a market-opening measure. The intra-Community movement of waste is not founded on Regulation No 259/93 but directly on those provisions of the Treaty which require the free movement of goods. That was expressly acknowledged by the Court in *Commission* v *Belgium* ('the *Walloon waste* judgment'), [17] which has been referred to a number of times in the present case, and it is not invalidated by the fact that, as that judgment shows, restrictions justified by the particular nature of waste may be placed upon that freedom, in the light of the environmental problems relating to the management of waste. [18]

35. What in fact Regulation No 259/93 did was, specifically, to impose restrictions on the intra-Community movements of waste, restrictions based on requirements of protection of the environment and human health under Article 130r of the EC Treaty (now, after amendment, Article 174 EC). As the Court noted in the judgment in *Parliament* v *Council*, the aim of the Regulation is not to encourage movements of waste but to limit them through a harmonised set of procedures, in order to secure observance of those requirements. [19]

36. Admittedly, while pursuing its environmental objective, the Regulation is also concerned to ensure that the restrictions placed on movements of waste interfere to the least extent possible with the functioning of the internal market and therefore seeks to facilitate movements of waste carried out in accordance with that objective. But, clearly, the objective of freedom of movement is strictly ancillary and an instrument in the attainment of the environmental objective of the Regulation. [20]

37. I feel there can be no question but that the State's secondary liability as referred to in Article 33(2) of the Regulation pursues its own essential function specifically within the ambit of that environmental objective, because it contributes to ensuring that no transfrontier movement of waste is completed without the proper guarantees in terms of protection of the environment and health. On the other hand, considering what I have said before, I do not believe that it can serve the other objective of the

17 — Judgment in Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, paragraph 28.

18 — Paragraphs 30 to 34.

19 — Judgment in Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857, paragraph 26.

20 — As stated by Advocate General Jacobs in the Opinion delivered on 18 May 1994 in *Parliament* v *Council* (cited in footnote above), points 46 and 47.

Regulation, to facilitate the movement of waste.[21] At most, it might perhaps be thought that — precisely because it is intended to prevent exports which do not provide proper guarantees for the protection of the environment and health — such liability indirectly favours exports which, carried out in accordance with the Regulation, do provide such guarantees.

38. That, however, does not seem to me to be a sufficient ground for maintaining, as the German Government does, that at the time of exporting waste each economic operator obtains an advantage from the opportunity which the State's secondary liability affords him for that purpose and that is why he is required to contribute to the relevant costs. There would be a basis for that contention if the outcome of secondary liability were the very possibility of exporting waste: in such a case it might be shown that the exporter is the same person as the one actually and individually benefiting from the measure concerned. But that is not the case where, as here, the advantage offered to operators consists merely in an improvement in the opportunities for export. In such circumstances it is truly difficult to determine whether and to what extent the State's secondary liability has facilitated a specific export operation, and to be able to claim that the contribution to the Fund does nothing more than compensate for that facility. In other words, I do not believe it can be claimed, in such circumstances, that every time that each economic operator exports waste he benefits from the State's secondary liability in a specific manner which differs with respect to the other operators concerned.

39. In short, it appears to me that in this case, as the Commission also has pointed out, this is a situation similar to that considered in the *Lamaire* case.[22] In that case, the Court had to rule whether a compulsory contribution to an agricultural-products promotion board, imposed on exporters of such products in proportion to the quantities exported, was a charge having effect equivalent to a customs duty. The Court found that it was, having noted that the contribution was intended to finance the board's promotional activity in general and could not therefore represent consideration for a specific and individual advantage provided to the economic operator:[23] a possible improvement in the opportunities for exporting agricultural products which arises from the promotion board's activity cannot constitute such an advantage.

21 — In any case, in the passage cited above, from the Opinion in *Parliament* v *Council*, the Advocate General was certainly not referring to the State's secondary liability: the express reference was to measures such as the uniform notification procedure of exports, the 'tacit consent' procedure in authorising the export of waste for recovery, the requirement on the importing Member State to give reasons for objections, etc. — all of them measures which can clearly be acknowledged as having a beneficial effect on movements of waste carried out in accordance with the requirements that the Regulation is intended to protect.

22 — Judgment cited in footnote 15.

23 — Paragraph 19. To the same effect, see the judgment in *Commission* v *Italy* (paragraphs 15 and 16), regarding an alleged improvement in the competitive position of importers and exporters resulting from the provision of foreign-trade statistics, and the judgment in *Cadsky* (paragraphs 7 and 8), regarding the alleged improvement in export opportunities afforded by the affixing of a quality mark to products passing certain checks (both cited in footnote 16).

40. I think that similar reasoning can be applied in the present case: a measure, such as the State's secondary liability as referred to in Article 33(2) of Regulation No 259/93, which has the effect of improving the opportunities for exporting waste from Germany may produce an advantage of a *general* and *diffuse* kind for the entire category of economic operators concerned in the export of waste, but it certainly does not afford an actual and individual advantage to the economic operators concerned. And that is because, as I said earlier, [24] it seems to me to be excessively difficult to establish a particular correlation between the secondary liability and the carrying out of a particular commercial waste-export operation, such as to establish a bilateral relationship between the enhanced opportunities afforded by such liability and the contribution sought from the exporters.

41. In the light of those considerations, I therefore consider that the German Government has not succeeded in showing that the contribution to the Solidarity Fund constitutes proper payment for a service actually and individually provided to economic operators in the sense indicated in the case-law of the Court.

42. I am further supported in this conclusion by the actual manner in which intervention by the State and, in this case, intervention by the Solidarity Fund fit together for the purposes of Article 33(2) of the Regulation. As we have seen, the secondary liability which is laid down in that provision can be invoked to cover the costs of return, disposal or recovery of waste in two instances: firstly, where it has not been possible to complete an export of waste under the detailed rules made and authorised by the competent authorities of the Member States concerned (Article 25(1) of the Regulation); and, secondly, where waste is illegally exported, that is to say, essentially, without prior notification and/or consent, or with incorrect or falsified notification or, again, with a view to disposal or recovery in contravention of Community or international rules, if the notifier or the person who should have given notice is responsible for such an illegal export of waste (Article 26(1) of the Regulation). [25] It must be considered however, firstly, that the possibility of such costs arising is usually covered by the special guarantee which exporters must provide when notifying under Article 27 of the Regulation and, secondly, in this instance, that, by virtue of the Law creating the Fund and the Fund Regulation, exporters are also called upon to contribute to the Solidarity Fund at that time.

43. But it is in fact the *secondary* nature of the liability in question, which comes into play only when it is not possible to charge

24 — At point 38.

25 — See points 7 to 9.

the costs of return, disposal or recovery of the waste to the exporter concerned, which compels the conclusion that the Federal Republic of Germany — and, therefore, the Fund — is called upon to intervene, by virtue of Article 33(2) of the Regulation, precisely in those cases (of illegal traffic of waste) where the exporters concerned have not contributed to the Fund or, at least, have not contributed to the extent prescribed. [26]

44. It is of course possible that the Fund will also be called upon to intervene in cases where the compulsory guarantee under Article 27 of the Regulation has been provided, but that could occur only if, for whatever reason, the guarantee was found to be insufficient or inoperative and where the operator was in any event unable to meet the relevant costs. That possibility is therefore clearly more remote than the possibility of the Fund intervening in cases of illegal traffic of waste, where either no notification has been given (and the operator responsible is therefore presumably unknown, the guarantee prescribed in Article 27 has not been provided and the contribution to the Fund not paid) or the notification is incorrect or falsified (and therefore, neither the guarantee nor the contribution to the Fund has been determined correctly).

26 — And, of course, they have not provided the guarantee or insurance under Article 27 of the Regulation, or have provided too small an amount.

45. In these circumstances, I cannot see what constitutes the definite, quantified advantage which the exporter contributing to the Solidarity Fund ought to derive from the existence of secondary State liability so that it is possible to regard the contribution to the Fund as proper remuneration for such an advantage.

46. In the light of the above considerations, I therefore consider that the arguments of the German Government on the remunerative nature of the contribution to the Solidarity Fund must be disregarded.

C — *Whether the contribution in dispute may be compared to a measure imposed by Community law for the purpose of furthering the free movement of goods*

1. Arguments of the parties

47. As I have already mentioned [27] in disproof of the alleged infringement of Articles 23 and 25 EC, the Federal Republic of Germany cites a number of judgments of the Court which, subject to certain

27 — See point 25.

conditions, rule that charges levied on the occasion of export or import inspections prescribed by Community law cannot be characterised as charges having an effect equivalent to a customs duty. The German Government maintains that the contribution to the Solidarity Fund is to be regarded similarly. [28] It notes, more specifically, that, according to the case-law of the Court, such charges cannot be characterised as charges having equivalent effect where they are levied on the occasion of inspections which are obligatory and uniform for all the products concerned in the Community, prescribed by Community law in the general interest of the Community and intended to further the free movement of goods. Furthermore, the amount of such charges must not exceed the actual costs of the inspections concerned. [29]

48. According to the defendant government, all those conditions are fulfilled here: first of all, like the inspections referred to above, the State's secondary liability is laid down by Community law in the interest of the free movement of goods, with the object of permitting and furthering the movement of waste while observing the requirements of environmental protection which derive from the specific nature of that waste. That liability is obligatory and uniform for all waste within the Community. Lastly, the amount of the contributions laid down in the Law establishing the Fund does not exceed the actual costs borne by the Federal State in performing the obligations which derive from that liability; each contribution, individually considered, is therefore proportionate to the individual advantage which each operator derives from that liability.

49. The Commission disputes the German viewpoint and in particular, if I have fully understood its arguments, denies that the intention of permitting or furthering the free movement of waste can be attached to the secondary liability under Article 33(2) of Regulation No 259/93. The Commission also disputes that the detailed rules for calculating the contribution at issue, as laid down in the Law establishing the Fund and the Fund Regulation, make it possible to set the amount of contribution in proportion to the actual costs of the measure, in the sense indicated in the case-law of the Court. [30]

2. Assessment

50. Again, the objections raised by the Commission seems to me, in substance, to be well founded both as regards the assessment of the purpose of the liability in question and as regards the relationship

28 — In addition to the *Bauhuis* judgment, also cited by the Commission (see footnote 11), the German Government cites, among others, the judgment in Case C-111/89 *Bakker Hillegom* [1990] ECR I-1735.

29 — Judgment in *Commission* v *Germany*, cited in footnote 8.

30 — On this, the Commission cites the *Bakker Hillegom* judgment (cited in footnote 28), paragraph 14.

between the charge levied on exporters and the costs relating to that liability, for the reasons which I shall now demonstrate.

(a) On the characterisation of the State's secondary liability as a measure intended to further the free movement of goods

51. Firstly, I, too, believe that it is not possible to characterise the secondary liability of the State, as provided in Regulation No 259/93, as a measure intended to further the free movement of goods (in this case, of waste) in the same way as the inspections ruled upon in the judgments cited by the German Government. As I have said earlier, even though it is conceivable that the secondary liability of the State may indirectly have the effect of furthering exports of waste carried out in conformity with the environmental objective of the Regulation, the chief end and the primary effect of that liability are different. [31]

52. On a perusal of the case-law which relates to the lawfulness of charges levied on the occasion of inspections of imported or exported goods, it cannot fail to be observed that, in the cases considered, the measures concerned had as their *primary and fundamental* objective the elimination of the — actual or potential — obstacles to intra-Community trade created by the unilateral application of measures in conformity with Article 36 of the EC Treaty (now Article 30 EC). These are the measures which the Court held to be intended to facilitate the free movement of goods; and that can well be understood because, as those inspections were intended to remove obstacles to trade, the fact of placing the relevant cost on the exporters or importers does not — although it affects the price of the goods concerned — of itself have the effect, peculiar to customs duties, of hindering the movement of such goods. [32]

53. Referring only to the rulings cited by the parties, I note for example that, in the *Bauhuis* judgment, [33] the Court held that charges levied in connection with health inspections upon the export of live animals pursuant to Directive 64/432/EEC [34] were compatible with the prohibition on imposing charges having equivalent effect,

31 — See points 36 and 37.

32 — See judgment in *Bauhuis* (cited in footnote 11), paragraphs 27 to 31. This does not mean that the levying of taxes or other pecuniary charges intended to compensate for the cost of similar inspections cannot in some way have a negative effect on the free movement of goods, since the imposition of such taxes or charges is decided upon unilaterally by the Member States concerned. However, in the judgment in *Commission* v *Germany* (cited at footnote 8), paragraphs 14 and 15, the Court ruled that that effect can be eliminated only with the adoption of Community provisions to harmonise the rules on the financing of the inspections concerned (on this, see the judgment in *Commission* v *Netherlands*, cited at footnote 12).

33 — Cited in footnote 11.

34 — Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra- Community trade in bovine animals and swine (OJ, English Special Edition, 1963-1964, p. 185).

because the express purpose of the directive was to eliminate obstacles to trade arising from differences in the national laws of Member States regarding animal health provisions by the introduction of a harmonised system of inspections. [35] Similarly, in the judgments in *Commission* v *Netherlands* [36] and *Bakker Hillegom*, [37] the Court acknowledged the lawfulness of fees levied for plant-health inspections upon export as provided in an international convention to which all the Member States were party, in order to eliminate duplicated inspections at frontiers. [38] So also, in the judgment in *Commission* v *Germany*, [39] the Court ruled that it was lawful to impose a fee to compensate for the costs of the veterinary inspections, on the import of animals, introduced by Directive 81/389/EEC within the context of harmonisation intended to remove technical obstacles to trade caused by differences between national laws concerning the transport of animals. [40]

54. However, the objectives of the secondary liability placed upon Member States by Article 33(2) of Regulation No 259/93 are essentially different from the measures mentioned above: in my opinion, the Regulation is not, as I have said earlier, [41] a measure intended to further the free movement of goods in the sense indicated in the case-law of the Court regarding fees charged for inspections on export or import, and particularly so if it is considered that, in the present context, the concept of 'measure intended to further the free movement of goods' essentially defines the scope of an exception to the fundamental prohibition on imposing taxes having equivalent effect which is laid down in Articles 23 and 25 EC. [42] Very clearly, this requires a narrow interpretation of that concept and therefore requires the exclusion from it of measures not having primarily and fundamentally the objective stated.

(b) On the relationship between the charges imposed on operators and the actual cost of the measure concerned

55. Secondly, it seems to me that it also cannot be accepted that the contribution to the Solidarity Fund fulfils the further condition laid down by the case-law regarding the relationship between the cost of the inspections and the amount of the tax or pecuniary charge levied on the operator. As we know, in the *Bakker Hillegom* judg-

35 — Paragraphs 16 to 19.

36 — Cited in footnote 12.

37 — Cited in footnote 28.

38 — See judgments in *Commission* v *Netherlands* (cited in footnote 12), paragraphs 11 and 13, and in *Bakker Hillegom* (cited in footnote 11), paragraph 11. The convention concerned is the International Plant Protection Convention signed at Rome on 6 December 1951 (United Nations Treaty Collection, 1952, No 1963). In the *Commission* v *Netherlands* judgment (paragraph 12), the Court also pointed out the similarity between the functions of the Convention and those of Directive 64/432.

39 — Cited in footnote 8.

40 — Paragraph 12.

41 — See point 51.

42 — Advocate General Jacobs, at point 13 of his Opinion in the *Bakker Hillegom* case (cited in footnote 28), spoke in this sense, although he was referring to the connection between the cost of the inspections and the amount of the charges levied to carry them out (on this, see below).

ment the Court clarified the scope of that condition by stating that it 'cannot be considered to have been satisfied unless there is a *direct link* between the amount of the fee and the actual inspection in respect of which the fee is charged' and that 'such a link is present when the amount of the fees is calculated on the basis of the duration of the inspection, the number of persons required, the cost of materials, overheads or other similar factors, which does not preclude a fixed-rate assessment of inspection costs, such as, for example, a fixed hourly rate'.[43] It is therefore possible to pass on to the economic operator concerned only *the actual costs of the specific inspection* for which that operator is asked to pay the tax or charge in question.

56. The documents in the case show that the amount of the contribution due from each operator to the Solidarity Fund is calculated on the basis of the weight and the nature of the waste exported and that amounts not used by the Fund within three years are returned to the contributors in proportion to the payments made.[44] In principle, a system devised in this way could in fact suggest that, in the final analysis, the charges levied on exporters of waste correspond to the costs borne by the Federal Republic of Germany in meeting its secondary-liability obligations under Article 33(2) of Regulation No 259/93.[45] However, I would note that, even if that were the case, the fact remains that this correspondence would be between the *total amounts* of the charges levied on exporters and the disbursements effected by the Fund. Such a correspondence is not, however, enough to fulfil the condition of a direct relationship between charges and costs which, as we have just seen, must in fact be established at an individual and specific level.

57. Moreover, the point made above as regards the other concept ('measure intended to further the free movement of goods') applies here also: like that concept, the concept of 'direct link' defines the scope of an exception to the general prohibition on levying charges having equivalent effect and must therefore be interpreted narrowly.[46] For this reason also, therefore, it cannot be accepted that a general relationship established, as here, between the total charges levied on operators and the total costs borne by the administration corresponds to this concept.

58. But, apart from that, I really do not see, in the light of the relevant Community and

43 — Paragraphs 12 and 13. My italics.

44 — Sixth and seventh sentences of Paragraph 8(1) of the Law and Paragraph 18 of the Regulation on the Fund (see also above, at points 14 and 15).

45 — Even though it could in any event be objected that, even as regards sums subsequently returned to the contributors, it is the contributors who finally bear the financial burdens for the period during which those sums remained available to the Fund. Such an additional burden is not justified by the costs borne by the Fund itself for the return or processing of waste under Article 33(2) of Regulation No 259/93.

46 — See point 54 and footnote 42.

German legislation, how it can be claimed that there is a direct relationship, in the sense indicated by the case-law, between the charges borne by an exporter of waste and the costs of the activity actually undertaken by the administration in respect of him. I have already shown the reasons for which I consider that the assumption of secondary liability under Article 33(2) of the Regulation is not a service individually and actually provided to each exporter of waste. Those same reasons apply here to rule out any such relationship between charges and costs. As we have seen, this secondary liability can at the very most be reflected in a collective and diffuse advantage for the entire category of the economic operators concerned; clearly, however, that does not make it possible to determine whether and to what extent that liability has produced effects as regards any particular operator or, therefore, to determine the cost which the latter should bear. [47]

59. Nor could any different conclusion be possible if regard is had to the ways in which, in practice, the Federal Republic is able to intervene pursuant to Article 33(2): as we have seen, the Fund intervenes whether the operator has contributed or not and in fact does so chiefly in situations where no contribution has been paid. From this point of view, too, therefore, I do not think it possible to establish any correlation between the size of the contribution sought from the individual operator and the cost of the activity — assuming there has been any — undertaken in respect of the latter. [48]

60. That having been said, I must in any event point out that, in accordance with Article 33(1) of Regulation No 259/93, the administrative costs relating to the procedure for notifying exports of waste and to any inspections necessary are already charged to operators regardless of the obligation placed upon them of contributing to the Solidarity Fund. [49] In my opinion, therefore, at the most it is those costs, and not the contributions to the Fund, which could be linked to the obligations imposed by the Community legislation.

61. It seems to me, therefore, that not even on this point can the German Government's arguments be upheld.

D — *Concluding considerations*

62. In the light of all of the foregoing considerations, I am of the view that the

47 — See point 40.

48 — See points 43 and 44.

49 — See the German Government's answer, of 21 January 2000, to the reasoned opinion (annex 4 to the application, page 14).

contribution to the Solidarity Fund established by the Law of 30 September 1994 does not fall outside the prohibition laid down in Articles 23 and 25 EC and, therefore, that the Federal Republic of Germany must be found to have failed to fulfil its obligations.

IV — Costs

63. 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 I consider that the application must be allowed, I propose that the Federal Republic of Germany be ordered to pay the costs, since the Commission has applied for them.

V — Conclusion

64. In the light of all of the foregoing considerations, I propose that the Court should declare as follows:

(1) By making shipments of waste from its territory subject to a compulsory contribution to the Solidarity Fund established by the Law of 30 September 1994, the Federal Republic of Germany has failed to fulfil its obligations under Articles 23 and 25 EC.

(2) The Federal Republic of Germany shall pay the costs.