

OPINION OF ADVOCATE GENERAL
MISCHO

delivered on 20 September 2001¹

1. The Commission of the European Communities asks the Court to declare that, by exempting undertakings and establishments which carry out hazardous waste recovery operations covered by Council Directive 91/689/EEC of 12 December 1991 on hazardous waste² from the permit requirement laid down by Article 10 of Council Directive 75/442/EEC of 15 July 1975 on waste,³ as amended by Council Directive 91/156/EEC of 18 March 1991⁴ (hereinafter: 'Directive 75/442'), without making such exemption conditional upon satisfaction of the requirements laid down by the first and second indents of Article 3(2) of Directive 91/689, the Italian Republic has failed to fulfil its obligations under Article 11 of Directive 75/442 and Article 3 of Directive 91/689.

I — Legal framework

Community legislation

Directive 75/442

2. The purpose of Directive 75/442 is to ensure the disposal and recovery of waste and to encourage the adoption of measures designed to limit the production of waste, particularly by promoting appropriate technology and recyclable and reusable products.

3. Article 4 of Directive 75/442 provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or

1 — Original language: French.

2 — OJ 1991 L 377, p. 20.

3 — OJ 1975 L 194, p. 39.

4 — OJ 1991 L 78, p. 32.

methods which could harm the environment, and in particular:

— without risk to water, air, soil and plants and animals,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

...'

5. Article 11 of Directive 75/442 provides:

'1. Without prejudice to Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste ... , as last amended by the Act of Accession of Spain and Portugal, the following may be exempted from the permit requirement imposed in Article 9 or Article 10:

(a) establishments or undertakings carrying out their own waste disposal at the place of production;

and

(b) establishments or undertakings that carry out waste recovery.

4. Under Article 10 of Directive 75/442:

This exemption may apply only:

'For the purposes of implementing Article 4, any establishment or undertaking which carries out the operations referred to Annex II B must obtain a permit'.

— if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question

may be exempted from the permit requirements, 7. Article 3 of Directive 91/689 provides:

and

‘1. The derogation referred to in Article 11(1)(a) of Directive 75/442/EEC from the permit requirement for establishments or undertakings which carry out their own waste disposal shall not apply to hazardous waste covered by this Directive.

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

2. In accordance with Article 11(1)(b) of Directive 75/442/EEC, a Member State may waive Article 10 of that Directive for establishments or undertakings which recover waste covered by this Directive:

2. The establishments or undertakings referred to in paragraph 1 shall be registered with the competent authorities.

3. Member States shall inform the Commission of the general rules adopted pursuant to paragraph 1.’

— if the Member State adopts general rules listing the type and quantity of waste and laying down specific conditions (limit values for the content of hazardous substances in the waste, emission limit values, type of activity) and other necessary requirements for carrying out different forms of recovery, and

Directive 91/689

6. According to Article 1 of Directive 91/689 the purpose of the directive is the approximation of the laws of the Member States on the controlled management of hazardous waste.

— if the types or quantities of waste and methods of recovery are such that the conditions laid down in Article 4 of Directive 75/442/EEC are complied with.

3. The establishments or undertakings referred to in paragraph 2 shall be registered with the competent authorities.

4. If a Member State intends to make use of the provisions of paragraph 2, the rules referred to in that paragraph shall be sent to the Commission not later than three months prior to their coming into force. The Commission shall consult the Member States. In the light of these consultations the Commission shall propose that the rules be finally agreed upon in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC.'

National legislation

8. The rules implementing the provisions relating to the exemption from authorisation prescribed by Directive 75/442 appear in Decree-Law No 22 of 5 February 1997, as amended by Decree-Law No 389 of 8 November 1997 (hereinafter referred to as 'Decree-Law No 22/97').

9. As regards specifically establishments or undertakings that carry out waste recovery, the subject of Directive 91/689, Article 33 of Decree-Law No 22/97 provides for the possibility of simplified procedures. The establishments or undertakings that carry out the operations of recovery of hazardous waste without applying for a permit are

obliged to notify the relevant province, attaching a report establishing that all the conditions for access to the simplified procedure (the conditions set out in Article 33 of Decree-Law No 22/97) have been complied with. A declaration that the conditions for using the simplified procedure are satisfied entails exemption from the permit required by Directive 75/442. The competent provincial authority verifies compliance with these conditions and requirements on the basis of that declaration. Given the complexity and the technical nature of the relevant rules, Decree-Law No 22/97 neither describes nor identifies in any detail those conditions and requirements; it provides for them by reference, stating that the technical rules determining the type, quantity and conditions for recovery under the simplified procedures regime will be adopted by ministerial Decree.

10. Article 33(6) of Decree-Law No 22/97 provides that, pending the adoption of technical rules determining the type, quantity and conditions for recovery under the simplified procedures regime, these procedures are applicable to any person who carries out the waste recovery operations listed respectively in Annex 3 to the Decree of the Minister for the Environment of 5 September 1994 (applying Articles 2 and 5 of Decree-Law No 438 of 8 July 1994, laying down provisions for the recovery of industrial or household waste by production or combustion processes, and for the

disposal of waste) and in Annex 1 to the Decree of the Minister for the Environment of 16 January 1995 (technical rules for energy production by combustion of industrial and household waste), in accordance with the rules laid down therein.

II — Facts and pre-litigation procedure

11. In accordance with the procedure laid down by the first paragraph of Article 226 EC, the Commission, having given the Italian Government the opportunity to submit its observations, sent a reasoned opinion to that Member State in a letter dated 14 July 1999, calling on it to take the necessary measures to comply with the obligations imposed by Article 11 of Directive 75/442 and Article 3 of Directive 91/689 within two months of notification of that opinion.

12. As the information given to the Commission by the Italian authorities, in response to that opinion, concerned only an interministerial decree on activities for the recovery of hazardous waste within the meaning of Articles 31 and 33 of Decree-Law No 22/97, the Commission decided to institute the present proceedings.

III — Assessment

13. According to the Commission, the simplified procedures for establishments and undertakings which carry out hazardous waste recovery operations covered by Directive 91/689 are currently still subject only to the conditions laid down by the ministerial decrees of 5 September 1994 and 16 January 1995 which do not satisfy the requirements laid down by the first and second indents of Article 3(2) of Directive 91/689.

14. The Italian Government does not dispute this. It maintains that it will, as soon as possible, remedy its failure to implement properly Article 11 of Directive 75/442 and Article 3 of Directive 91/689. It adds that the relevant departments of the Ministries of the Environment and Industry will, in good time, forward the final version of the interministerial decree on activities for the recovery of hazardous waste within the meaning of Articles 31 to 33 of Decree-Law No 22/97.

15. It must be observed that, as the ministerial decrees of 5 September 1994 and 16 January 1995 do not meet the requirements laid down by the first and second indents of Article 3(2) of Directive 91/689, the Italian Republic is allowing undertakings and establishments which carry out hazardous waste recovery operations covered by Directive 91/689 to be exempted from the permit requirement in Article 10 of Directive 75/442 without this

exemption being subject to the requirements laid down in the first and second indents of Article 3(2) of Directive 91/689.

16. However, Article 3(2) of Directive 91/689 provides: '... a Member State may waive Article 10 of that Directive (75/442)', which requires every establishment and undertaking to obtain a permit, 'if the Member State adopts general rules listing the type and quantity of waste and laying down specific conditions ...' (first indent of Article 3(2)) and 'if the types or quantities of waste and methods of recovery are such that the conditions laid down in Article 4 of Directive 75/442/EEC are complied with' (second indent of Article 3(2)).

17. In my view, it follows ineluctably from that wording that exemption from the permit requirement laid down in Article 10 of Directive 75/442 is only possible if the requirements laid down by Article 3(2), first and second indents, of Directive 91/689 are met.

18. The Italian Republic having failed, by the expiry of the period prescribed in the reasoned opinion, to ensure that permit exemptions were granted in accordance with the above requirements, I take the view that the action brought by the Commission for failure to fulfil obligations under Article 3 of Directive 91/689 must be upheld.

19. I am not, however, convinced that this failure to fulfil obligations under Article 3 of Directive 91/689 also amounts to a failure to fulfil obligations under Article 11 of Directive 75/442, as the Commission proposes that the Court should rule.

20. It is clear from Article 1(1) of Directive 91/689 that it was 'drawn up pursuant to Article 2(2) of Directive 75/442/EEC', that is to say it constitutes '[s]pecific rules for particular instances or supplementing those of [Directive 75/442] on the management of particular categories of waste ...'. Article 1(2) of Directive 91/689 further provides: '[s]ubject to this Directive, Directive 75/442/EEC shall apply to hazardous waste'.

21. In my view, Article 3 of Directive 91/689 and Article 11 of Directive 75/442, which are not formulated identically, despite reference in Article 3 to Article 11, are in a relationship of *lex specialis* to *lex generalis*. Bearing in mind the principle: *lex specialis derogat legi generali*, I am of the opinion that only the specific rule, in this instance Article 3 of Directive 91/689, applies when it is a question of determining which are the conditions in which undertakings and establishments which carry out hazardous waste recovery operations can be exempt from the permit requirement in Article 10 of Directive 75/442, and Article 3 of Directive 91/689 and Article 11 of Directive 75/442 cannot apply at the same time.

22. As the Commission gave no reason, other than that connected with the failure to fulfil obligations under Article 3 of Directive 91/689, why the Italian Republic should be held to have failed to fulfil its

obligations under Article 11 of Directive 75/442, in my view, the application of the Commission on this point should be dismissed.

IV — Conclusion

23. I propose that the Court should:

- declare that, by exempting undertakings and establishments which carry out hazardous waste recovery operations covered by Council Directive 91/689/EEC of 12 December 1991 on hazardous waste from the permit requirement provided for by Article 10 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, without making such exemption conditional upon satisfaction of the requirements laid down by the first and second indents of Article 3(2) of Directive 91/689, the Italian Government has failed to fulfil its obligations under Article 3 of Directive 91/689;
- dismiss the remainder of the action;
- order the Italian Republic to pay the costs.