OPINION OF ADVOCATE GENERAL JACOBS

delivered on 23 October 1997 *

1. The present case concerns the Netherlands' policy of prohibiting the export of certain waste for recovery unless the treatment of such waste abroad is more efficient than the treatment in the Netherlands. The Raad van State (State Council) of the Netherlands seeks to ascertain whether such a policy is contrary to Article 34 of the Treaty, taking into account the principles of 'self-sufficiency' and 'proximity'. Those principles are referred to in Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into, and out of the Community [1] ('the Waste Regulation' or simply 'the Regulation') and Council Directive 75/442/EEC of 15 July 1975 on waste. [2]

2. The Raad van State wishes to ascertain in particular whether that legislation envisages the application of the principles of self-sufficiency and proximity only in relation to waste for disposal or whether it also allows their application in relation to waste for recovery. Moreover, it questions whether the Netherlands' policy is a correct implementation of those principles. In the event that the Community legislation does not apply the principles of self-sufficiency and proximity in relation to waste for recovery, the Raad van State seeks to ascertain whether the Netherlands' policy in question can nevertheless be justified under Article 130t of the Treaty. It also asks whether the exclusive rights granted to the national undertaking responsible for the management of waste are compatible with Article 90(1) and Article 90(2) of the Treaty in conjunction with Article 86 of the Treaty.

The Community legislation on waste

The Waste Directive

3. Council Directive 75/442 on waste was adopted on 15 July 1975 on the basis of Articles 100 and 235 of the Treaty. All of its substantive provisions were replaced by Council Directive 91/156. [3] The latter directive was adopted on 18 March 1991 on the basis of Article 130s of the Treaty. I shall refer to Directive 75/442, as amended by

* Original language: English.

1 — OJ 1993 L 30, p. 1.

2 — OJ 1975 L 194, p. 39.

3 — Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste, OJ 1991 L 78, p. 32.

Directive 91/156, as 'the Waste Directive' or simply 'the Directive'. [4]

4. The Directive lays down a number of general provisions and general principles regarding the disposal and recovery of waste. Articles 3, 4, 5, and 7 are of particular relevance to the present case. Those articles provide as follows.

5. Article 3 requires Member States to take appropriate measures to encourage, first, 'the prevention or reduction of waste production and its harmfulness', [5] and secondly, 'the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials' or 'the use of waste as a source of energy'. Such measures must be notified to the Commission. [6] Article 4 requires Member States to take 'the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment'. It also requires them 'to prohibit the abandonment, dumping, or uncontrolled disposal of waste'.

4 — Annexes IIA and IIB of the Directive were amended by Commission Decision 96/350/EC of 24 May 1996, OJ 1996 L 135, p. 32.

5 — Several examples of the type of action envisaged are given.

6 — Article 3(2).

6. Article 5 embodies the principles of self-sufficiency and proximity which are at issue in this case. It provides as follows:

'1. Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste.

2. The network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.'

7. Article 7 requires Member States' competent authorities to draw up 'waste management plans' in order to attain the objectives referred to in Articles 3, 4 and 5. Such plans must be notified to the Commission, and the

Member States 'may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans'. Member States must inform the Commission and other Member States of any such measures.

8. Article 7 also provides that waste management plans 'shall relate in particular to the type, quantity and origin of waste to be recovered or disposed of, general technical requirements, any special arrangements for particular wastes, [and] suitable disposal sites or installations'. It stipulates that such plans 'may, for example, cover the natural or legal persons empowered to carry out the management of waste, the estimated costs of the recovery and disposal operations, [and] appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste'.

9. Finally, in relation to the Directive, it is relevant to note in particular the ninth recital, which states that '... movements of waste should be reduced and ... Member States may take the necessary measures to that end in their management plans'.

The Waste Regulation

10. The Waste Regulation was adopted on 1 February 1993, and applied from 6 May 1994.[7] Like the Directive (in its amended form) it was adopted under Article 130s. The Regulation sets out, *inter alia*, a system of prior notification of shipments of waste between Member States. It replaced and repealed Directive 84/631 on hazardous waste, but provides for the notification of the transboundary movement of both hazardous and non-hazardous waste, and gave effect within the Community to the Basel Convention (which was approved for the Community by Council Decision 93/98/EEC [8] adopted on the same date as the Regulation).

11. The Regulation applies separate sets of rules in relation to shipments of waste for disposal and shipments of waste for recovery. However, prior notification is required in respect of both. The provisions relating to waste for disposal are to be found in Chapter A of Title II of the Regulation and those

7 — Article 44.

8 — Council Decision 93/98/EEC of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention), OJ 1993 L 39, p. 1. The text of the Convention is annexed to the Council Decision.

relating to waste for recovery in Chapter B. Chapter A comprises Articles 3 to 5. Chapter B comprises Articles 6 to 11.

12. In the case of waste for disposal, the Member State of destination is responsible for granting authorisation for shipment, although the Member States of dispatch and transit also receive notice of the shipment. They have the right to raise objections and the Member State of destination may only issue the authorisation in the absence of any such objections. In the case of waste for recovery, the Member States of dispatch, destination, and transit have the right to object to a shipment but, as a general rule, no express authorisation is required.

13. The grounds for objecting to shipments of waste for disposal are listed in Article 4(3). Article 4(3)(a)(i) provides that:

'In order to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels in accordance with Directive 75/442/EEC, Member States may take measures in accordance with the Treaty to prohibit generally or partially or to object systematically to shipments of waste. Such measures shall immediately be notified to the Commission, which will inform the other Member States.'

14. Article 4(3)(b) further provides that:

'The competent authorities of dispatch and destination, while taking into account geographical circumstances or the need for specialised installations for certain types of waste, may raise reasoned objections to planned shipments if they are not in accordance with Directive 75/442/EEC, especially Articles 5 and 7:

(i) in order to implement the principle of self-sufficiency at Community and national levels;

(ii) in cases where the installation has to dispose of waste from a nearer source and the competent authority has given priority to this waste;

(iii) in order to ensure that shipments are in accordance with waste management plans.'

15. Finally, Article 4(3)(c) lists three further grounds of objection. Objections may be raised if the shipment:

'— ... is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection, [or]

— the notifier or the consignee has previously been guilty of illegal trafficking ..., or

— the shipment conflicts with obligations resulting from international conventions concluded by the Member State or Member States concerned.'

16. The grounds for objection in relation to shipments of waste for recovery are listed in Article 7(4)(a) of the Regulation. The first indent of Article 7(4)(a) allows objections to be made in accordance with the Waste Directive, in particular Article 7 thereof. As I explained earlier, Article 7 of the Directive requires Member States to draw up waste management plans in order to attain the objectives referred to in Articles 3, 4 and 5 of the Directive, and allows Member States to take 'the measures necessary to prevent movements of waste which are not in accordance with their waste management plans'.

17. The other grounds for objection to shipments of waste for recovery listed in Article 7(4)(a) of the Regulation are identical to those listed in Article 4(3)(c) in relation to waste for disposal (set out at paragraph 15 above). There is, however, one additional ground: namely if 'the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations' (Article 7(4)(a), fifth indent). It is noteworthy that the principles of self-sufficiency and proximity are not referred to in the list of grounds for objecting to shipments of waste for recovery.

The facts

18. Chemische Afvalstoffen Dusseldorp BV ('Dusseldorp') wished to export certain waste for processing in the Federal Republic of Germany by Factron Technik GmbH ('Factron'). The waste in question consisted of oil filters, air filters, plastic and metal cans contaminated with oil, cloths, gloves, absorption granules and grease cartilages.

For convenience these are referred to generally in the order for reference as oil filters and I shall adopt the same shorthand. After some initial difference of opinion, the Ministry accepted that the purpose of the shipments was the recovery of the filters rather than their disposal.

19. The proposed shipments were notified to the Netherlands Ministry for Housing, Town and Country Planning and Conservation ('the Ministry'), as required by the Waste Regulation. Notifications were made in relation to two separate loads of waste: one weighing 2 000 000 kg and the other 60 000 kg. According to the observations of the Netherlands Government, the shipments were to take place between 27 May 1994 and 26 May 1995 and between 16 May 1994 and 15 May 1995 respectively. The Ministry objected to the export on the grounds that the processing of oil filters by Factron in Germany was not superior to the processing in the Netherlands. That decision was taken pursuant to the Netherlands' long-term plan for the disposal of dangerous wastes ('the Plan'). The Plan included a rule prohibiting the export of oil filters if the intended processing abroad was not superior to the processing available within the Netherlands ('the contested rule'). I shall discuss the nature of the Plan more fully below. [9]

20. The Ministry's objections to the shipments were made by means of two decisions dated 22 August 1994. Dusseldorp, Factron, and Dusseldorp Lichtenvoorde BV (collectively 'the appellants') wrote to the Ministry objecting to those decisions. By decision dated 8 December 1994 the Ministry declared the appellants' objections to be unfounded. It did, however, amend the basis of the earlier decisions so as to refer to the article of the Regulation concerning the lodging of objections to shipments of waste for recovery (Article 7), rather than to the article concerning objections to shipments of waste for disposal (Article 4). The appellants appealed against the decision of 8 December 1994 and it is in the context of those appeal proceedings that the present order for reference has been made.

21. The appellants' appeal against the decision of 8 December was brought on both factual and legal grounds. As to the facts, they disputed the Ministry's finding that the quality of the processing by Factron in Germany was not superior to the quality of the processing in the Netherlands. That factual dispute, however, does not concern this Court. It is sufficient to note that the national court's questions are based on the assumption that the case concerns a situation in which the processing abroad was not superior to that in the Netherlands so that the contested rule applied.

22. The questions of law raised by the appellants concern the lawfulness of the Minis-

9 — See paragraphs 23 to 31.

try's objection to the shipment of waste to another Member State of the European Union. They contend that the contested rule was an unjustifiable restriction upon the free movement of goods, particularly since the principles of self-sufficiency and proximity in waste management may be invoked under the Regulation only as a ground for objecting to shipments of waste for disposal, not waste for recovery.

The Plan

23. I turn now to consider in more detail the nature of the Plan upon which the contested decisions were based. The Raad van State describes the Plan as follows. Paragraph 3.1 of Part I indicated that the principles of self-sufficiency and proximity referred to in the Regulation and the Directive were an important basis for the Ministry's policy regarding the import, export, and transit of waste. Those principles found expression in paragraph 6.5 of Part I of the Plan which aimed, *inter alia*, to achieve both the best possible method of disposal and 'continuity of disposal' (although the Raad van State sees no direct relationship between those principles and the former aim). Specifically, in so far as is relevant, consent was given for the export of waste only if disposal abroad was of a higher quality or if there was no processing capacity available in the Netherlands. Sectoral plan number 10 of Part II of the Plan, relating to waste for incineration, provided that, on account of the principle of self-sufficiency, the export of dangerous waste for incineration should be restricted as far as possible, in part because elsewhere the emission requirements for incineration were less strict than in the Netherlands.

24. The contested rule (i. e. that the export of oil filters was not permitted if the processing outside the Netherlands of such filters was not superior to the processing available within the Netherlands) was contained in sectoral plan number 19, relating to oil filters (in Part II of the Plan). The appellants consider that that rule amounted to a general ban on the export of oil filters. The Raad van State, however, does not agree because, in its view, if it appeared that a processing method of higher quality was available abroad, there were no grounds in the sectoral plan for objecting to export of the filters.

25. In furtherance of its aim of achieving the best possible method of disposal, sectoral plan number 10 granted a single undertaking, AVR Chemie CV ('AVR'), a 'waste management function'. According to the sectoral plan, there was room for only one plant in which dangerous waste could be incinerated and AVR was designated as the sole end-processor for the incineration of waste in a revolving drum oven. Waste which had to be incinerated in such an oven could be exported only by AVR. In order to prevent

undesirable price increases, conditions were imposed in the permit given to AVR.

26. The appellants maintain that AVR's treatment of oil filters amounts to a disposal rather than a recovery operation because it incinerates the filters. According to the appellants, although AVR makes use of some of the heat produced by the incineration in order to generate electricity and recovers some of the residues, that is only incidental. The appellants maintain that, in contrast, Factron's process enables the whole of the oil filter to be recycled.

27. According to the appellants, AVR is a limited partnership, in which the Netherlands State and the district of Rotterdam own a 55% share (the remainder being owned by private undertakings). The appellants also maintain that one of the members of the Surveillance Board of AVR is the director of the waste management division of the Netherlands Ministry. They state that that Ministry lays down the Netherlands' policy in relation to waste and thus decides whether a particular export should be allowed to proceed.

28. The Raad van State draws the following conclusions in relation to the Plan. First, it concludes that, since the Plan refers to 'disposal (which includes recovery)', the policy set out in the Plan applies to any treatment of waste, irrespective of whether it involves disposal or recovery. Secondly, it concludes that the policy laid down in the Plan amounts to a prohibition on exports if the quality of the intended processing abroad is the same as or lower than the quality of the processing available in the Netherlands.

29. Thirdly, it concludes that the Plan must be assumed to be a 'waste management plan' within the meaning of the Directive. As explained above, [10] under the Waste Directive, Member States are required to draw up 'waste management plans' and the Regulation refers to the enforcement of such plans. The appellants argue that the Plan in issue in the present case cannot be classified as a waste management plan within the meaning of the Community legislation. The Raad van State, however, disagrees with the appellants on that point. According to the observations of the Commission and the Netherlands Government, the Plan was indeed notified as a 'waste management plan' to the Commission on 13 September 1993.

30. Fourthly, the Raad van State concludes that AVR must be considered as a public undertaking or an undertaking with special or exclusive rights in the sense of Article 90(1) of the Treaty. It also concludes that AVR is in a dominant position in a substan-

10 — At paragraphs 7, 8, 14 and 16.

tial part of the common market since it is the sole licence holder in the Netherlands for the incineration of dangerous waste.

31. Finally, it is to be noted that the Netherlands Government explains that the Ministry is to change its policy regarding the export of waste for recovery. Such exports will be permitted unless the amount of waste recovered abroad is appreciably less than that recovered in the Netherlands. The Government maintains that that policy is in conformity with Article 7(4)(a), fifth indent, of the Regulation. [11] In so far as is relevant here, that provision stipulates that objections to shipment of waste for recovery may be raised 'if the ratio of the recoverable and non-recoverable waste ... [does] not justify the recovery under economic and environmental considerations'. The Commission invites the Court to consider the compatibility of that new policy with Community law by way of an *obiter dictum*. In my view, however, that would not be appropriate since no question has been posed in relation thereto and accordingly no observations have been submitted on that point. The fact that the policy set out in the Plan has now changed does not obviate the need to answer the questions referred. As the Commission observes, there is always a risk that the present practice will continue and it might still be relevant to know whether the previous policy was illegal for the purpose of establishing whether or not the Ministry is liable for damages.

11 — Quoted at paragraph 17 above.

The questions referred

32. The questions posed by the Raad van State are set out below.

'1. (a) Having regard to the scheme of Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of wastes within, into and out of the European Community and Directive 75/442/EEC of 15 July 1975 on waste (as amended by Directive 91/156/EEC), read in conjunction with each other, do the principles of self-sufficiency and proximity apply solely to the shipment between Member States of waste for disposal or also to waste for recovery?

(b) If the Court of Justice takes the view that Regulation (EEC) No 259/93 and Directive 75/442/EEC do not provide a basis for the application of the principles of self-sufficiency and proximity to the shipment between Member States of waste for recovery, can Article 130t of the EC Treaty then provide a basis for rules such as those contained in the relevant part of the Long-term Plan for Disposal of Dangerous Waste of June 1993 drawn up by the Netherlands Government?

2. In the abovementioned Long-term Plan, the principles of self-sufficiency and proximity find specific expression in the pursuit of the best possible quality method of disposal (including recovery) and continuity of disposal. Does this constitute a correct implementation of those principles?

3. (a) In so far as the criteria laid down in the Long-term Plan for objecting to the export of waste for recovery are in themselves acceptable, is this then a case of a measure having equivalent effect within the meaning of Article 34 of the EC Treaty, and is there any justification for it?

(b) In that context, if the principles of self-sufficiency and proximity may be applied in regard to waste intended for recovery, does it make any difference whether those principles are applied primarily within the Community as a whole or exclusively at national level?

4. Are the exclusive rights to incinerate dangerous waste conferred by the Netherlands authority on AVR Chemie CV in Sectoral Plan 10 of Part II of the Long-term Plan compatible with Article 90(1) and (2) in conjunction with Article 86 of the EC Treaty, having regard to the reasons given for such conferral in the Long-term Plan?'

33. Written observations have been submitted by the appellants, the Netherlands and French Governments, and the Commission. At the hearing, oral submissions were presented by the appellants, the Netherlands and Danish Governments, and the Commission.

Question 1(a)

34. In its first question, the Raad van State asks whether, having regard to the scheme of the Regulation and the Directive, the principles of self-sufficiency and proximity apply in relation to waste for recovery as well as waste for disposal.

The principles of self-sufficiency and proximity

35. In considering that question it may be useful to examine first the meaning and history of the principles of self-sufficiency and proximity, and their application by the Court.

36. The principle of self-sufficiency is expressed in the requirement, laid down by Article 5(1) of the Directive, that an integrated and adequate network of disposal installations should 'enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste'. The principle of proximity is expressed in the requirement, laid down by Article 5(2) of the Directive, that the network should 'enable waste to be disposed of in one of the nearest appropriate installations'. As set out above, [12] express reference is also made to those principles in Article 4(3)(a)(i) and (in relation to self-sufficiency only) Article 4(3)(b) of the Waste Regulation.

37. Environmental policies were given an express legal basis in Community law by the Single European Act which came into force on 1 July 1987 and which introduced into the Treaty a specific title on the environment. That title [13] comprises Articles 130r, 130s, and 130t, and was amended by the Treaty on European Union. Article 130r(2) provides that Community policy on the environment shall be based on, *inter alia*, the principle that 'environmental damage should as a priority be rectified at source' (hereinafter 'the principle of rectification at source'). That principle has been interpreted by the Court in *Commission* v *Belgium* [14] ('the *Walloon Waste* case') as entailing that 'it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated, and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste'. [15] The Court also considered the principle of rectification at source to be 'consistent with the principles of self-sufficiency and proximity set out in the Basel Convention'. [16]

38. It seems that the first appearance of the principles of self-sufficiency and proximity in a Community text was in a Commission Communication on Community Strategy for Waste Management Policy dated 18 September 1989, [17] followed by a Council Resolution dated 7 May 1990. [18] The Commission Communication did not expressly mention either principle but did refer to the need to develop a network of facilities for the final disposal of waste so that certain areas within the Community were not left underequipped, and to the desirability of waste being disposed of in the nearest suitable centres (with exceptions for recyclable waste). [19]

12 — At paragraphs 13 and 14 respectively.

13 — Originally Title VII but now Title XVI by reason of amendment by the Treaty on European Union.

14 — Case C-2/90 [1992] ECR I-4431, discussed at paragraphs 45 to 50 below.

15 — Paragraph 34 of the judgment.

16 — Paragraph 35 of the judgment.

17 — SEC (89) 934 final; see Damian Chalmers, 'Community Policy on Waste Management — Managing Environmental Decline Gently', *Yearbook of European Law*, 1994, p. 280.

18 — OJ 1990 C 122, p. 2.

19 — At pp. 23 to 25.

The Council Resolution mentioned proximity only implicitly (recital 7 of the preamble to the Resolution and paragraphs 7 and 11 of the substantive text of the Resolution) but referred expressly to self-sufficiency in recital 5 of the preamble (see also paragraph 7 of the substantive text).

39. In the *Walloon Waste* case the Court referred to the appearance of the principles of self-sufficiency and proximity in the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. [20] The Convention was signed on 22 March 1989 and approved on behalf of the Community on 1 February 1993, after the judgment in the *Walloon Waste* case, by Council Decision 93/98/EEC. [21] The Waste Regulation was designed, *inter alia*, to make the existing Community system for the supervision and control of waste movements comply with the requirements of the Convention, as evidenced by the fourth recital of the preamble to Decision 93/98 and the first recital of the preamble to the Regulation. Although the title of the Convention refers to the control of transboundary movements of hazardous wastes and their 'disposal', it applies to both waste for disposal and waste for recovery since the term 'disposal' is defined as including recovery operations. [22] Moreover, it also applies to certain non-hazardous waste. [23]

40. The actual terms 'self-sufficiency' and 'proximity' do not appear in the Convention. Nevertheless, the ideas behind those principles might be said to be embodied in the Convention, having regard to the following provisions.

41. The Convention requires the parties to 'ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes ...', [24] and 'to ensure that the transboundary movement of hazardous wastes and other wastes only be allowed if:

(a) the State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner; or

20 — Paragraph 35 of the judgment, cited at paragraph 45 below.

21 — Cited in note 8.

22 — Article 2(4) provides that 'disposal' means 'any operation specified in Annex IV'; Annex IV includes a list of 'operations which may lead to resource recovery, recycling, reclamation, direct reuse or alternative uses'.

23 — See Article 2(3) which refers to the transboundary movement of hazardous wastes 'or other wastes'; Article 1(2) defines 'other wastes' as wastes listed in Annex II: the only wastes listed therein are 'wastes collected from households' and 'residues arising from the incineration of household wastes'.

24 — Article 4(2)(d). See also the 18th recital of the preamble where it is stated that the transboundary movement of hazardous wastes and other wastes should be reduced to the minimum possible.

(b) the wastes in question are required as a raw material for recycling or recovery industries in the State of import; or

(c) the transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided those criteria do not differ from the objectives of this Convention.' [25]

42. In addition, for the export of waste to be acceptable under the Convention, the legislation of the State of import must not have prohibited imports and the exporting State must not have reason to believe that the wastes in question will not be managed in an environmentally sound manner. [26]

43. Moreover, Article 4(2)(b) of the Convention requires each party to 'ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal'. [27] That appears to be similar to the principle of self-sufficiency as outlined at paragraph 36 above.

44. It has been commented, however, that the principle of proximity cannot be deduced from the Convention since, although the Convention requires environmentally sound disposal, it does not insist that wastes should be disposed of in the nearest disposal plant. [28] It aims simply at reducing transboundary movement of waste. However, that aim goes at least some way towards a proximity principle, even though its application in certain cases will be contrary to that principle (i. e. where a disposal installation abroad is in fact nearer than the nearest national installation).

The case-law

45. The application of the principles of self-sufficiency and proximity to the free movement of waste has already been addressed by this Court to a certain extent in the *Walloon*

25 — Article 4(9).

26 — Article 4(2)(c).

27 — See also the eighth recital of the preamble where it is stated that hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated.

28 — Peter Von Wilmowsky, 'Waste disposal in the internal market: the state of play after the ECJ's ruling on the Walloon Import Ban', *Common Market Law Review*, 1993, p. 541 at p. 560, note 37.

Waste case. [29] That case concerned a Walloon measure which prohibited the storage, tipping, or dumping of waste originating in another Member State or in a region of Belgium other than Wallonia. The measure was alleged to be contrary to Article 30 of the Treaty. The Court upheld the measure to the extent that it related to waste which was not covered by Directive 84/631, [30] on the ground that it was 'justified by imperative requirements of environmental protection'. The Court reasoned as follows:

'Imperative requirements can indeed be taken into account only in the case of measures which apply without distinction to both domestic and imported products ... . However, in assessing whether or not the barrier in question is discriminatory, account must be taken of the particular nature of waste. The principle that environmental damage should as a matter of priority be remedied at source, laid down by Article 130r(2) of the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated, and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste.

Moreover, that principle is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, to which the Community is a signatory ...

It follows that having regard to the differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory.' [31]

46. Various aspects of that judgment have been the subject of criticism, in particular the way in which the Court applied the principles of self-sufficiency and proximity in order to find that the import ban was not discriminatory. [32] It should be noted, however, that the Court cannot be said to have justified the ban on the basis of the principles of self-sufficiency and proximity as such. Although it used those principles to find that the rule was not discriminatory, the environmental justification which it identified was Wallonia's limited capacity to receive waste for tipping and the consequent

29 — Cited in note 14.

30 — Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ 1984 L 326, p. 31.

31 — Paragraphs 34 to 36 of the judgment.

32 — See, for example, Hancher and Sevenster, 'Case comment on Case C-2/90 *Commission* v *Belgium*', *Common Market Law Review*, 1993, pp. 351 to 367; Jules H. V. Stuyck, 'Le traitement des déchets dans la (non-) réalisation du marché intérieur', *Journal des tribunaux/droit européen*, 1994, No 5, pp. 10 to 12; Von Wilmowsky, cited in note 28; Damian Chalmers, cited in note 17; Damien Geradin 'The Belgian Waste Case', *European Law Review* 1993, p. 144 and David A. Demiray, 'The Movement of Goods in a Green Market', *Legal Issues of European Integration*, 1994, No 1, pp. 73 to 110.

real danger to the environment from imports of waste for tipping. [33] The Court stated that:

'With respect to the environment, it is important to note that waste is matter of a special kind. Accumulation of waste, even before it becomes a health hazard, constitutes a danger to the environment, regard being had in particular to the limited capacity of each region or locality for waste reception.

In the instant case the Belgian Government argued, without being contradicted by the Commission, that in view of the abnormal large-scale inflow of waste from other regions for tipping in Wallonia, there was a real danger to the environment, having regard to the limited capacity of that region.

It follows that the argument that the contested measures were justified by imperative requirements of environmental protection must be considered to be well founded.' [34]

47. It accordingly seems to me that the Court cannot be said to have endorsed the blanket application of the principles of self-sufficiency and proximity as grounds of justification for any measure contrary to Articles 30 or 34: each measure adopted in implementation of such principles must, in my view, be individually justified. That point is important in the present case because the Raad van State states expressly that if the Court takes the view that the principles of self-sufficiency and proximity may be invoked when objecting to the planned export of waste for recovery, the question then arises whether Article 34 limits the way in which those principles may be applied.

48. The view that the application of the principles of self-sufficiency and proximity are subject to compliance with Articles 30 and 34 is also supported by the fact that the Community legislation introducing those principles is not couched in mandatory terms. Thus, Article 5 of the Directive talks only of enabling 'the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste'. Although Member States are required to take appropriate measures 'to establish an integrated and adequate network of disposal installations', they are to do so 'in cooperation with other Member States where this is necessary or advisable'. Furthermore, Article 4(3)(a)(i) of the Regulation refers to the application of the principles 'in accordance

33 — See, to the same effect, Professor J. H. Jans, 'Self-sufficiency in European Waste Law?', *First Nordic Conference on EU Environmental Law*, 1994, pp. 71 to 78.

34 — Paragraphs 30 to 32 of the judgment.

with the Treaty'. [35] There is thus nothing in the legislation to suggest that it was intended that implementation of the principles of self-sufficiency and proximity should not be subject to scrutiny under the Treaty.

49. As I observed in my second Opinion in the *Walloon Waste* case, [36] the objective of self-sufficiency is not to be achieved in a manner incompatible with Articles 30 to 36. The same applies to the principle of proximity. Thus, although the principles of self-sufficiency and proximity may be acceptable considerations in relation to waste for disposal, they cannot necessarily be relied upon in every case as justification for objecting to a particular shipment of waste. In answering the first question I shall accordingly consider simply whether the Regulation and the Directive intended that the principles of self-sufficiency and proximity should be applied as general considerations to shipments of waste for recovery in addition to shipments of waste for disposal.

50. The *Walloon Waste* case is not, in any event, authority for concluding that the principles of self-sufficiency and proximity apply to waste for recovery since that case concerned waste for disposal. Although the reference to 'treatment' in paragraph 34 of the judgment is ambiguous, the rule in question in that case concerned the storage, tipping, or dumping of waste and, with the possible exception of storage, those activities are disposal operations. [37]

51. The Raad van State mentions two further cases: *Commission* v *Germany* [38] and *Commission* v *Council*. [39] However, these too can be distinguished for present purposes. In *Commission* v *Germany* the Court, with reference to the principle of rectification at source set out in Article 130r(2), held that certain export restrictions imposed by Germany on transboundary movements of waste were not in breach of Directives 84/631 [40] and 86/279. [41] However, the judgment refers to waste for disposal and, even if it could be shown that the term 'disposal' was used loosely, the facts of that case pre-dated the Regulation. Moreover, rather than constituting an outright export ban, the German restrictions were expressly limited to a list of circumstances which appeared environmentally justifiable.

35 — With regard to the provisions of the Regulation and the Directive it is clear that they cannot authorise Member States to breach the Treaty: see, for example, Joined Cases 80/77 and 81/77 *Commissionnaires Réunis* v *Receveur des Douanes* [1978] ECR 927; Joined Cases C-363/93 and C-407/93 to C-411/93 *Lancry* v *Direction Générale des Douanes* [1994] ECR I-3957.

36 — At paragraph 27.

37 — Moreover, since the Court referred in that paragraph to treatment 'and' disposal and elsewhere referred only to disposal, in using the word 'treatment', the Court might have had in mind treatment prior to disposal, perhaps in order to render waste safe pending or during disposal.

38 — Case C-422/92 [1995] ECR I-1097.

39 — Case C-155/91 [1993] ECR I-939.

40 — Cited in note 30.

41 — Council Directive 86/279/EEC of 12 June 1986 amending Directive 84/631 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ 1986 L 181, p. 13.

52. In the second case mentioned, *Commission* v *Council*, the Court stated that Article 7 of the Directive authorises Member States to prevent movements of waste for disposal or *recovery* which are not in accordance with their waste management plans. [42] However, it does not necessarily follow that waste management plans can legitimately include restrictions of the movement of waste for recovery on the grounds of the implementation of the principles of self-sufficiency and proximity. Moreover, as the Raad van State observes, the judgment in that case was given before the Regulation became applicable. [43]

Assessment

53. In the present case the appellants, the Commission and France all contend that the Community legislation does not apply the principles of self-sufficiency and proximity in relation to waste for recovery. The Netherlands and Denmark, however, are of the opposite view.

54. It is clear to my mind that the Directive and the Regulation do not envisage the application of the principles of self-sufficiency and proximity in relation to waste for recovery. I reach that conclusion on the basis of the terms and scheme of the Directive and the Regulation, interpreted in the light of the Council Resolution of 7 May 1990 in which the Council resolved to adopt the amendments to the initial terms of the Directive.

55. The principles of self-sufficiency and proximity are referred to in the Directive only in relation to waste for disposal (see Article 5 and the seventh recital). Similarly, in the Regulation they feature only in the list of grounds for objecting to shipments of waste for disposal, not in that relating to waste for recovery. [44] Moreover, the 10th recital of the preamble to the Regulation refers to the principles of proximity, priority for recovery and self-sufficiency (in similar terms to the terms of Article 4(3)(a)(i) of the Regulation) in relation to 'waste for disposal': '... Member States should be able to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels — in accordance with Directive 75/442/EEC — by taking measures in accordance with the Treaty to prohibit generally or partially or to object systematically to shipments of waste for disposal ...'

42 — Paragraph 14 of the judgment.

43 — The Regulation entered into force on the third day following its publication, on 6 February 1993, in the *Official Journal of the European Communities*, but applied only 15 months after publication (Article 44).

44 — The seventh recital of the preamble to the Regulation makes reference to the principles of proximity and self-sufficiency in rehearsing the provisions of the Directive which refer to those principles. It accordingly similarly refers to those principles only in the context of waste for disposal.

56. It is true, as the Raad van State observes, that one of the grounds for objecting to the shipment of waste for recovery is that the shipment is not in accordance with the Directive, in particular Article 7 thereof, and that Article 7 refers to the enforcement of waste management plans without expressly excluding the possibility of such plans applying the principles of self-sufficiency and proximity in relation to waste for recovery. However, as the appellants point out, the purpose of the waste management plans is expressed, in Article 7, to be the attainment of the objectives set out in Articles 3, 4, and 5, and the principles of self-sufficiency and proximity are only referred to in those articles in relation to waste for disposal (Article 5).

57. Moreover, the Explanatory Memorandum which accompanied the original proposal for the Regulation stated that 'The strategy highlights distance and rational, environmentally sound management as criteria which can justify intervention from the competent authorities in waste disposal matters; environmentally sound management ... will be the only criterion for [the intervention of the competent authorities] if the operation involves further use.' [45] Similarly, it stated that 'the system, laid down by the proposal for a Regulation is based on the principle that any shipment which leaves the jurisdiction of one competent authority for any other jurisdiction in the Community will be judged on the same criteria (environmentally sound management and, where disposal is involved, proximity). This system is also able to guarantee the supply of new disposal installations with a high level of protection.' [46] Although the text finally adopteddiffers from that originally proposed by the Commission (and to which the Explanatory Memorandum accordingly referred), both versions of the text are similar in so far as is relevant since in both texts the principle of proximity is mentioned as a ground for objecting to waste for disposal but is not mentioned in relation to waste for recovery. [47]

58. Furthermore, the second recital of the preamble to the Waste Directive refers to the Council Resolution of 7 May 1990 on waste policy, in which the Council undertook to accelerate the amendment of the Directive, [48] and that Resolution states expressly, albeit in a footnote, that 'It is noted that self-sufficiency in waste disposal does not apply to recycling.' [49] It might be argued that the fact that there is no similar footnote in

45 — COM (90) 415 final — SYN 305, 26 October 1990, p. 4.

46 — P. 5.

47 — In the original proposal, provided certain conditions were complied with, a separate regime applied in relation to waste for recovery. The grounds for objecting to the shipment of waste for recovery were not listed and in fact only the competent authority of destination could lodge objections. In relation to waste for disposal, on the other hand, Article 4(3) provided that the competent authority of dispatch could raise objections to a planned shipment if there was 'an authorised centre significantly nearer than the one chosen by the notifier and which [used] suitable technologies to ensure a high level of protection of the environment and human health'.

48 — Paragraph 15 of the Resolution.

49 — That statement appears as a footnote to the fifth recital of the preamble to the Resolution which provides that '... it is important for the Community as a whole to become self-sufficient in waste disposal and it is desirable for Member States individually to aim at such self-sufficiency'.

relation to what might be said to be references to the proximity principle [50] suggests that the proximity principle does apply in relation to waste for recovery. I do not, however, take that view. There may be, as I shall suggest, good economic or environmental grounds for moving waste for recovery which do not apply to waste for disposal.

59. It has been argued that the application of the principles of self-sufficiency and proximity in relation to waste for recovery would discourage the recovery of waste, as opposed to its disposal, and that that would be contrary to the express aim in Article 3 of the Directive of encouraging such recovery. [51] The appellants argue that cross-border movement of waste for recovery is necessary in order to ensure that enough business is available to make recovery businesses economically viable and to ensure competition between undertakings so as to encourage the development of new technologies. It is to be noted, however, that the Netherlands Government argues, along similar lines, that it is necessary to restrict exports of waste for recovery from the Netherlands so as to ensure that AVR has enough business and raw material to make it economically viable.

50 — Namely the reference in paragraphs 7 and 11 to the facilitation of 'the disposal of waste in one of the nearest suitable facilities' and to the minimisation of the movement of waste.

51 — Cited at paragraph 5. 'Priority for recovery' is also mentioned in Article 4(3)(a)(i) of the Regulation, see paragraph 13 above.

Moreover, lack of intra-State competition might be said to limit the development of technologies in relation to disposal processes as well as recovery processes.

60. What is clear, however, is that the economic and environmental arguments for allowing cross-border trade are stronger where waste is to be recovered rather than disposed of. Where waste is simply to be disposed of, it is easy to see that the economic benefits conferred on waste-disposal undertakings by a single market are overridden by the environmental interest in preventing unnecessary transport of waste and ensuring that Member States make adequate arrangements to dispose of their own waste in an environmentally sound manner. Any development of technologies resulting from free movement of waste would moreover be specific to waste disposal.

61. Waste for recovery, on the other hand, provides substitute raw materials for a wide variety of Community industries. The economic benefits of a single market are therefore much greater. Moreover, the environmental arguments are much more finely balanced. While the transport of waste over distances may, depending on the type of waste, entail certain environmental risks, a single market

in waste for recovery is likely to improve recycling, thereby reducing the volume of waste for disposal and conserving primary raw materials. Such considerations doubtless underlie the distinction drawn by the Community legislation.

62. Thus the Regulation clearly envisaged different rules applying in relation to waste for recovery and waste for disposal: that is evident from the eighth recital of the preamble to the Regulation which states that '... it is necessary to apply different procedures depending on the type of waste and its destination, including whether it is destined for disposal or recovery', and from the structure of the Regulation. Thus Chapter A of Title II concerns the procedure to be applied in relation to waste for disposal and Chapter B of that same title concerns the procedure to be applied in relation to waste for recovery. The procedure in relation to shipments of waste for recovery is less restrictive in that the consent of the competent authorities can be tacit and no general prohibitions may be laid down. [52] If, however, self-sufficiency and proximity were to constitute general grounds for objecting to shipments of waste for recovery, in addition to shipments of waste for disposal, the difference between the two regimes would be considerably reduced since, with the exception of one ground specific to the nature of recovery, the other grounds for objection under the two procedures are almost identical.

63. The appellants argue that the Regulation should be interpreted in the light of the Basel Convention and that that Convention makes it clear that the principles of self-sufficiency and proximity do not apply in relation to waste for recovery. I agree that, since the Regulation was intended to implement that Convention, [53] it may, subject to compliance with the Treaty, be interpreted in the light of the Convention. I do not, however, agree that the Convention clarifies the issue.

64. As set out above, Article 4(2) of the Convention requires parties to ensure the availability of adequate disposal facilities [54] and the term 'disposal' is defined in the Convention as including recovery operations. [55] However, although parties are generally required to prohibit transboundary movements of waste, certain exceptions apply, which include the situation in which the waste in question is 'required as a raw material for recycling or recovery industries in the State of import' (Article 4(9)). [56]

52 — Compare Article 4(3)(a)(i) in relation to waste for disposal.

53 — See paragraph 39 above.

54 — See paragraph 41 above.

55 — See paragraph 39 above.

56 — Quoted in full at paragraph 41 above.

65. The appellants and the Commission argue that that exception indicates that the Convention was in favour of the free movement of waste for recovery and did not intend to apply the principles of self-sufficiency and proximity to waste for recovery. On the other hand it is arguable that the reference to waste being 'required' as a 'raw material' means that export can only be allowed if the waste is in short supply abroad. There is, however, also the rather vague exception, in subparagraph (c) of Article 4(9) of the Convention, allowing transboundary movement in accordance with 'other criteria'. Furthermore Article 11 of the Convention might be relevant. That article allows parties to enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with parties or non-parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by the Convention. [57] Any such agreements or arrangements must be notified to the Secretariat.

66. It can be argued that, in any event, the principles of self-sufficiency and proximity apply only at Community level and that the Convention cannot be regarded as compelling the Community to introduce measures incompatible with the EC Treaty rules on the free movement of goods.

67. There is accordingly, in my view, no clear obligation under the Convention upon Member States of the Community to apply the principles of self-sufficiency and proximity so as to prohibit shipments of waste for recovery in intra-Community trade, but nor does the Convention make it clear that those principles are not to be applied in relation to waste for recovery. [58] I conclude that the Convention is of little assistance in interpreting the Regulation.

68. Nevertheless, I consider that, for the reasons set out at paragraphs 54 to 62 above, the principles of self-sufficiency and proximity do not apply under the Regulation and the Directive in relation to waste for recovery.

69. That conclusion does not, however, mean that, in a particular case, an objection to a shipment of waste for recovery might not be justified under Community law on environmental protection or public health grounds because, for example, exceptionally hazardous waste was being transported

57 — See the discussion of Article 11 in Katharina Kummer, *International Management of Hazardous Wastes*, Oxford, 1995, at pp. 88 to 99.

58 — Parties might be entitled under the Convention to prohibit the export of waste for recovery by virtue of Article 4(11) of the Convention, which provides that nothing in the Convention shall prevent a Party from imposing additional requirements that are consistent with the provisions of the Convention, and are in accordance with the rules of international law, in order better to protect human health and the environment.

unnecessarily far and thereby creating an unacceptable risk to public health or the environment. It is clear that such risks increase directly in relation to the distance that such waste is transported. [59]

Question 1(b)

70. The next question asks whether, if the principles of self-sufficiency and proximity cannot be applied on the basis of the Regulation and the Directive, the contested rule can nevertheless be justified under Article 130t of the Treaty.

71. That article provides that 'the protective measures adopted pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.'

72. The appellants argue, *inter alia*, that Article 130t cannot apply because, in their view, the Community legislation has totally harmonised the field and Article 130t cannot apply in cases of total harmonisation; and because, rather than going further in the same direction as the Community legislation, the contested rule, in their view, runs counter to it.

73. It must also be observed that the contested rule was not notified to the Commission under Article 130t, as required by the last sentence of that article. The Netherlands Government does not deny the Commission's assertion that the rule was not notified under that Article. It explains that it did not notify the measure because it believed it to be in conformity with the terms of the Regulation and the Directive.

74. In my view, however, none of the issues which might arise under Article 130t need to be resolved in the present case. Article 130t provides that the measures permissible by virtue of that article must in any event be compatible with the other provisions of the Treaty. For the reasons given below, I consider that the contested rule is contrary to Article 34 of the Treaty.

59 — As the Economic and Social Committee observed at paragraph 3.2.2. of its Opinion on the Communication from the Commission on the review of the Community strategy for waste management, 'risks from toxic substances ... increase according to the distance they are transported i. e. according to the areas and number of people at risk of contamination', OJ 1997 C 89, p. 2.

Question 2

75. Question 2 appears to be asking whether the contested rule is a correct implementation of the principles of self-sufficiency and proximity. Since I have concluded that those principles cannot be applied in relation to waste for recovery, it may be unnecessary to address that question. Nevertheless I have the following observations.

76. The Raad van State appears to consider that, even if the principles do apply, the contested rule may not be necessary to ensure their application. The Commission appears to agree with that view.

77. It is possible to argue, however, that the contested rule might be seen as contributing in some way towards the goals of self-sufficiency and proximity. First, it necessarily reduces the number of transboundary movements of waste, which in many cases, if not all, will mean that the waste is disposed of nearer to source than it otherwise would be. Secondly, it might be said to assist in attaining self-sufficiency if, as the Netherlands Government argues, a limited export ban is necessary to ensure enough business and raw material for AVR in order to make it economically viable.

78. With regard to the principle of proximity, however, some recovery installations abroad might be nearer than AVR to the source of waste in question in a particular case. Thus, in some cases the contested rule may actually be contrary to the principle of proximity. As for the principle of self-sufficiency, as the Commission points out, the Member States are not under an absolute obligation to become self-sufficient.

79. Moreover, as mentioned previously [60] and discussed in relation to question 3(a) below, the application of the principles of self-sufficiency and proximity is itself subject to compliance with Community law, including the principle of proportionality.

Question 3(a)

80. The first part of question 3 asks whether the contested rule constitutes a measure

60 — At paragraphs 46 to 49.

having equivalent effect to a quantitative restriction on exports within the meaning of Article 34 of the Treaty, and, if so, whether it can nevertheless be justified.

81. It is first necessary to clarify the nature of the contested rule. As mentioned above, [61] the appellants argue that there was an outright ban on the export of oil filters, presumably because they consider that it had been decided that the quality of the processing of such filters abroad was nowhere superior to that of the processing in the Netherlands, and hence a general prohibition had been imposed. The Raad van State, however, considers that there was no general ban on the export of oil filters because, in its view, there were no grounds under the Plan for objecting to export if it could in fact be shown that a better quality processing method was available abroad. Since the nature of the Plan is a question of fact or of national law, it is appropriate to proceed on the assessment adopted by the Raad van State.

82. According to established case-law, Article 34 does not catch measures applicable without distinction to domestic trade and to exports: the test which has been repeated on numerous occasions is that set out in *Oebel*, [62] namely that Article 34 only concerns national measures which fulfil two conditions: first, they have as their specific object or effect the restriction of patterns of exports; and, secondly, they thereby establish a difference between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question.

83. In the present case those conditions appear to be satisfied. The contested rule has as its specific object or effect the restriction of patterns of exports. Moreover it is discriminatory because it favours a domestic processor of waste over processors in other Member States. It follows that the contested rule constitutes a measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 34.

84. I turn now to the issue of justification. The Netherlands Government argues that its objections to the export of waste for recovery are designed to achieve the best possible method of recovery and continuity of

61 — At paragraph 24.

62 — Case 155/80 [1981] ECR 1993; see also Joined Cases 141/81 to 143/81 *Holdijk* [1982] ECR 1299, paragraph 11 of the judgment; Case 172/82 *Fabricants Raffineurs d'Huile de Graissage* v *Inter-Huiles* [1983] ECR 555, paragraph 12; Case 237/82 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483, paragraph 22 and Case C-47/90 *Delhaize* v *Promalvin* [1992] ECR I-3669, paragraph 12.

disposal, and that those concerns are inspired by the wish to protect the health and life of humans. It refers in that respect to the fifth recital of the preamble to the Regulation which refers to the need to ensure 'a high level of protection of the environment and human health'.

85. In making those observations, however, the Netherlands Government appears to be referring to the export of waste for recovery generally. It has not shown that the transport of the oil filters in question further than necessary posed a threat to the health or life of humans. Nor has it shown that the nature of the recovery process abroad posed such a threat — even assuming that it would be entitled to rely on such considerations. It is not suggested that Factron's recovery facility is not up to required standards. Indeed, the Netherlands Government accepted at the relevant time that Factron's recovery process was comparable, albeit not superior, to that of AVR. As the Commission points out, it appears that no reference to public health was made in the decisions objecting to the shipments, even though Article 7(4)(a), second indent, allows objections to be raised if a shipment is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection.

86. In support of their view that the contested rule was not justified, the appellants quote a decision of the Netherlands Ministry dated 24 September 1996 relating to a further request from Dusseldorp to export waste. According to the appellants, the Ministry stated in that decision that, although there was no reason under the Plan to authorise the export of oil filters to Belgium since the treatment in Belgium was not of a higher quality than the treatment by AVR, it considered that the Plan did not currently constitute a sufficient ground for objecting to the export of oil filters for recovery (with reference to Article 7(4) of the Regulation, first indent), in view of the decision of the Raad van State by which the present questions were referred to this Court.

87. Moreover, the appellants maintain that the Netherlands Government does now allow similar shipments to proceed. The Government admits that it will be changing its policy, explaining that objections to the export of waste for recovery will be made on the basis of the rate of recovery abroad compared with that in the Netherlands. [63] It states, somewhat cryptically and unconvincingly, simply that that change in policy was made because, in relation to waste for recovery, the importance of self-sufficiency for hygiene and the environment has diminished. No further explanation is given.

63 — See paragraph 31 above for a description of the new policy.

88. The conclusion appears to be that the proposed shipment of waste would have posed no threat to the health of humans, animals or plants, and accordingly Article 36 cannot be invoked in relation to the application of the contested rule in the present case.

89. Environmental considerations which go beyond the concerns mentioned in Article 36 may qualify as imperative requirements within the meaning of *Cassis de Dijon*. [64] However, they can constitute justification for measures caught by Article 34 only in the event that the measure is applicable without distinction. That of course suggests that imperative requirements can never justify measures caught by Article 34 since measures are only caught by that article if they are discriminatory. [65]

90. In the *Walloon Waste* case I concluded that the Walloon import ban could not be justified on environmental grounds because it discriminated against imports. The Court succeeded nevertheless in applying that ground of justification by finding that the measure was not discriminatory. However, in order to reach that result it applied environmental considerations since it had regard to the principles of self-sufficiency and proximity. That is not the first case in which the Court has been obliged to adopt rather tortuous reasoning in order to be able to justify measures on the ground of one of the imperative requirements. [66] It is perhaps, however, the 'most striking example'. [67]

91. Even assuming, however, that the contested rule could be said to be capable of justification in certain circumstances by reference to the imperative requirement of environmental protection, it would not, in my view, be justified on the facts since a threat to the environment has not been proved. It has not been shown that the transport of the waste in question in itself poses an environmental threat. Nor, as mentioned earlier, has it been suggested that the treatment abroad is not up to required standards. As the Court stated in *Inter-Huiles*, [68] in such circumstances 'clearly, the environment is protected just as effectively when the

64 — Case 120/78 *Rewe-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; in relation to environmental considerations, see, for example, Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 8 of the judgment.

65 — See, to the same effect, Peter Oliver, *Free Movement of Goods in the European Community*, Third Edition, 1996, Sweet & Maxwell, at p. 122.

66 — See, for example, the cases cited by Peter Oliver, at pp. 112 and 113: Case 113/80 *Commission* v *Ireland* [1981] ECR 1625; Case 16/83 *Prantl* [1984] ECR 1299; Case 274/87 *Commission* v *Germany* [1989] ECR 229 and Case C-238/89 *Pall* [1990] ECR I-4827.

67 — Peter Oliver, at p. 113.

68 — *Inter-Huiles*, cited in note 62, at paragraph 14 of the judgment.

[products] are sold to an authorised disposal or regenerating undertaking of another Member State as when they are disposed of in the Member State of origin'. It is also relevant to note the case of *Nertsvoederfabriek Nederland*, [69] in which the Court stated that it did not appear necessary to prohibit the export of poultry offal, provided that the conditions relating to health were satisfied with respect to removal and transport on national territory.

92. The Netherlands Government maintains that the rule is needed in order to ensure an adequate supply of oil filters to AVR for use as fuel. According to the Netherlands Government, in the absence of a sufficient supply of oil filters AVR would be obliged to use a less environmentally friendly fuel. However, even if the prevention of the use of less environmentally friendly fuel could in principle be accepted as a justifiable environmental aim, it would have to be shown that the contested rule was proportionate to that aim, and it has not been shown that a sufficient supply of environmentally friendly fuel could not be provided by means which are less restrictive of intra-Community trade. [70]

93. Finally, the Netherlands Government argues that the export ban is necessary in order to ensure sufficient raw materials and business to make AVR economically viable. In answer to that point, it is well established that purely economic grounds cannot justify a rule which is in *prima facie* breach of the Treaty rules on free movement of goods. [71] It might be different if there were an environmental justification, to which the economic considerations were merely subsidiary. [72] In the present case however, as has been seen, no environmental justification has been shown for preserving the functions of AVR which are in issue in this case.

94. I accordingly conclude, in answer to question 3(a), that the contested rule constitutes a quantitative restriction on exports within the meaning of Article 34 of the Treaty, and that it cannot be justified on the basis of either Article 36 or the imperative requirements.

69 — Case 118/86 *Openbaar Ministerie* v *Nertsvoederfabriek Nederland* [1987] ECR 3883, at paragraph 16 of the judgment.

70 — See, for example, *Nertsvoederfabriek Nederland*, cited in note 69, in which the Court considered that an implicit restriction on the export of poultry offal did not appear necessary in order to safeguard health.

71 — See, for example, Case 7/61 *Commission* v *Italy* [1961] ECR 317, at p. 329, and Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563.

72 — Case 72/83 *Campus Oil Limited* v *Minister for Industry and Energy* [1984] ECR 2727, paragraph 35 of the judgment; *Nertsvoederfabriek Nederland*, cited in note 69, paragraph 15, where, quoting *Campus Oil*, the Court stated that 'the mere fact that national provisions, justified by objective circumstances corresponding to the needs of the interests referred to therein, enable other objectives of an economic nature to be achieved as well, does not exclude the application of Article 36. That applies with greater force where the objective of an economic nature necessarily enables the objective relating to health to be attained.'

Question 3(b)

95. Question 3(b) is put only subject to the condition that the principles of self-sufficiency and proximity may apply to waste for recovery. Since I have concluded that those principles do not apply in the present case, it is unnecessary to address question 3(b).

Question 4

96. Question 4 asks whether the exclusive rights granted to AVR under sectoral plan 10 of Part II of the Plan [73] are compatible with the first and second paragraphs of Article 90, in conjunction with Article 86 of the Treaty. Article 90(1) states that, in relation to public undertakings and undertakings to which Member States have granted special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules of the Treaty, particularly those in Article 6 and Articles 85 to 94. Article 90(2) states that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules of the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

97. The Raad van State considers that, as a result of sectoral plan 10 of Part II of the Plan, AVR constitutes a public undertaking or an undertaking with special or exclusive rights within the meaning of Article 90(1) of the Treaty. The Raad van State also considers that, as sole holder of an authorisation to incinerate dangerous waste in the Netherlands, AVR is in a dominant position in a substantial part of the common market. It reasons that it is accordingly necessary to consider whether AVR has abused that dominant position, contrary to Article 86 of the Treaty, having regard to the possibility of justification under Article 90(2) of the Treaty. The Netherlands Government, on the other hand, maintains that the Plan did not give AVR exclusive rights with regard to the incineration of oil filters. It explains that it made a comparison between the process of recovery of waste oils by Factron abroad and that carried out by AVR simply because at the relevant time there was no other undertaking in the Netherlands which was capable of treating waste oil, or at least not to as high a standard. The Netherlands Government accordingly maintains that AVR has no exclusive rights as far as waste for recovery is concerned. However, the question whether

73 — According to the Netherlands Government, that part of the Plan is not relevant since it concerns only inflammable packaged waste which has nothing to do with the present litigation; it is sectoral plan 19 which concerns oil filters. The nature of the Plan is discussed at paragraphs 23 to 31 above.

AVR has been granted exclusive rights in relation to the incineration of oil filters is a question of fact for the national court. Since question 4 is posed on the basis that exclusive rights for the incineration of waste have been granted and it has been pointed out that the recovery of oil filters by AVR entails incineration, this Court should proceed on the basis that exclusive rights have indeed been granted. The exclusive rights referred to in question 4 should be taken to include both the general exclusivity granted for incineration and any exclusivity resulting from the contested rule.

98. The Raad van State asks expressly about the application of Article 90 only in relation to a possible abuse of a dominant position by AVR, contrary to Article 86. The Commission argues that it is, therefore, unnecessary to address the fourth question if, as I have suggested, the contested rule is in breach of Article 34 and is not justified under Article 36 or the imperative requirements since the rule would be unlawful in any event. However, question 4 concerns not only the export restriction which I have considered under Article 34, but also the exclusive rights granted to AVR for the incineration of waste. In any event, the issue of a breach of Article 90 in conjunction with Article 86 is not rendered manifestly irrelevant by virtue of a finding that Article 34 has been infringed, and it is primarily for the national court to assess the necessity of its questions. The question might even be raised whether Article 90(2) could apply to what would otherwise be a breach of Article 34. [74] It seems doutful whether Article 90(2) could apply in that way in the present case; it is one thing to grant an undertaking exclusive rights within a State for the purpose of operating services of general economic interest, but it is very different to reinforce those exclusive rights by prohibiting trade between Member States. That issue has not, however, been referred in the present case. I shall accordingly confine myself to some general observations on the abuse of a dominant position contrary to Article 86 and on the possible application of Article 90(1) and Article 90(2) in conjunction with that article.

99. The Raad van State observes that AVR generally charges higher prices for treating waste (including the recovery thereof) than foreign undertakings, and that the policy contained in the Plan involves a limitation of markets, so that there might be an abuse within the meaning of subparagraphs (a) and (b) of Article 86 respectively. Those subparagraphs provide, respectively, that abuse of a dominant position may, in particular, consist in 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions' or 'limiting production, markets, or technical development to the prejudice of consumers'.

74 — The relevant case-law is discussed in the Opinion of Advocate General Cosmas of 26 November 1996 in Joined Cases C-157/94, C-158/94, C-159/94 and C-160/94 *Commission* v *Netherlands, Italy, France and Spain*, at paragraphs 86 to 90.

100. The national court does not specifically seek guidance on Article 86 itself, and it may therefore be sufficient to make three comments. First, when a State confers a legal monopoly upon an undertaking in respect of a substantial part of the common market, that undertaking will be in a dominant position within the meaning of Article 86, [75] and the territory of a Member State over which the monopoly extends may constitute a substantial part of the common market. [76] Secondly, it is well-established that the mere grant of exclusive rights does not in itself necessarily create an abuse of a dominant position. [77] Thirdly, the mere fact that the charges of an undertaking with special or exclusive rights are higher than those of other undertakings in the same line of business does not necessarily constitute proof of an abuse of its dominant position, although it is a relevant factor to be taken into account. The Court has held that there will be an abuse if prices are excessive because they bear no reasonable relation to the economic value of the product supplied; the questions to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if so, whether a price has been imposed which is either unfair in itself or when compared to competing products. [78]

101. If the national court finds that AVR has abused a dominant position contrary to Article 86, it may need to consider whether the Netherlands is in breach of Article 90(1) in conjunction with Article 86. The Netherlands Government would only be in breach of Article 90(1) in conjunction with Article 86 if the exclusive rights granted to AVR caused the breach of Article 86. While any such abuse may be a consequence of the dominant position enjoyed by AVR, the mere fact that the Netherlands has conferred exclusive rights on AVR is clearly not in itself sufficient to demonstrate that there is an infringement of Article 90(1). It would have to be shown that AVR either abused its dominant position merely by exercising its exclusive rights, or that the rights conferred created a situation in which AVR was induced to commit such abuses. [79] However, so far as the alleged unfair prices are concerned, it does not appear to be suggested that the Netherlands is itself responsible for the pricing policy of AVR: at most it has only facilitated any unfair prices by the exclusive rights granted to AVR and there is no indication that AVR's pricing policy was an inevitable result of any of the exclusive rights which it has been granted.

102. I turn now to consider whether Article 90(2) provides AVR with a defence to any breach of Article 86. It is necessary first to establish whether AVR can be considered to have been 'entrusted with the operation of services of general economic interest'. The question whether the service in question can

75 — See, for example, Case 26/75 *General Motors* v *Commission* [1975] ECR 1367, and Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 9 of the judgment.

76 — See, for example, Case C-322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28 of the judgment and Case C-260/89 *ERT* [1991] I-2925, paragraph 31.

77 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 29 of the judgment.

78 — Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 250 to 254 of the judgment and Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479, paragraph 31.

79 — See the Opinion of Advocate General Fennelly of 9 October 1997 in Case C-163/96 *Silvano Raso and Others* [1998] ECR I-533, paragraphs 57 to 66.

be classified as a service of general economic interest is for the national court in so far as it is a question of fact or requires an interpretation of the applicable national legislation. [80] However, the following observations can be made as to the general meaning of the concept of an undertaking 'entrusted with the operation of services of general economic interest'.

103. It seems to me that a waste management function might well be said to constitute a service of general economic interest within the meaning of Article 90(2). [81] However, AVR must be shown not simply to be performing a service of general economic interest in relation to waste management but actually to have been 'entrusted' with such a service in the sense that certain obligations are imposed on it by the State in the general economic interest. Indeed, Article 90(2) refers to the assignment of 'particular tasks' to the undertakings in question.

104. Moreover, it should be noted that, since Article 90(2) provides for a derogation from the rules of the Treaty, that derogation should be interpreted restrictively. [82]

105. The reason for the assignment of particular tasks to undertakings is often that the tasks need to be undertaken in the public interest but might not be undertaken, usually for economic reasons, if the service were to be left to the private sector. The potential lacuna may often occur because the performance of certain tasks such as the provision of services to remote regions is not profitable (for example, airline services, [83] postal services, [84] a telecommunications network, [85] and the provision of electricity [86]).

106. If the Raad van State were to find that AVR was entrusted with a service of general economic interest and that it was in breach of Article 86 it would be necessary to show that requiring AVR to comply with the competition rules of the Treaty would obstruct the particular tasks assigned to it. Again, it is ultimately for the national court to decide whether any anti-competitive behaviour engaged in by AVR is necessary for the achievement of AVR's tasks. [87]

80 — See Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraph 22 of the judgment, and the Opinion of Advocate General Da Cruz Vilaça in *Bodson*, cited in note 78, at paragraph 81.

81 — See Advocate General Rozès in her Opinion in *Inter-Huiles*, cited in note 62, at p. 581, who similarly considered that French undertakings approved for the collection and disposal of waste oils could be regarded as undertakings entrusted with the operation of services of general economic interest within the meaning of Article 90(2).

82 — *BRT* v *SABAM*, cited in note 80, and Case C-242/95 *GT-Link*, judgment of 17 July 1997, paragraph 50.

83 — Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Berkämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 55 of the judgment.

84 — *Corbeau*, cited in note 75, see especially paragraph 15.

85 — Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 16 of the judgment.

86 — Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 48 of the judgment.

87 — *Corbeau*, cited in note 75, paragraph 20 of the judgment; *Almelo*, cited in note 86, paragraph 50. Those judgments suggest that the national court may not only rule that Article 90(2) is inapplicable but also that it can be applied with the result that a particular practice escapes the competition rules of the Treaty.

However, the following comments can be made.

107. The test for determining whether the application of the competition rules would 'obstruct' the performance of the tasks in question has been formulated in different ways. In *Almelo* [88] the Court stated that 'restrictions on competition from other economic operators must be allowed in so far as they are necessary in order to enable the undertaking entrusted with ... a task of general interest to perform it'. In *Sacchi* [89] and *CBEM* [90] it considered that the rules of the Treaty would apply unless their application would be 'incompatible' with the performance of the assigned tasks. In the more recent case of *Corbeau*, [91] however, the Court considered the test to be whether the restriction on competition or even the exclusion of all competition from other economic operators is necessary 'in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions'. [92] The Court considered the starting point of such an examination to be 'the premise that the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned'. [93] The Court added that the exclusion of competition was not justified in so far as the opening up of competition in certain services to competitors did not 'compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right'. [94]

108. Article 90(2) expressly allows for certain exemptions from the Treaty rules for undertakings rather than for Member States. To the extent that Article 90(2) could nevertheless be invoked as authorising derogations from the Treaty rules where Member States confer special rights on undertakings inasmuch as the rules in themselves cause the undertaking to breach Article 86 and thereby result in breach of Article 90(1), the exclusive rights would have to be examined under Article 90(2). On that point, the Netherlands Government argues that the exclusive rights are necessary in order to make AVR economically viable. However, as the Commission points out, it must be shown to the satisfaction of the national court that that objective cannot be achieved equally well by other means.

88 — Cited in note 86, paragraph 49 of the judgment.
89 — Case 155/73 [1974] ECR 409.
90 — Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261.
91 — Cited in note 75.
92 — Paragraph 16 of the judgment.
93 — Paragraph 17 of the judgment.
94 — Paragraph 19 of the judgment.

Conclusion

109. Accordingly in my opinion the questions referred by the Raad van State should be answered as follows:

(1) Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into, and out of the Community and Council Directive 75/442/EEC of 15 July 1975 on waste (as amended by Council Directive 91/156/EEC) must be interpreted as meaning that the principles of self-sufficiency and proximity do not apply under the Regulation and the Directive to waste for recovery.

(2) A measure of a Member State such as the rule in issue in the main proceedings, which prohibits the export of oil filters if the intended processing abroad is not superior to the processing available within that Member State, is a measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 34 of the EC Treaty insofar as it prevents the export of the oil filters to another Member State. Such a measure is not in the circumstances of the present case justified under Article 36 of the Treaty or by the imperative requirements which may take such measures outside the scope of Article 34.

(3) Where an undertaking is found to have infringed Article 86 of the Treaty by abuse of a dominant position within the common market or a substantial part of it, a Member State which has granted special or exclusive rights to that undertaking will be in breach of Article 90(1) of the Treaty only if the grant of the special or exclusive rights caused the infringement of Article 86.

(4) Where, in the absence of Article 90(2), the conduct of an undertaking would be unlawful under Article 86 of the Treaty, that undertaking may rely on Article 90(2) of the Treaty only if it can be shown that it has been specifically

entrusted with the operation of services of general economic interest and only if the application of Article 86 would make it impossible for it to perform the particular tasks assigned to it.