

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 13 December 2001¹

1. Under Article 226 EC, the Commission of the European Communities requests the Court to make a declaration that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste,² as amended by Council Directive 91/156/EEC of 18 March 1991,³ and Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442.⁴

2. Directive 75/442, as amended by Directive 91/156,⁵ sets out the Community rules governing the management of waste in the Community.

3. Article 1(a) of Directive 75/442 provides:

‘For the purposes of this Directive:

- (a) “waste” shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure.’

4. The Commission adopted the list referred to in that provision, entitled ‘European Waste Catalogue’,⁶ by Decision 94/3.

1 — Original language: French.

2 — OJ 1975 L 194, p. 39.

3 — OJ 1991 L 78, p. 32.

4 — OJ 1994 L 5, p. 15.

5 — ‘Directive 75/442’.

6 — ‘The EWC’.

5. The third recital in the preamble to Directive 91/156 states that 'common terminology ... [is] needed in order to improve the efficiency of waste management in the Community'.

8. Under the first indent of point 1 of that circular:

'This circular has two objectives

6. According to point 5 of the introductory note of the annex to Decision 94/3:

— to introduce a Luxembourg waste nomenclature

'The EWC is to be a reference nomenclature providing a common terminology throughout the Community with the purpose to improve the efficiency of waste management activities.'

— to take over the European Waste Catalogue (EWC).'

7. The EWC was incorporated into Luxembourg law by the ministerial circular of 20 November 1998 introducing a waste nomenclature, adopted by the Minister for the Environment.⁷

9. Considering that Directive 75/442 and Decision 94/3 had not been correctly transposed into Luxembourg law, the Commission initiated the infringement procedure. Having given the Grand Duchy of Luxembourg notice to submit its observations, the Commission, on 25 July 2000, delivered a reasoned opinion requesting Luxembourg to adopt the necessary measures to comply therewith within two months of notification of the opinion. Since the Grand Duchy of Luxembourg failed to do so, the Commission brought the present action.

⁷ — *Mémorial A* 1998, p. 2548, 'the ministerial circular'.

10. The Commission claims that the Court should:

- declare that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 1(a) of Directive 75/442 and Decision 94/3,

- order the Grand Duchy of Luxembourg to pay the costs.

11. The Commission observes that, in acquiring an EWC, the Community sought to have common terminology and a definition of waste in order to improve the efficiency of waste management in the Community, as indicated in the third recital in the preamble to Directive 91/156 and point 5 of the introductory note of the annex to Decision 94/3.

12. The Commission recalls that under Article 2 thereof, Decision 94/3 is addressed to the Member States and that, under the fourth paragraph of Article 249 EC, a decision is to be binding in its entirety upon those to whom it is addressed. Therefore, the Grand Duchy of Luxembourg was under an obligation to incorporate the EWC into its domestic law.

13. According to the Commission, the Grand Duchy of Luxembourg has failed to respect the obligatory nature of Decision 94/3, first, by incorporating the EWC by means of a ministerial circular which is binding on the administrative authorities but not on third parties and, second, by introducing alongside the EWC a purely Luxembourg nomenclature, distinct from the EWC and having the effect of excluding the use of the EWC for a large number of operations in which the classification of waste is taken into account.

14. The Luxembourg Government observes that the entry into force of a Grand Ducal regulation ensuring full and accurate use of the EWC is set down for 1 January 2002 and that the environmental authorities are preparing all the measures required to ensure the exclusive use of the EWC from that date. The Luxembourg Government also indicates that the ministerial circular will shortly be repealed. Consequently, it requests that the Commission withdraw its action.

The failure to fulfil obligations

15. The Luxembourg Government does not dispute that it has failed to comply with its

obligations under Article 1(a) of Directive 75/442 and Decision 94/3.

16. On the contrary, it has indicated that it intended to respond appropriately to the action brought by the Commission with the dual concern of avoiding an order being made against it and guaranteeing proper and uniform application of the Community legislation.

17. In any event it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes cannot be taken into account by the Court.⁸

18. The period laid down by the Commission in the reasoned opinion sent to the Grand Duchy of Luxembourg expired on 25 September 2000.

19. The Luxembourg Government indicated that a draft Grand Ducal regulation was drawn up with a view to full and accurate use of the EWC and that that regulation was adopted by the Luxembourg Government on 6 September 2001 and will come into force on 1 January 2002, the date from which the EWC alone will be used. A draft Grand Ducal regulation on the disposal of waste was adopted by the Luxembourg Government on 20 July 2001. The ministerial circular is to be repealed imminently.

20. Since the obligations under Directive 75/442 and Decision 94/3 had not been complied with by the date laid down in the reasoned opinion, the action brought by the Commission is well founded. For the same reasons, the Commission cannot be criticised for not acceding to the Grand Duchy of Luxembourg's request to withdraw the action.

21. Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings, which is the situation in the present proceedings.

⁸ — See, in particular, Cases C-71/99 *Commission v Germany* [2001] ECR I-5811, paragraph 29, and C-110/00 *Commission v Austria* [2001] ECR I-7545, paragraph 13.

Conclusion

22. Consequently, I propose that the Court should:

- (1) declare that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, and Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442;
- (2) order the Grand Duchy of Luxembourg to pay the costs.