REPORT FOR THE HEARING
in Case C-2/90 *

I — Disputed national rules

1. The Decree of the Walloon Regional Executive of 17 March 1983 concerning the disposal of certain waste products in Wallonia (Moniteur Belge of 14 June 1983, p. 7717) provided as follows:

'*Article 1*

The tipping or dumping or causing the tipping or dumping of waste from a foreign State in the depots referred to in the General Rules for the Protection of Workers .. and the Royal Decree of 9 February 1976 laying down general rules on toxic waste ... except in depots annexed to an installation for the destruction, neutralization and disposal of toxic waste, shall be prohibited.

Operators of the installations referred to in the first paragraph shall be prohibited from permitting or tolerating the tipping or dumping of waste from a foreign State in the installations operated by them.

Article 2

Derogations from Article 1 may be granted ... at the request of a foreign public authority.

A derogation may be granted only for a limited period and ... must be justified by reference to serious and exceptional circumstances.

...

Article 3

The tipping or dumping or causing the tipping or dumping of waste from a region of Belgium other than Wallonia in the installations referred to in the first paragraph 1 of Article 1 shall be prohibited.

...

Article 5

Waste not produced in Wallonia shall be deemed to be waste from a foreign State or a region of Belgium other than Wallonia.

If the waste results from a process in which two or more States or regions have taken part, it originates in the State or region where the last substantial processing, carried out for economic reasons in an undertaking equipped for that purpose, takes place ...'.

* Language of the case: French.

2. On 19 March 1987 the Walloon Regional Executive adopted a further Decree on the disposal of certain waste products in Wallonia (Moniteur Belge of 28 March 1987, p. 4671), which repealed the decree cited above but contained almost identical provisions. In the Decree of 19 March 1987 the beginning of Article 1 was drafted in the following terms: 'The storage, tipping or dumping of waste, or causing the same, shall be prohibited ...'.

II — Community rules

3. Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39) has a twofold legal basis, namely Article 100 and Article 235 of the Treaty.

4. The first recital in the preamble to that directive states that it is necessary to approximate laws on waste since '... any disparity between the provisions on waste disposal already applicable or in preparation ... may create unequal conditions of competition and thus directly affect the functioning of the common market ...'.

5. According to the second recital, Article 235 of the Treaty should be invoked since 'it seems necessary for this approximation of laws to be accompanied by Community action so that one of the aims of the Community in the sphere of protection of the environment and improvement of the quality of life can be achieved by more extensive rules ...', and the powers required for this purpose have not been provided for by the Treaty.

6. According to the third recital, '... the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste'.

7. The fifth recital states '... effective and consistent regulations on waste disposal which neither obstruct intra-Community trade nor affect conditions of competition should be applied to movable property which the owner disposes of ...'.

8. Article 2(1) of the directive provides that 'without prejudice to this directive, Member States may adopt specific rules for particular categories of waste' and Article 2(2) provides that certain categories of waste are to be excluded from the scope of the directive.

9. Pursuant to Article 3, 'Member States shall take appropriate steps to encourage the prevention, recycling and processing of waste ...' and 'they shall inform the Commission in good time of any draft rules to such effect ...'.

10. Under Article 5, Member States 'shall establish or designate the competent authority ... for the planning, organization, authori-

zation and supervision of waste disposal operations' and are required to draw up plans on the matter (Article 6).

11. Any installation or undertaking treating, storing or tipping waste on behalf of third parties must obtain a permit from the competent authority (Article 8) and are to be periodically inspected by the latter (Article 9), whereas 'undertakings transporting, collecting, storing, tipping or treating their own waste and those which collect or transport waste on behalf of third parties shall be subject to supervision' by that authority (Article 10).

12. 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), as amended by Council Directive 86/279/EEC of 12 June 1986 (OJ 1986 L 181, p. 13) and adapted to technical progress by Commission Directive 87/112/EEC of 23 December 1986 (OJ 1987 L 48, p. 31), also takes as its legal basis Article 100 and Article 235 of the Treaty.

13. According to the third recital in the preamble to that directive, '... shipment of waste between Member States ... may be necessary in order to dispose of it under the best possible conditions'.

14. Its fourth recital states that any difference between the provisions on disposal of hazardous waste applicable in the Member States '... may distort the conditions of competition and thus directly affect the functioning of the common market ...', and its sixth recital that 'an efficient and coherent system of supervision and control of the transfrontier shipment of hazardous waste should neither create barriers to intra-Community trade nor affect competition'. Finally, the seventeenth recital provides that '... the Member States may fix border crossing-points after consulting the Commission'.

15. Article 1 of the said directive enjoins the Member States to take '... the necessary measures for the supervision and control, with a view to the protection of human health and the environment, of the transfrontier shipment of hazardous waste ...' in the Community.

16. To that end Article 3 stipulates that 'where the holder of the waste intends to ship it ... from one Member State to another, to have it routed through one or more Member States ..., he shall notify the competent authorities of the Member States concerned'. That notification is effected by means of a uniform document.

17. A transfrontier shipment may not be executed before the competent authority of the Member State concerned has acknowledged receipt of the said notification. Member States may raise objections to the planned shipment which must be substantiated on the basis of laws and regulations relating to environmental ... or health protection which are in accordance with the directive and other Community instruments (Article 4).

III — Facts and written procedure

18. On 11 November 1986 the Commission received a complaint concerning the abovementioned national rules. After examining the rules in question, the Commission took the view that they were contrary to Community law. On 29 February 1988 it therefore sent a letter of formal notice to the Belgian Ministry of External Relations pursuant to the first paragraph of Article 169 of the Treaty pointing out that the provisions adopted by the Walloon Executive were contrary to Directives 75/442/EEC and 84/671 and Articles 30 and 36 of the EEC Treaty.

19. No reply to that letter was received, and on 17 October 1988 the Commission sent a reasoned opinion to the Kingdom of Belgium requesting it to take the measures necessary to comply therewith within a period of two months.

20. No reply to the reasoned opinion was received and on 3 January 1990 the Commission brought the present proceedings, asking that the Court:

— hold that by laying down that the storage, tipping or dumping or causing the tipping or dumping in Wallonia of waste originating in another Member State or in a Region of Belgium other than Wallonia are prohibited, the Kingdom of Belgium has failed to fulfil its obligations under Directives 75/442/EEC and 84/631/EEC and articles 30 and 36 of the Treaty;

— order the Kingdom of Belgium to pay the costs.

The defendant contended that the Court should:

— dismiss the application as unfounded;

— order the Commission to pay the costs.

21. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However it did ask the Commission to reply in writing to two questions and the Belgian Government to one question.

IV — Submissions and arguments of the parties

22. The *Commission* points out that Directive 75/442/EEC has a twofold objective: first, on the basis of Article 100 of the Treaty, to ensure approximation of the laws of the Member States on waste, in order to eliminate differences which could lead to unequal conditions of competition and, secondly, on the basis of Article 235 of the Treaty, to attain one of the Community's objectives in the sphere of protection of the environment and improvement of the quality of life with the introduction of rules on waste disposal. The same applies to Directive 84/631/EEC.

23. No provision in the directives concerned authorizes a prohibition such as that contained in the national rules cited above. Such

a prohibition is contrary not only to the objectives of the directives but also to the scheme of their provisions which ensure the free movement of waste under conditions which are not harmful to human health or the environment.

24. The Commission maintains that in addition such a prohibition runs counter to Articles 30 and 36 of the Treaty.

25. It is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade and thus constitutes a measure having an effect equivalent to quantitative restrictions prohibited by Article 30 (judgment in Case 8/74, *Dassonville* [1974] ECR 837).

26. According to the Commission, Directives 75/442/EEC and 84/631/EEC introduce a uniform harmonized system of measures for the authorization and supervision of waste disposal undertakings and for the supervision and control of the transfrontier shipment of hazardous waste. According to the case-law of the Court, where there are Community measures setting up such a harmonized system a Member State cannot rely on a derogation pursuant to Article 36 from the prohibition contained in Article 30 (judgment in Case 5/77 *Denkavit* [1977] ECR 1555).

27. In any event, in this case it is not possible to rely on Article 36 in view of the fact that the prohibition in question constitutes an arbitrary discriminatory measure against waste from other Member States since that waste cannot be regarded as more hazardous than waste from Wallonia. It is all the more arbitrary and discriminatory since the definition of waste from another State or a region of Belgium other than Wallonia contained in Article 5 of the decrees cited above is extremely wide. The prohibition in question is thus very stringent because its scope is so broad.

28. Finally the Commission claims that the possibility of derogation provided for in Articles 2 and 4 of the decrees cited cannot alter that conclusion. Those derogations are optional, limited in time and have to be justified by serious and exceptional circumstances. According to the case-law of the Court, the administrative formalities for the grant of such derogations could *per se* constitute a measure having an effect equivalent to a quantitative restriction (judgment in Case 82/77 *Van Tiggele* [1978] ECR 25).

29. The *Kingdom of Belgium*, the defendant, contends first that after the amendment to the Decree of 19 March 1987 referred to above by the Decree of 23 July 1987 (Moniteur Belge of 29 September 1987), the wording of the first paragraph of Article 1 runs as follows: 'The storage, tipping or dumping of waste from a foreign State in depots, stores and tips which require authorization pursuant to the Decree of 5 July 1985 on waste ...'.

30. Those provisions aim, on the one hand, to prohibit any producer or holder of waste from disposing of it in Walloon installations and, on the other, to prohibit the operators

of Walloon installations from accepting such waste.

31. The defendant maintains that in adopting the Decree of 19 March 1987 the intention of the Walloon Regional Executive was to react speedily and provisionally to an influx of waste into Wallonia from surrounding countries where legislation was much stricter than the Community rules. Thus the decree in question constitutes a deterrent and exceptional emergency measure which has largely become devoid of purpose. The Decree of 19 March 1987 will soon be replaced by a system of taxation and it will be possible to repeal its provisions concerning the import of foreign waste by the end of 1990.

32. The rules at issue were aimed at protecting health and the environment and should therefore be regarded as an exceptional and temporary protective measure.

33. According to the defendant, the primary objective of any rules, whether Community or national, on waste is the protection of health and the environment. That objective is recognized in the Treaty itself as taking precedence over the objective of the free movement of goods, as is shown by Articles 36 and 130 R, and is moreover expressly mentioned in the third recital of the preamble to Directive 75/442/EEC. Rules on waste do not as such have any objective of an economic character and can have only an indirect effect on intra-Community trade.

34. The Belgian Government maintains that a measure of that kind is not contrary to Directives 75/442/EEC and 84/631/EEC. It points out that the Commission does not refer to any specific article as having been misapplied but states solely that the Decree of 19 March 1987 is contrary to the objectives and scheme of the directives.

35. With regard to the Commission's statement that no provision of the directives in question authorizes a Member State to introduce a prohibition such as that at issue in these proceedings, the defendant maintains that the rules in question are in complete harmony with the system of authorization and planning introduced by the directives since they allow the competent authority to monitor the dumping of waste more effectively by way of a system of derogations from the basic prohibition.

36. Thus, although the system introduced by the rules in question is not expressly provided for or authorized by the directives, it is not prohibited. In any event it does not infringe any provision of the directives and fully complies with their spirit.

37. The defendant denies that Article 30 is applicable in this case, and refers first to the definition of the term 'goods' given by the Court of Justice as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions' (judgment in Case 7/68 *Commission* v *Italy* [1968] ECR 423).

38. On the basis of that definition, although recyclable and reusable waste can be the subject of commercial transactions, the same is not true of non-recyclable waste which is to be dumped and has no economic value. In any event waste constitutes a specific type of goods which is *sui generis* and not easily assimilated to other goods.

39. Even if waste ought to be regarded as goods, which is not the case, it cannot be concluded that the rules in question fall within the ambit of Article 30. Those rules do not govern the import of waste but merely impose a partial prohibition on storage aimed not only at foreign waste but also at waste from Regions of Belgium other than Wallonia.

40. The defendant contends finally that even were the rules at issue to be regarded as constituting a quantitative restriction on imports prohibited by Article 30, which they are not, they nevertheless have a legal basis in Article 36 and are justified in particular on grounds of public policy and protection of health and the environment. They constitute a protective measure of a temporary nature adopted to deal with a specific exceptional situation.

41. Those rules are not discriminatory, as the Commission alleges, because they are not aimed at protecting trade in goods of Walloon origin. Moreover, Article 36 does not preclude distinctions being made between domestic and foreign products (judgment in Case 34/79 in *Henn* [1979] ECR 3795).

42. The *Commission* replies that the Decree of 19 March 1987 cannot be regarded as a protective measure of a temporary nature because it merely extends the validity of the Decree of the Wallonia Executive of 17 May 1983. In view of the defendant's assertion that the Decree of 19 March 1987 has to a large extent become devoid of purpose, the Commission expresses surprise at not receiving any specific information to that effect, since its letter of formal notice and its reasoned opinion elicited no response.

43. As regards the conformity of the rules in question with Directives 75/442/EEC and 84/631/EEC, the Commission argues that those directives create a framework at Community level to ensure protection of health and the environment without hindering intra-Community trade. Thus the directives in question provide, respectively, for a system of planning and control and a system of notification and supervision, not a system of prohibition.

44. The aim of the directives is to ensure, under the supervision of the authorities of the Member States, the free movement of waste so that it can be disposed of without endangering human health or the environment. It is clear from the Court's judgment in Case C-359/88 *Zanetti* [1990] ECR I-1509 that the measures adopted by Member States and authorized by Directive 75/442/EEC must contribute to achieving those objectives.

45. The directives do not authorize the Member States to adopt measures that are more restrictive than those laid down therein. Since no provision is made for a prohibition such as that at issue in the directives concerned, it runs counter to their objectives.

46. Moreover, the Commission considers that the rules in question introduce in addition arbitrary and disguised discrimination because they differentiate, first, according to the origin of the waste and, secondly, in that the third paragraph of Article 3 provides for exceptions to the general prohibition by way of agreements between the Walloon Regional Executive and the competent authorities for the Flemish and Brussels Regions, that possibility not being available to the Member States.

47. With regard to the application of Article 30, the Commission refers to the judgment of the Court in Case C-7/68 *Commission* v *Italy*, cited above, and maintains that waste, whether or not recyclable, constitutes goods for the purpose of the application of that provision. That conclusion is confirmed by the fact that the Court has upheld a unitary definition of waste, with no legal consequence being drawn from whether or not the substances are capable of economic reutilization (Case C-359/88 *Zanetti*, cited above).

48. Thus quantitative restrictions on the importation of waste and any measure having equivalent effect are prohibited between the Member States. A prohibition such as that at issue constitutes, in any event, a measure having an effect equivalent to a quantitative restriction.

49. With regard to the possibility that Article 36 might apply, the Commission reiterates that a Member State may not rely on that provision when faced with Community measures providing for a harmonized system in the sphere in question such as that introduced by Directives 75/442/EEC and 84/631/EEC.

50. The *Belgian Government* lays stress on its main argument that the objective of protection of health and the environment clearly takes precedence over that of the free movement of waste. That priority is moreover confirmed by the judgment in Joined Cases C-206/88 and C-207/88 *Vessoso and Zanetti* [1991] ECR I-1461.

51. Thus, where free movement of waste constitutes a threat to the environment, the adoption of temporary measures, such as those at issue in the present case, is not prohibited by the directives in question nor is it contrary to the rules of the Treaty.

C. N. Kakouris
Judge-Rapporteur