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

1. By Order of 2 May 1991, made pursuant to Article 61 of the Rules of Procedure, the Court ordered the reopening of the oral procedure, since it considered it necessary to hear the parties to the case and the other Member States and institutions on the nature of an operation involving unusable and non-recyclable waste.

2. The Court also asked the parties to the case and the other Member States and institutions to define their position in writing on the following question:

'Is the movement of unusable and non-recyclable waste which is devoid of commercial value covered by the Treaty provisions concerning the free movement of goods, or are the commercial transactions relating to the disposal, tipping or destruction of such waste covered by the Treaty provisions concerning the free movement of services?'

3. In reply to that question written observations were submitted on 5 June 1991 by the Belgian Government, represented by Robert Hoebaer, acting as Agent, and on 6 June 1991 by the Commission of the European Communities, represented by Maria Condou-Durande and Xavier Lewis, acting as Agents.

4. By letter of 5 June 1991, the Council of the European Communities informed the Court that 'since the case does not concern the validity of one of its measures, the Council has no observations to submit on the question'.

Observations of the Belgian Government

5. The Belgian Government claims that unusable or non-recyclable waste is of no value and therefore does not form part of the economic production-processing-consumption circuit. A waste disposal operation is merely a provision of services.

6. Thus, with regard to the levying of VAT, only the operation of removing valueless waste is taxed, as a provision of services, whereas if the waste is recognized as being of value VAT is levied not only on the provision of the service but also on the waste.

7. According to the Belgian Government, goods are objects put on the market, and in order to be marketed they must have an exchange value. Since unusable waste is of no value, it is not capable of being marketed and a commercial transaction consisting of

* Language of the case: French.

disposing of unusable waste does not result in marketing the waste.

8. That view is in conformity with the definition of goods given by the Court in its judgment in Case 7/68, *Commission* v *Italy*. A commercial transaction could very well concern objects which are not 'goods'. For objects which are the subject of a commercial transaction to be regarded as goods, they must be of value. It is that value, that is to say the fact that the goods can be 'valued in money', according to the Court's definition, which confers on the objects in question the character of 'goods'.

9. The Belgian Government concludes that commercial transactions concerning the disposal, dumping or destruction of unusable or non-recyclable waste are operations involving the provision of services which are covered by the Treaty provisions on the free movement of services.

The Commission's observations

10. The Commission considers that the movement of unusable and non-recyclable waste of no commercial value is covered by Articles 30 to 36 of the EEC Treaty on the free movement of goods for the following reasons.

11. On the basis of the definition of goods given by the Court in Case 7/68 *Commission* v *Italy*, cited above, it cannot be doubted that usable or recyclable waste is a product that can be valued in money terms and is capable as such of forming the subject of commercial transactions.

12. The Court has already dismissed the possibility of drawing legal consequences from a distinction between recyclable and non-recyclable or unusable waste. In its judgment in Joined Cases 372/85 to 374/85 *Ministère Public* v *Traen* [1987] ECR 2141, paragraph 7, the Court pointed to the broad scope of Directive 75/442/EEC and in its judgment in *Vessoso and Zanetti*, cited above, it stated that 'the concept of waste ... is not to be understood as excluding substances and objects which are capable of economic reutilization'.

13. The Court thus decided that objects or substances which the holder disposes of, regardless of his intention to recycle or reuse them, must be treated in the same way in law. Thus whether an object is recyclable or not, which depends on its holder's intentions, constitutes a psychological or subjective factor which does not affect the objective characteristic of the object. It is therefore logical to make the movement of waste in general, the objective characteristic of which is the same, subject to the same rules in the Treaty, namely those concerning the free movement of goods.

14. The Commission maintains, furthermore, that the distinction between usable and unusable or non-recyclable waste is difficult to make.

15. Recycling, in common with any industrial process, has a price which can vary from one substance to another. Thus a substance could well be technically recyclable, but its recycling might not be economically worthwhile. Whether an object was recyclable could thus depend in large measure on

fluctuating economic factors and on technological factors which are in perpetual evolution. It would also depend on the cost of alternative ways in which a holder could dispose of the object in question.

16. The Commission cites as examples on this point paper, cardboard and glass, which are in principle recyclable but which may not be recycled because in a given place there is no collection and treatment network for recycling. The recycling rate of those products would vary significantly in time and from one Member State to another.

17. The Commission points out, moreover, that to the extent to which that distinction can be drawn, it is drawn on the basis of subjective criteria, in large measure detached from the actual nature of the object in question, which are contrary to the criteria laid down by the Court.

18. The distinction between a recyclable and non-recyclable object depends, in principle, on the purpose of the object, and underlying that is the holder's intention. Thus a subjective or psychological factor determines the purpose of the object.

19. The Court has rejected a distinction between objects covered by the free movement of goods and objects not so covered on the basis of subjective criteria concerning the use to which the holder intends to put them and has implied that the provisions concerning the free movement of goods govern the movement of objects whether it is intended that they enter the economic circuit or leave it by being consumed (judgments in Case 261/81 *Rau* [1982] ECR 3961 and Case C-362/88 *GB-INNO-BM* [1990] ECR 667).

20. The Court thus makes the system applicable to an object in EEC law depend on its nature and not on the purpose intended for it by its holder. It could therefore be concluded that, on the basis of the case-law of the Court, the provisions of the Treaty concerning the free movement of goods are applicable in a case where an object is intended to leave the economic circuit either by being consumed by the holder or by its destruction if the holder considers that the object is no longer of any value to him.

21. The Commission then refers to the definition given by the Court in its judgment in Case 7/68 *Commission* v *Italy* in support of its argument that even unusable waste is *per se* covered by the term 'goods' within the meaning of Article 30 of the Treaty inasmuch as it may be the subject of a shipment, treatment or disposal operation, which are commercial transactions. It would be difficult to describe waste directly as 'of no commercial value' because an object of no value to one person could have commercial value for someone else.

22. The Commission states that the definition cited above is not the only one given by the Court. Thus, according to the judgment in Joined Cases 60 and 61/85 *Cinéthèque* [1985] ECR 2605, paragraph 10, '... it is not possible to regard the process of production of video-cassettes as the provision of "servic-

es" within the meaning of the Treaty since the services of a manufacturer of such products result directly in the manufacture of a material object which is, moreover, the subject of classification in the Common Customs Tariff ...'.

23. The Court has thus used the Common Customs Tariff classification as an indication that the goods involved were goods within the meaning of Title I of the Treaty. The Commission claims that waste appears at several points in the tariff nomenclature, in particular in Chapter 23 'Residues and waste from the food industries; prepared animal fodder' (Commission Regulation (EEC) No 2472/90 of 31 July 1990 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ 1990 L 247). The nomenclature does not distinguish between recyclable and non-recyclable waste.

24. The Commission refers, in this context, to the judgment in Case 240/83, *Procureur de la République* v *ADHBU* [1985] ECR 531, pointing out that the Court treated waste oil for disposal as goods.

25. The Commission points out in addition that even though unusable waste is the subject of the provision of services, that does not link the waste itself to the Treaty provisions on free movement of services. The fact that treatment or disposal of waste is a service within the meaning of Article 59 of the Treaty does not mean that the movement of waste falls within the ambit of that provision. On this point the Commission refers to the 'residual' nature of the concept of services under Article 60 of the Treaty and to the strict application of that principle under the Court's case-law (judgment in Case C-239/90 *Boscher* [1991] ECR I-2023).

26. Finally the Commission observes that its position is consistent with the solution reached by the United States Supreme Court in a case analogous to this. In *City of Philadelphia* v *New Jersey* (437 U. S. 617; S. Ct. 2531; 1978 U. S. LEXIS 37), the Supreme Court held that waste, even if of no value, should enjoy the constitutional protection afforded to interstate trade. In order to prevent the influx of waste from New York, the State of New Jersey had banned the tipping of waste from other States on sites in its territory. The Court stated clearly that waste of all kinds was an article of trade and should in consequence circulate freely.

Replies to questions put by the Court

27. In the same Order of 2 May 1991 the Court also asked the Belgian Government to specify in writing whether the operations prohibited by the Decree of the Walloon Regional Executive of 19 March 1987 on the dumping of certain waste products in Wallonia related to recyclable or non-recyclable waste.

28. The Belgian Government gave the following reply to that question:

'The Decree of the Walloon Regional Executive of 19 March 1987 prohibits the storage,

tipping or dumping of waste in depots, stores and tips which must be authorized pursuant to the Decree of 5 July 1985 on waste or the Law of 22 July 1974 on toxic waste except in depots annexed to an installation for the destruction, neutralization and disposal of toxic waste.

That wording implies that in reality only controlled tips and temporary depots were meant. The system for authorizing tips is laid down in the Regional Executive's Decree of 23 July 1987 and the system for authorizing temporary depots in the General Rules for the Protection of Workers (Article 16). With regard to toxic waste the administration's practice has always been to prohibit tipping thereof.

The tipping of "products, co-products and by-products resulting from an industrial process which are recycled or used in another production process" (Article 3 of the Decree of 5 July 1985), whether final or temporary, has never been subject to the above authorization systems but rather to the system governing installations covered by the General Rules for the Protection of Workers.

The Decree of 19 March 1987 does not therefore refer to "secondary raw materials" but to unusable or non-recyclable waste or waste which is not in fact used or recycled'.

29. The Court also invited the Commission to inform it in writing of any Community legislation which might be in the process of being drafted with regard to the transfrontier shipment and storage, tipping or dumping of non-hazardous but non-recyclable waste, and whether the Commission intended to propose measures for restricting transfrontier shipment of non-hazardous but non-recyclable waste.

30. The Commission replied as follows:

'1. Proposal for a Council Regulation on the supervision and control of shipments of waste within, into and out of the European Community (OJ No C 289 of 17 November 1990, p. 9).

This proposal aims to replace the Community system on the supervision and control within the European Community of the transfrontier shipment of hazardous waste introduced by Council Directive 84/631/EEC of 6 December 1984.

That reform was deemed necessary first, in order to comply with the obligations undertaken by the Community when it signed the Basle Convention of 22 March 1989 and the Fourth Lomé Convention of 15 December 1989 and, secondly, to give effect to the principles underlying the Community's strategy for waste management proposed by the Commission and approved by the Council in its Resolution of 7 May 1990 on waste policy (OJ No C 122 of 18 May 1990, p. 2).

The proposal concerns all waste. However, it provides for exemptions as regards certain categories of non-contaminated waste which are intended for further use.

The proposal draws a distinction between, on the one hand, movement of waste within the Community and, on the other, exports out of the Community, imports into the Community and transit through the Community.

Movement of waste within the Community is to be based on the principle of the removal of internal frontiers with a view to the completion of the internal market and according to the guidelines laid down by the Community as part of its strategy for the management of waste.

Those guidelines can be summarized as follows:

Reduction of the risks to the environment resulting from the shipment of waste, especially those linked with transport and disposal, which is reflected in the application of the principle that waste should be disposed of in the nearest adequate disposal centre which makes use of the most suitable technology guaranteeing a high level of protection. In that respect the proposal provides for the shipment of waste for disposal, the application of a system of control founded on an obligation to notify all shipments between competent authorities, even in cases where a single Member State is concerned. Any shipment leaving the jurisdiction of one competent authority for any other Community authority will have to be evaluated by the competent authorities concerned on the basis of objective Community criteria, namely those of environmentally sound management and proximity.

In its evaluation the competent authority of the country of dispatch and/or of destination is to take account of all the relevant circumstances, such as geographical location, nature of the waste, and economic aspects of the operation, in order to prevent any arbitrary distortion of competition, the capacity and the availability of the planned centre, and the implementation of programmes or plans drawn up pursuant to Community obligations.

The shipment may only take place after the notifier has received authorization from the competent authority of the country of destination.

A more flexible system is laid down for waste intended for further use.

The conditions under which waste may be exported from the Community and imported into the Community reflect the provisions of, and obligations under, the Basle and Lomé IV Conventions.

2. Adoption by the Council of a directive on waste.

On 18 March 1991 the Council adopted Directive 91/156/EEC amending Directive 75/442/EEC on waste (OJ No L 78, p. 32). Article 5 of that directive imposes an obligation on the Member States with regard to waste disposal to take appropriate measures, in cooperation with other Member States where this is necessary or advisable, in order to establish an integrated and adequate network of disposal installations, taking account of the best technology available not involving excessive costs.

The purpose of setting up such a network is to 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 specialized installations for certain types of waste.

The network must in addition 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.

As far as waste disposal is concerned, the directive reflects the trend expressed in the strategy for waste management, namely disposal of waste in one of the nearest suitable facilities, and the environmentally sound management of waste. The principle of cooperation between Member States in order to establish an adequate and integrated network extends to the establishment of management plans which are to be drawn up in cooperation with the other Member States and the Commission.

3. Proposal for a directive on the dumping of waste.

This proposal aims to harmonize the environmental and technical standards for the dumping of waste so as to establish a high level of environmental protection and prevent distortions of competition and waste disposal in non-costly installations where the level of environmental protection is low.'

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