# OPINION OF ADVOCATE GENERAL LÉGER delivered on 25 September 2003 [1]

1. In the present proceedings, brought pursuant to Article 226 EC, the Commission of the European Communities aims to establish that the Republic of Austria has failed to fulfil its obligations under the following:

— 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] (hereinafter referred to as 'amended Directive 75/442');

— Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1a of Directive 75/442/EEC [4] (hereinafter referred to as 'the European waste catalogue' or 'the EWC');

— Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, [5] as amended by Council Directive 94/31/EC of 27 June 1994 [6] (hereinafter referred to as 'amended Directive 91/689'); and

— Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689, [7] (hereinafter referred to as 'the list of hazardous waste' or 'the LHW').

2. The Commission considers that the Austrian authorities have not adopted the measures necessary to comply with the European waste catalogue, the list of hazardous waste, or Annexes I and II of amended Directive 91/689.

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 — OJ 1991 L 377, p. 20.
6 — OJ 1994 L 168, p. 28.
7 — OJ 1994 L 356, p. 14.

## I — Legal framework

### A — *Community law*

3. Amended Directive 75/442 establishes Community rules relating to the management and disposal of waste.[8] Its main objective is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.[9]

4. Article 1(a) of amended Directive 75/442 defines the concept of waste. It is worded as follows:

'For the purposes of this Directive: ... "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.'

5. Article 18 of amended Directive 75/442 provides:

'The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the EEC Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. ...

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the

8 — First recital in the preamble.

9 — Third recital in the preamble.

Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

[...]'

6. By Commission Decision 94/3, the Commission adopted the list laid down in Article 1(a) of amended Directive 75/442, namely the EWC. Paragraph five of the introductory note to Annex I of this Decision provides that '[t]he 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'.

7. As regards amended Directive 91/689, this enacts specific rules relating to the management of hazardous waste. It aims to improve conditions for the management and disposal of hazardous waste. [10] The fifth recital in the preamble to this document states: 'Whereas it is necessary, in order to improve the effectiveness of the management of hazardous waste in the Community, to use a precise and uniform definition of hazardous waste ...'.

10 — Second and fourth recitals in the preamble.

8. Article 1(4) of amended Directive 91/689 defines the concept of hazardous waste as follows:

'For the purpose of this Directive "hazardous waste" means:

— wastes featuring on a list to be drawn up in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC on the basis of Annexes I and II to this Directive, not later than six months before the date of implementation of this Directive. These wastes must have one or more of the properties listed in Annex III. ...

— any other waste which is considered by a Member State to display any of the properties listed in Annex III. Such cases shall be notified to the Commission and reviewed in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC with a view to adaptation of the list.'

9. The list of hazardous waste (the LHW) was adopted through Council Decision 94/904. According to paragraph 1 of the introduction to the Annex to this Decision, the different types of hazardous waste in the LHW are fully defined by a six figure code.

B — *Austrian law*

10. Under Austrian law, the general law on waste management is in the Bundesgesetz über die Vermeidung und Behandlung von Abfällen (Abfallwirtschaftsgesetz) of 6 June 1990 [11] (federal law on the prevention and treatment of waste). [12]

11. Article 2(5) of this law, in the version published in 1998, [13] states that the Minister of Environment, Youth and Family is required to decide which wastes must be considered hazardous. The same provision stipulates that, to this end, the competent Minister may make certain 'ÖNORMEN' ('Ecostandards') obligatory. 'ÖNORMEN' are the standards adopted by the Austrian standards institute.

12. The Austrian catalogue of wastes appears in ÖNORM S 2100 of 1 September 1997. [14] This text, which is not binding in itself, contains a list of ordinary waste as well as a list of hazardous waste. It is common ground that ÖNORM S 2100 classifies waste by a different method than that used in the European waste catalogue and the list of hazardous waste.

13. In August 1997, the Minister of Environment, Youth and Family adopted the Verordnung über die Festsetzung von gefährlichen Abfällen und Problemstoffen (Festsetzungsverordnung 1997) [15] (decree relating to the determination of hazardous waste and harmful substances, hereinafter referred to as 'the 1997 decree').

14. Article 3(1) of this decree provided that wastes referred to in ÖNORM S 2100 and reproduced in Annex I (of the said decree) should be considered hazardous. Article 3(2) of the 1997 decree, however, modified the list with effect from 1 July 2000. It stated:

'With effect from 1 July 2000, wastes referred to in the LHW shall be deemed to be hazardous. The Ministry of Environment, Youth and Family will publish this list in the Bundesgesetzblatt before 1 July 2000.'

11 — BGBl. 1990/325.

12 — This legislation was replaced in 2002 by the Bundesgesetz, mit dem ein Bundesgesetz über eine nachhaltige Abfallwirtschaft (Abfallwirtschaftsgesetz 2002) erlassen (BGBl. 2002/102) (federal law on sustained waste management). The new law is not, however, relevant for the purposes of this dispute, as it was introduced after expiry of the time-limit for the reasoned opinion.

13 — BGBl. 1998/151.

14 — This was disclosed to the Court by the Austrian authorities in a letter dated 4 April 2003.

15 — BGBl. 1997/227.

15. On 30 June 2000, the day before this provision came into force, the Minister of Agriculture, Forests, the Environment and Water adopted the Verordnung mit der die Festsetzungsverordnung 1997 geändert wird [16] (decree modifying the 1997 decree, hereinafter referred to as 'the 2000 decree'). The latter repealed Article 3(2) of the 1997 decree and introduced a provision modifying the 1997 decree to transpose amended Directive 91/689 and the list of hazardous wastes.

## II — Preliminary proceedings

16. Having taken the view that Austrian legislation did not properly transpose the EWC, the LHW and amended Directives 91/689 and 75/442, the Commission issued a letter of formal notice to the Austrian authorities on 14 July 1999.

17. In its response of 8 October 1999, the Austrian Government maintained, inter alia, that the EWC, the LHW, and Annexes I and II of amended Directive 91/689 had been properly transposed by ÖNORM S 2100 and the 1997 decree. The Austrian authorities reiterated this argument in a letter of 2 November 2000, in reply to the Commission's reasoned opinion of 27 July 2000.

18. On 4 May 2001, the Commission therefore commenced the present action.

## III — Parties' claims and pleas in law

19. In this action, the Commission has advanced three grounds for complaint against the Austrian authorities. [17]

20. First, the Commission claims that the Austrian authorities have failed to transpose the EWC into domestic law. It argues that, under Article 249(4) EC, the decision establishing the EWC is binding on those to whom it is addressed, namely the Member States. It also points out that, according to paragraph 5 of the introductory note, the EWC constitutes a nomenclature providing a common terminology of waste, which is

16 — BGBl. 2000/178.

17 — Originally, the Commission also set out other complaints against the Austrian authorities. It complained that they had excluded certain substances from the scope of amended Directive 75/442 and failed to transpose Annex I of that directive. In the event, by the time of the hearing, the Commission had expressly withdrawn these complaints, so that this Opinion may be limited to the three heads of claim which the Commission has maintained.

valid throughout the Community. It is therefore essential that the EWC be applied at national level if the effectiveness of Community waste policy is to be assured.

21. Secondly, the Commission considers that the Austrian authorities have not properly transposed the LHW into domestic law. The Commission maintains that the LHW is an integral part of the definition of 'hazardous waste' within the meaning of amended Directive 91/689 and that, according to the fifth recital of the latter, it is necessary to use a precise and uniform definition of the concept of 'hazardous waste' in the Community. National measures transposing the LHW should, therefore, closely follow the system in place at Community level.

22. Further, the Commission emphasises that the LHW has never been used under Austrian law. Indeed, Article 3(2) of the 1997 decree, which provided that the LHW would apply with effect from 1 July 2000, was repealed by the 2000 decree the day before it was due to come into force.

23. Thirdly, the Commission complains that the Austrian authorities have not transposed Annexes I and II of amended Directive 91/689. According to the Commission, Member States are obliged to transpose the whole of amended Directive 91/689, including the contested Annexes.

24. The Republic of Austria disputes these various claims.

25. As regards the first head of claim, the Austrian Government maintains that it is not necessary to transpose the EWC into domestic law. It does not in its view have binding effect and is not included in the concept of 'waste' within the meaning of amended Directive 75/442. In any event, the Austrian Government argues that all the wastes listed in the EWC feature in ÖNORM S 2100, with the result that the EWC has been properly transposed. In this respect, the Austrian Government explains that the national list of wastes (ÖNORM S 2100) is more detailed and effective than the EWC, since it classifies waste according to properties rather than origin.

26. As regards the second claim, the Austrian Government emphasises that it is not required by Community law to transpose the LHW *literally*. It points out that, under Article 249(3) EC, directives are binding upon Member States as to the result to be achieved, but not as to the form or methods to be adopted. Thus, in this case, the result required by amended Directive 91/689 was achieved, since ÖNORM S 2100 and the 1997 decree had transposed the substance of the LHW.

27. The Austrian Government also explains that the purpose of Article 3(2) of the 1997 decree was to abandon the Austrian classification system (laid down in Article 3(1) and Annex I of the said decree) in order to move to a Community classification system (the LHW). This provision was, however, repealed in 2000, because the Austrian authorities judged progress on modifying the LHW to be unsatisfactory.

28. Indeed, the Austrian Government considers that the Austrian list of hazardous waste is more precise, more rigorous and more appropriate than the LHW, in that it classifies waste according to its properties rather than its origin. According to the Austrian Government, taking up the LHW in its current form would mean a serious decline in Austrian ecological standards. Furthermore, the Austrian list of wastes does not jeopardise the functioning of the internal market, since the Austrian authorities ensure that (waste) codes used at national level are coordinated with those used at Community level.

29. Finally, as regards the third head of claim, the Austrian Government considers that Annexes I and II of amended Directive 91/689 should not be transposed into domestic law. In its view those Annexes were intended to be used in drawing up the LHW, but do not have to be incorporated into Member States' domestic law.

30. The Austrian Government therefore claims that the Court should dismiss the application, and order the Commission to pay the costs.

## IV — Analysis

31. The first two heads of claims lodged by the Commission raise identical issues concerning the Member States' discretion when complying with the EWC and the LHW, and the lawfulness of Community catalogues. I shall therefore consider them together, before tackling the third head of claim, relating to the failure to transpose Annexes I and II of amended Directive 91/689.

### A — *The first two heads of claim (non-implementation of the EWC and the LHW)*

32. It is undisputed in this case that the Austrian lists of waste catalogues do not correspond with the EWC or LHW. ÖNORM S 2100 and the 1997 decree classify waste according to its properties and composition, whereas the Community

catalogues classify waste according to origin. [18] The Austrian lists, therefore, differ from the definitions and classification system which apply at Community level.

33. In my view, the merits of these first two heads of claim follow from the nature of the measures in issue.

34. It is important to emphasise that in this case these claims do not relate a failure to transpose a Community directive. The Commission is seeking to establish that the Austrian authorities have not properly implemented these 'decisions' within the meaning of the fourth paragraph of Article 249 EC. It is clear that the EWC and the LHW are decisions (of the Commission and the Council) which have been addressed to the Member States.

35. As set out in the fourth paragraph of Article 249 EC, a decision is 'binding in its entirety upon those to whom it is addressed'. Whereas a directive is only binding as to the result to be achieved, [19] a decision is mandatory in respect of all its provisions. Partial or selective application is, therefore, prohibited, [20] so that Member States to whom a decision is addressed must comply fully. Member States can only choose the legal form for implementing the decision in domestic legislation. [21]

36. It follows that, contrary to the contentions of the Republic of Austria, the Member States have no discretion in implementation of the EWC or the LHW.

37. In this respect, it will be recalled that, according to case-law, the Court may redesignate a Community measure. Indeed, the Court considers that the true nature of a

18 — At the hearing, the Austrian Government illustrated this distinction by referring to category 30103 of the EWC, which refers to 'shavings, cuttings, spoiled timber/particle board/veneer'. It explained that, due to its general nature, this category could include both mechanically and chemically treated wood waste. In the Community system, these two types of waste would fall into the same category because they have a common origin (wood waste). On the other hand, in the Austrian system, these two types of waste would fall into separate categories because they have different properties and a different composition.

19 — Third paragraph of Article 249 EC.

20 — See, in relation to regulations which are also 'binding "in [their] entirety"', Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 20.

21 — G. Isaac and M. Blanquet, *Droit communautaire général*, 8th ed., Armand Colin, Dalloz, Paris 2001, p. 146. On the characteristics of the various types of Community act, see also J.-V. Louis, G. Vandersanden, D. Waelbroeck and M. Waelbroeck, *Commentaire J. Megret, Le droit de la CEE, Volume 10, La Cour de justice, les actes des institutions*, 2nd ed., Université de Bruxelles, Brussels 1993, p. 479 et seq.; S. Van Raepenbusch, *Droit institutionnel de l'Union et des Communautés européennes*, 3rd ed., De Boeck Université, Brussels 2001, p. 293 et seq., as well as T. Hartley, *The foundations of European Community Law*, 4th ed., Oxford University Press, New York 1998, p. 99 et seq.

measure does not follow from the author's designation [22] or the method of its implementation. [23] Thus, if the provisions of a regulation do not have general application, the Court takes the view that its provisions must be seen as a bundle of individual decisions. [24] Similarly, a decision which, in relation to a category of persons has legal effect in an abstract and general way, must, notwithstanding the term 'decision', be considered a measure with general application. [25] Finally, the Court may check that a directive within the meaning of the third paragraph of Article 249 EC does not include a specific provision which is in the nature of an individual decision. [26]

38. In this case, the Austrian Government does not dispute that the EWC and the LHW are genuine decisions. It has not, at any point in the proceedings, put forward the proposition that the description of the legal measures in dispute is incorrect.

39. In any event, I consider that the EWC and the LHW do not have the characteristics of a 'directive' within the meaning of the third paragraph of Article 249 EC.

40. On the one hand, it should be emphasised that it is the deliberate choice of the Community legislature to enact the EWC and the LHW in the form of decisions. We know that amended Directive 75/442 did not seek to establish a Community list of wastes. Article 1(a) of that directive was limited to defining the concept of waste as 'any substance or object ... which the holder discards or is required to discard'. Nevertheless, when amending Directive 75/442 in 1991, the Council considered that 'common terminology and a definition of waste are needed'. [27] The EWC was therefore adopted as 'a reference nomenclature providing a common terminology throughout the Community'. [28]

41. Similarly, the fifth recital to amended Directive 91/689 states: 'it is necessary, in order to improve the effectiveness of the management of hazardous waste in the Community, to use a precise and uniform definition of hazardous waste based on experience'. The LHW is also therefore intended to provide a uniform definition of the concept of hazardous waste in the Community.

42. In the light of the foregoing, it is evident that the Community legislature could not enact the EWC and the LHW in the form of directives. To allow Member States a certain freedom as to form and

22 — See, in particular, Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471, ECR 478 and Case 22/70 *Commission* v *Council* (the '*AETR*' case) [1971] ECR 263, paragraphs 38 et seq.

23 — See, in particular, Case 307/81 *Alusuisse Italia* v *Council and Commission* [1982] ECR 3463, paragraph 13.

24 — Joined Cases 41/70 to 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411, paragraphs 16 to 21.

25 — Case T-166/99 *Andres de Dios and Others* v *Council* [2001] ECR II-1857, paragraphs 35 to 44.

26 — Order of 23 November 1995, Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraphs 28 to 31.

27 — Directive 91/156 (third recital).

28 — Introductory note to the Annex of the EWC (paragraph 5).

method would plainly be contrary to the purpose of Community catalogues, which are intended to establish a definition and a uniform classification system for (hazardous) waste in the Community. By opting for decisions, the Community legislature therefore deliberately chose to limit the Member States' discretion in this area.

43. Furthermore, examination of the content of Community catalogues confirms that they constitute genuine 'decisions' in the sense of Article 249 EC. The EWC and the LHW set out the different categories of waste precisely and in detail. And they classify waste according to a set order and method, which is based, essentially, on the origin of the waste.

44. Consequently, I consider that the Republic of Austria had no discretion in the implementation of the EWC and the LHW. It was under a duty to incorporate the Community catalogues fully and accurately into domestic legislation.

45. This conclusion is confirmed, moreover, by the decision in *Commission* v *Luxembourg*.[29] In that case, the Court found that the Grand Duchy of Luxembourg had failed to fulfil its obligations on the ground that it had adopted a purely Luxembourg classification system for waste, which differed from the EWC.

46. However, the Republic of Austria challenges this conclusion, calling into question the relevance of the Community catalogues. It has put forward numerous arguments to show that the Austrian lists are more precise, more rigorous and more effective than the Community catalogues.

47. From a legal point of view, I think that this approach is unlikely to succeed.

48. According to settled case-law, the system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 226 and 227 EC, for a declaration that a Member State has failed to fulfil its obligations, and those provided for in Articles 230 and 232 EC, for review of the lawfulness of measures adopted by the Community institutions, or of their failure to adopt measures. These remedies serve different purposes and are subject to different rules. A Member State cannot, therefore, plead the unlawfulness of a directive as a defence in an action for a

29 — Case C-196/01 [2002] ECR I-569.

declaration that it has failed to fulfil its obligations arising out of its failure to transpose the directive. [30] Nor, likewise, can it plead unlawfulness of a decision addressed to that Member State as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision. [31] The Court has held that it could only be otherwise if the measure in question contained such particularly serious and manifest defects that it could be classified as non-existent. [32]

49. The case-law is based on the principle that a decision or a directive adopted by the Community institutions which has not been challenged by its addressee within the time-limit laid down in Article 230 EC, becomes definitive as against that person. [33]

50. It is true in this case that the EWC and the LHW were adopted before the Republic of Austria joined the European Union. The Austrian authorities did not therefore have an opportunity of challenging the validity of the Community catalogues under Article 230 EC.

51. Nevertheless, this does not mean that the defence put forward by the Republic of Austria must be accepted.

52. Indeed, Article 2 of the Treaty relating to the accession of the Republic of Austria to the European Union [34] states: 'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act'. Furthermore, Article 10 of the Act of Accession provides: 'The application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act'.

53. It follows that the Act of Accession is based on the principle of immediate and full application of provisions of Community

30 — See, in particular, Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 10, and Case C-52/00 *Commission* v *France* [2002] ECR I-3827, paragraph 28, and Case C-154/00 *Commission* v *Greece* [2002] ECR I-3879, paragraph 28.

31 — See, in particular, Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraphs 13 and 14; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 10; Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraphs 34 and 35; Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraphs 18 and 19 and Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraph 100.

32 — See, in particular, Case C-226/87 *Commission* v *Greece* cited above, paragraphs 15 and 16, and *Commission* v *Germany* cited above, paragraph 11.

33 — See, as a recent example of settled case-law, Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, paragraph 34, and cases cited.

34 — Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21), as modified by Decision 95/1/EC, the Euratom and ECSC Treaties of the Council of 1 January 1995, adjusting the instruments concerning the accession of new Member States to the European Union (OJ 1995 L 1, p. 1, hereinafter referred to as 'the Act of Accession').

law in the new Member States, and that derogation from this principle is only permissible in so far as expressly provided in the transitional provisions of the said Act. [35]

54. As regards directives and decisions taken by the Community institutions, Article 168 of the Act of Accession also provides: 'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives and decisions within the meaning of Article 189 of the EC Treaty [now Article 249 EC] ... unless a time-limit is provided for in the list of Annex XIX or in any other provisions of this Act'.

55. In this case, it is common ground that none of the provisions of the Act of Accession permit the Republic of Austria to derogate from the obligations in the EWC and LHW. Nor does the Act of Accession permit the Republic of Austria to derogate from the obligations in amended Directive 75/442 or amended Directive 91/689.

56. Consequently, the Austrian Government cannot to my mind legitimately challenge the lawfulness of the EWC or the LHW in this action. These measures are an integral part of Community law; accordingly, the Republic of Austria is obliged to bring them fully into force. [36]

57. At the hearing, the Court also raised the question of the coexistence of the lists in the domestic legal system. The Court asked the Commission whether, in its view, proper implementation of the EWC and the LHW entailed that the Republic of Austria should repeal national lists or whether, on the contrary, Austria could continue to operate those lists in tandem with the Community catalogues.

58. I take the view that the Republic of Austria cannot be permitted to apply the two categories of list simultaneously. Indeed, it is settled case-law that Member States must implement their obligations under Community law with the specificity, precision and clarity necessary to satisfy the requirements of the principle of legal certainty. [37] In this respect, it matters little that the provisions of Community law in

35 — See, by analogy, Case 258/81 *Metallurgiki Halyps* v *Commission* [1982] ECR 4261, paragraphs 7 and 8.

36 — See this point, in another context, in Joined Cases 39/81, 43/81, 85/81 and 88/81 *Halyvourgiki and Helleniki Halyvourgia* v *Commission* [1982] ECR 593, paragraphs 9 to 12; *Metallurgiki Halyps* v *Commission* cited above, paragraphs 3 to 14, and Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraphs 31 to 34.

37 — See, in particular, Cases C-225/97 *Commission* v *France* [1999] ECR I-3011, paragraph 37; C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32; and C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraph 47.

question are directly applicable, and that individuals are therefore entitled to rely on them directly as against a defaulting Member State. [38]

59. The simultaneous application of Community and national lists, which are based on different classification methods, will inevitably create confusion and uncertainty with regard to the applicable law. Neither the individuals concerned nor the competent authorities will be in a position to determine precisely whether they must apply the Community catalogues or the national lists.

60. I would further point out that, in the aforementioned case of *Commission* v *Italy*, the Court has already ruled out a Member State being able to apply the two categories of list simultaneously. In that case, the Court held that the Grand Duchy of Luxembourg had failed to fulfil its obligations by introducing, alongside the EWC, a purely Luxembourg list of wastes, which differed from the EWC.

61. That being the case, the first two complaints formulated by the Commission in my view must be upheld. I therefore propose that the Court hold that, by failing to adopt the necessary measures to comply with the EWC and the LHW, the Republic of Austria has failed to fulfil its obligations under both the fourth paragraph of Article 249 EC and the aforementioned decisions.

B — *The third head of claim (failure to transpose Annexes I and II of amended Directive 91/689)*

62. By its third head of claim, the Commission alleges that the Austrian authorities have not transposed Annexes I and II of amended Directive 91/689. These annexes are referred to in Article 1(4) of amended Directive 91/689 [39] and list the categories of hazardous waste according to their nature or the activity by which they are generated (Annex I) as well as the constituents which render the wastes in Annex IB hazardous where they have the properties listed in Annex III (Annex II).

63. The Austrian Government does not deny that these two annexes have not been transposed into domestic law. It maintains that the annexes were intended to be used in the process of establishing the LHW, but did not have to be incorporated into the national legislation of Member States.

38 — See, in particular, Cases C-208/90 *Emmott* v *Minister for Social Welfare and the Attorney General* [1991] ECR I-4269, paragraphs 20 and 21, and C-162/99 *Commission* v *Italy* [2001] ECR I-541, paragraph 22.

39 — See paragraph 8 of this Opinion.

64. In my view, that argument has no legal basis. Indeed, there is no provision either in amended Directive 91/689 or the Act of Accession to exclude Annexes I and II from the transposition obligation on the ground that they are part of the process of establishing the LHW. On the contrary, it seems to me that these annexes are an integral part of amended Directive 91/689 and that they must, therefore, be transposed according to Article 10 of the aforementioned directive and the third paragraph of Article 249 EC.

65. Consequently, I consider that the Commission's third head of claim is also well founded.

## V — Conclusion

66. On the basis of the foregoing, I therefore propose that the Court uphold the Commission's claim and rule that:

(1) By failing to adopt the laws, regulations and administrative provisions necessary to ensure the implementation of Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC, and Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste, and the transposition of Annexes I and II of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, as amended by Council Directive 94/31/EC of 27 June 1994, the Republic of Austria has failed to fulfil its obligations under both the third and fourth paragraphs of Article 249 and the said decisions and directives.

(2) The Republic of Austria be ordered to pay the costs.