OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 7 March 2002 [1]

I — Introduction

1. In the present proceedings the Commission seeks a declaration that the Portuguese Republic has failed to fulfil its obligations under Articles 6(2), 8(2)(a), 13 and 17 of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, as amended by Council Directive 87/101/EEC of 22 December 1986, [2] the first paragraph of Article 10 EC and the third paragraph of Article 249 EC.

2. The Commission's claims relate to the permit procedure applicable to certain undertakings which dispose of waste oils, the conditions governing the disposal of residues from the combustion of waste oils, the inspection procedure for undertakings which dispose of waste oils and the duty to convey information to the Commission.

II — Legal Framework

A — *Community Law*

Directive 75/439

3. Directive 75/439 governs the disposal of waste oils, its aim being to protect the environment from the harmful effects of discharging, depositing and treating waste oils. [3] In order to achieve this aim Member States were obliged, under the original version of Articles 2 to 4 of that directive, to take the necessary measures to ensure the safe collection and disposal of waste oils and to ensure that, as far as possible, their disposal was carried out by recycling.

4. Directive 75/439 was amended by Directive 87/101, the principal aim of which was

1 — Original language: German.

2 — OJ 1987 L 42, p. 43.

3 — See the third recital in the preamble to the directive.

to give priority to the processing of waste oils by regeneration in view of the energy savings which can be achieved.

5. Articles 1 to 6 of the original text of Directive 75/439 were entirely replaced by new provisions inserted by Directive 87/101.

6. *Article 6* of Directive 75/439, as amended by Directive 87/101, now reads as follows:

'1. In order to comply with the measures taken pursuant to Article 4, any undertaking which disposes of waste oils must obtain a permit. Where necessary, this permit shall be granted after examination of the installations.

2. Without prejudice to the requirements laid down by national and Community provisions with a purpose other than that of this Directive, a permit may be granted to undertakings which regenerate waste oils or use waste oils as fuel only where the competent authority has satisfied itself that all appropriate environmental and health protection measures have been taken, including use of the best technology available, where the cost is not excessive.'

7. *Article 8(2)* of Directive 75/439, as amended by Directive 87/101, provides:

'The Member States shall further ensure that:

(a) the residues from the combustion of waste oils are disposed of in accordance with Article 9 of Directive 78/319/EEC;

...'.

8. *Article 13* of Directive 75/439, as amended by Directive 87/101, provides:

'1. The undertakings referred to in Article 6 shall be inspected periodically by the Member States, particularly as regards their compliance with the conditions of their permits.

2. The competent authorities shall examine trends in the state of technical development and/or of the environment with a view to revising, where necessary, permits granted to undertakings in accordance with this Directive.'

9. *Article 17* of Directive 75/439, as amended by Directive 87/101, reads as follows:

'Each Member State shall periodically convey to the Commission information concerning its technical expertise and the experience gained and results obtained through the application of measures taken pursuant to this Directive.

...'

Directives connected with Article 8(2) of Directive 75/439, as amended by Directive 87/101

10. Article 8(2) of Directive 75/439, as amended by Directive 87/101, makes reference to Article 9 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste. [4]

4 — OJ 1978 L 84, p. 43.

11. Council Directive 91/689/EEC of 12 December 1991 on hazardous waste [5] repealed and replaced Directive 78/319 with effect from 27 June 1995. [6]

12. *Article 9 of Directive 78/319* provided as follows:

'1. Installations, establishments or undertakings which carry out the storage, treatment and/or deposit of toxic and dangerous waste must obtain a permit from the competent authorities. Such waste may be stored, treated and/or deposited only by installations, establishments or undertakings holding such permits. Undertakings engaged in the carriage of toxic and dangerous waste shall be controlled by the competent authorities of the Member States.

2. The permit referred to in paragraph 1 shall cover in particular:

— the type and quantity of waste;

5 — OJ 1991 L 377, p. 20.

6 — See the first recital in the preamble to Directive 91/689/EEC and Article 11 of that directive, as amended by Council Directive 94/31/EC of 27 June 1994 (OJ 1994 L 168, p. 28).

— the technical requirements;

— the precautions to be taken;

— the disposal site(s);

— the methods of disposal.

This permit may also lay down the specific information to be made available at the request of the competent authorities.

3. Permits may include conditions and obligations. They may be granted for a specified period and may be renewed.'

13. *Article 1(2) of Directive 91/689* provides as follows:

'Subject to this Directive, Directive 75/442/EEC shall apply to hazardous waste.'

14. Directive 75/442/EEC is the Council Directive of 15 July 1975 on waste. [7] It was amended by Council Directive 91/156/EEC of 18 March 1991. [8]

15. *Article 9 of Directive 75/442, as amended by Directive 91/156*, reads as follows:

'1. For the purposes of implementing Articles 4, 5 and 7, any establishment or undertaking which carries out the operations specified in Annex II A must obtain a permit from the competent authority referred to in Article 6.

Such permit shall cover:

— the types and quantities of waste,

— the technical requirements,

7 — OJ 1975 L 194, p. 39.
8 — OJ 1991 L 78, p. 32.

— the security precautions to be taken,

— the disposal site,

— the treatment method.

2. Permits may be granted for a specified period, they may be renewable, they may be subject to conditions and obligations, or, notably, if the intended method of disposal is unacceptable from the point of view of environmental protection, they may be refused.'

B — *National Law* [9]

16. *Provisions relating to waste oils:*

— *Decreto-Lei No 88/91* of 23 February 1991 (hereinafter 'Decree-Law No 88/91'), by which, pursuant to Article 1, Directive 87/101 is transposed into domestic law;

— *Regulamento* (Regulation) on the grant of permits for the collection, storage, pretreatment, regeneration, reclamation, combustion and incineration of waste oils (hereinafter 'the Waste Oils Regulation Annexed to Implementing Order No 240/92'), approved by — and annexed to — *Portaria No 240/92* of 25 March 1992 (hereinafter 'Implementing Order No 240/92') regulating permits for operations in connection with waste oils, as provided in Article 8 of Decree-Law No 88/91.

17. *Provisions of industrial law:*

— *Decreto-Lei No 109/91* of 15 March 1991 on the pursuit of industrial activity, as amended by *Decreto-Lei No 282/93* of 17 August 1993 (hereinafter 'Decree-Law No 109/91');

— *Portaria No 314/94* of 24 May 1994 (hereinafter 'Implementing Order No 314/94') on the content of applications for the establishment of industrial plants.

18. *Provisions on waste:*

— *Decreto-Lei No 239/97* of 9 September 1997 (hereinafter 'Decree-Law

9 — The provisions of national law are set out below with a reference to their content.

No 239/97') on the carriage, storage, treatment, recovery and disposal of waste;

— *Portaria No 961/98* of 10 November 1998 (hereinafter 'Implementing Order No 961/98') laying down the conditions for permits authorising the storage, treatment, recovery and disposal of waste, pursuant to Articles 9 and 10 of Decree-Law No 239/97.

19. *Law on organisation in the environmental field:*

— *Decreto-Lei No 189/93* of 24 May 1993 (hereinafter 'Decree-Law No 189/93') on the establishment of the Directorate-General for the Environment;

— *Decreto-Lei No 549/99* of 14 December 1999 (hereinafter 'Decree-Law No 549/99') on the organisation of the Inspectorate-General for the Environment;

— *Decreto-Lei No 236/97* of 3 September 1997 (hereinafter 'Decree-Law No 236/97') on the establishment of the Institute for Waste Management.

III — Facts, pre-litigation procedure and court proceedings

20. Member States had to transpose Directive 75/439 as amended by Directive 87/101 into their domestic law by 1 January 1990.

21. In its letters dated 8 March 1991, 13 April 1992, 11 December 1992 and 18 April 1994 the Portuguese Government informed the Commission that Directive 87/101 had been transposed into its domestic law by Decree-Law No 88/91 of 23 February 1991, Implementing Order No 240/92 of 25 March 1992, Implementing Order No 1028/92 of 5 November 1992 and Despacho conjunto dos Ministérios da Indústria e do Ambiente e Recursos Naturias (Joint Order of the Ministries for Industry and for the Environment and Natural Resources) of 26 April 1993.

22. Since the Commission took the view that Directive 75/439, as amended by Directive 87/101, had not been properly implemented by those provisions, it sent a letter of formal notice to the Portuguese Government on 4 July 1994 requiring it to give its response within two months.

23. Since the Portuguese Government's reply of 26 October 1994 did not, in the Commission's view, allay the suspicion that

there had been an infringement of the Treaty, it sent a reasoned opinion to the Portuguese Republic on 27 November 1997 alleging various infringements of Directive 75/439, as amended by Directive 87/101, and requiring the Portuguese Republic to take the necessary measures within a period of two months — that is to say by 27 January 1998. The Portuguese Government's letter in reply was dated 25 February 1998.

24. As the Commission had come to the conclusion that the Portuguese Republic had failed to comply with its obligations, it brought proceedings against the Portuguese Republic before the Court of Justice under Article 226 EC, by a pleading dated 8 October 1999 which was lodged at the Court Registry on 13 October 1999.

25. The Commission claims that the Court should:

1. declare that:

— by failing to adopt provisions by which the competent authority, before granting a permit to undertakings which regenerate waste oils or use them as fuel, may satisfy itself that health is appropriately protected where waste oils are used as fuel and that the best available technology not entailing excessive cost is used where waste oils are regenerated or used as fuel;

— by failing to lay down that residues from the combustion of waste oils are to be disposed of in accordance with Article 9 of Directive 78/319/EEC and, from 27 June 1995, in accordance with Article 9 of Directive 75/442/EEC, which, as amended by Directive 91/156/EEC and pursuant to Directive 91/689/EEC, replaced Article 9 of Directive 78/319/EEC;

— by failing to provide for periodical inspection of undertakings which regenerate waste oils or use them as fuel, or for examination of trends in the state of technical development and/or of the environment with a view to revising, where necessary, permits granted to those undertakings;

— by failing to convey to the Commission information concerning its technical expertise and the experi-

ence gained and results obtained through the application of measures taken pursuant to Directive 75/439/EEC, as amended by Directive 87/101/EEC,

the Portuguese Republic has failed to fulfil its obligations under Articles 6(2), 8(2)(a), 13 and 17 of Directive 75/439/EEC, as amended by Council Directive 87/101/EEC, Article 10 EC and the third paragraph of Article 249 EC;

2. order the Portuguese Republic to pay the costs.

IV — Consideration of the Commission's heads of claim

A — *First head of claim*

26. In its first head of claim the Commission alleges that the Portuguese Republic has failed to adopt provisions which ensure that undertakings which regenerate waste oils or use them as fuel will be granted a permit only if the criteria stipulated in Article 6(2) of Directive 75/439, as amended by Directive 87/101, are met — namely the protection of health, and use of the best technology available where the cost is not excessive. [10]

1. Arguments of the parties

Ensuring health protection:

27. The *Commission* argues that it is mandatory for the grant of a permit by the competent national authority to undertakings which use waste oils as fuel to be contingent on health protection being ensured. For reasons of legal certainty, the relevant rules on permits must be clear and precise so that the undertakings concerned are made aware that health protection measures are a precondition of their permits.

28. The Commission then states that it is not, however, clear to itwhich of the

10 — In contrast to its reasoned opinion, the Commission is objecting to the rules on permits for undertakings which regenerate waste oils only with regard to the requirement of use of the best technology available whereas it is objecting to the rules on permits for undertakings which use waste oils as fuel with regard to ensuring both use of the best technology available and the protection of health.

various provisions mentioned by the Portuguese Government are intended to apply to permits for undertakings which use waste oils as fuel.

29. Part VI of the Waste Oils Regulation Annexed to Implementing Order No 240/92 merely prohibits the use of waste oils as fuel in the food industry and is therefore insufficient.

30. The Commission argues with regard to the general provisions of industrial law referred to by the Portuguese Government that, whilst Implementing Order No 961/98 does certainly make provision for the inclusion of appropriate elements in an application for a permit, this order did not enter into force until after the period laid down in its reasoned opinion had expired and cannot therefore be taken into consideration in these infringement proceedings.

31. The *Portuguese Government* argues that it is established case-law of the Court of Justice that implementation of a directive does not necessarily require its provisions to be formally incorporated verbatim in express, specific legislation and that a general legal context may be adequate for the purpose, provided that it does indeed ensure the full application of the directive in a clear and precise manner. [11]

32. In the opinion of the Portuguese Government, the essential point is whether an application for a permit to use waste oils as fuel does actually include — without its being necessary for a specific description to be expressly prescribed — the elements necessary to enable the competent authority to determine whether health protection is assured.

33. The Portuguese Government concedes that health protection is not expressly covered in Part VI of the Waste Oils Regulation Annexed to Implementing Order No 240/92. However, undertakings which use waste oils as fuel are bound in any event by the general rules on the pursuit of industrial activity. The Portuguese Government refers in this connection to the obligation imposed on industrialists to conduct their business in such a way, in particular, that precautions are taken to avoid and reduce risk to humans. [12]

34. It also argues that its industrial law [13] provides that the application for a permit to be submitted to the permit authority must contain an environmental impact study in accordance with the applicable legislation, and the permit authority must hear the views of bodies responsible for industrial matters, particularly on health issues. The terms and conditions stipulated by those bodies have to be included in the

11 — See in particular the judgment in Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653.

12 — Articles 4 and 5 of Decree-Law No 109/91 on the pursuit of industrial activity.

13 — Article 9 of Decree-Law No 109/91.

permit. Finally, the rules contained in its industrial law provide that appropriate safeguard measures must be taken by the authorities immediately in the event of a serious health risk. [14]

35. The Portuguese Government also refers to a provision which requires a risk assessment to be submitted [15] and to Implementing Order No 961/98, which makes it necessary to obtain a permit from the Environment Minister before storing, processing, recovering or disposing of waste. An application for such a permit must also contain elements which ensure that appropriate health protection measures are taken.

Use of the best technology available:

36. In the opinion of the *Commission*, the rules of domestic law submitted by Portugal do not ensure that use of the best technology available constitutes a *precondition for a permit* to regenerate waste oils or use them as fuel. The provisions of national law referred to are also too vague and diverse to ensure the necessary degree of legal certainty.

37. The *Portuguese Government* relies first of all, with regard to undertakings which regenerate waste oils, essentially on the provisions contained in the Portuguese Waste Oils Regulation: this provides, first, that the installation plan which has to be attached to an application for a permit must include a detailed description of the industrial activity concerned and a specification of the technical processes used, [16] thereby enabling the permit authority to establish whether there is indeed an intention to make use of the best technology available. Secondly, the application file also has to be referred to the Institute for Waste for an opinion. [17] This institute is obliged to have regard to the technology criterion. The objective here is to avoid or reduce the harmfulness of waste, in particular by recycling and by adapting manufacturing processes using 'appropriate technology'. [18]

38. The Portuguese Government also refers again to provisions of industrial law which apply to all undertakings, including those with which this case is concerned. It relies *inter alia* on the provision that industrial activity is to be carried out 'having regard to the existing level of technological development'. [19] There is also the requirement for a risk assessment, which has to be attached to the installation plans and must incorporate a 'choice of technologies enabling the use of dangerous equipment or products to be avoided or reduced'. [20]

14 — Article 13 of Decree-Law No 109/91.

15 — Article 2(4) of Implementing Order No 314/94.

16 — Article 13 of the Waste Oils Regulation Annexed to Implementing Order No 240/92.

17 — Article 15 of that regulation.

18 — Article 4(1) of Decree-Law No 239/97.

19 — Article 4 of Decree-Law No 109/91 on industrial activity.

20 — Article 2(4)(b) of Implementing Order No 314/94.

2. Analysis

39. Under Article 6(1) of Directive 75/439, as amended by Directive 87/101, any undertaking that disposes of waste oils must obtain a permit which, where necessary, is granted after examination of the installations. In the case of undertakings which regenerate waste oils or use them as fuel, Article 6(2) imposes special conditions for the permit: permits may fundamentally be granted to those undertakings 'only where the competent authority has satisfied itself that all appropriate environmental and health protection measures have been taken, including use of the best technology available, where the cost is not excessive'.

40. This means that the permit procedure under national law must be designed in such a way that an undertaking which regenerates waste oils or uses them as fuel may obtain a permit from the competent authority only if it has taken the necessary measures. It is therefore a *material precondition for a permit.*

41. National provisions which require an application for a permit to contain appropriate documents and information do allow the authority to determine whether or not appropriate measures have been taken but do not lay down that it is a precondition for a permit that such measures be guaranteed — as required under the directive.

42. The implementation of Article 6(2) must now first be examined with regard to the health protection precondition for a permit.

43. The provisions of industrial law cited by the Portuguese Government in this respect contain a general obligation to have regard in particular to human safety and avert danger to people during the course of industrial activity. However, this does not ensure that permits are granted only to undertakings which have taken all appropriate health protection measures.

44. Furthermore, whilst the measures of protection provided for under Portuguese industrial law do allow the authorities to react to hazardous situations which arise during the course of an undertaking's operations, they do not affect the permit procedure which precedes the commencement of operations by an undertaking.

45. The risk assessment and environmental impact study form part of the application for a permit; whilst they do therefore constitute a basis for assessing the grant of a permit, they likewise do not necessarily ensure that the precondition for such grant will be fulfilled. Nor will the latter be secured by the fact that certain bodies must be allowed to state their views on health issues and can stipulate conditions.

46. Finally, as far as Implementing Order No 961/98 is concerned, it is sufficient to state that, in accordance with settled case-law of the Court of Justice, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion.[21] Portugal does not deny that Implementing Order No 961/98 was not adopted until 10 November 1998 — after the end of the period prescribed, which expired on 27 January 1998 — so this order is not relevant to the present proceedings, as the Commission has correctly stated.

47. None of the provisions cited by Portugal do therefore lay down, in accordance with Article 6(2) of Directive 75/439, as amended by Directive 87/101, that it is an essential condition for the grant of a permit to undertakings which use waste oils as fuel that the applicant should have taken all appropriate health protection measures.

48. The second issue to be considered is whether the conditions for a permit regarding the obligation to make use of the best technology available meet the requirements laid down in the directive.

49. The new permit application rules concerning a risk assessment and — for undertakings which regenerate waste oils — installation plans do certainly again provide essential information for examination of an application, but they do not in themselves ensure that use of the 'best technology available' actually constitutes a precondition for a permit.

50. Nor can such a precondition be inferred from the right of the Institute for Waste to give an opinion on an application for a permit, especially as it has not been claimed that such an opinion is binding and the objectives only make general mention of 'appropriate technology' and not of 'the best technology available'.

21 — See, amongst other authorities, the judgment in Case C-435/99 *Commission* v *Portugal* [2000] ECR I-11179, paragraph 16.

51. Finally, the fact that there is an obligation under general industrial law to conduct industrial activity having regard to the existing level of technological development likewise does not ensure that undertakings will be granted a permit to regenerate waste oils or use waste oils as fuel only if they make use of the best technology available, where the cost is not excessive.

52. The Commission's first head of claim is therefore well founded.

B — *Second head of claim*

1. Arguments of the parties

53. The *Commission* claims that Portugal has failed, contrary to Article 8(2)(a) of Directive 75/439, as amended by Directive 87/101, to lay down that residues from the combustion of waste oils are to be disposed of in accordance with Article 9 of Directive 75/442 on waste which, as amended by Directive 91/156, replaced Article 9 of Directive 78/319 from 27 June 1995.

54. In the absence of any specific indication, the reference in Article 8(2)(a) to Article 9 of Directive 78/319 on toxic and dangerous waste must be understood, since the repeal of that directive by Directive 91/689 on hazardous waste, as a reference to Article 9 of Directive 75/442 on waste, as amended by Directive 91/156.

55. Under Article 1(2) of Directive 91/689, Directive 75/442 on waste is to apply to hazardous waste, subject to Directive 91/689. However, since Directive 91/689 does not itself contain any specific provisions to the contrary, Article 9 of Directive 75/442, as amended by Directive 91/156, also applies to hazardous waste. That article makes the disposal of residues from the combustion of waste oils subject to the prior grant of a permit by the competent authority and also lays down the conditions for such a permit.

56. Comparison of the provisions in Article 9 of Directive 78/319 and those in Article 9 of Directive 75/442, as amended by Directive 91/156, shows that they are essentially concordant. According to case-law of the Court of Justice,[22] the Commission is permitted in these circumstances to refer to Directive 75/442, as amended by

22 — Judgment in Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773.

Directive 91/156, for the first time in its application originating the proceedings.

57. None of the provisions cited by Portugal in the pre-litigation procedure corresponded to implementation of Article 9 of Directive 75/442, as amended by Directive 91/156, that is to say to the disposal of residues from the combustion of waste oils.

58. Implementing Order No 961/98 would, on the other hand, constitute appropriate implementation, but it did not enter into force until after the expiry of the period laid down in the reasoned opinion and therefore cannot be taken into account.

59. The *Portuguese Government* contests the admissibility of this complaint on the part of the Commission on the grounds that implementation of Directive 75/442, as amended by Directive 91/156, was not the subject of the reasoned opinion. These are 'new matters of fact' by which Portugal's rights of defence are infringed.

60. It argues that Article 9 of Directive 75/442, as amended by Directive 91/156, has nevertheless been implemented in its entirety. Under Decree-Law No 88/91 all tipping or landfilling of waste oils or their residues which is harmful to the soil is prohibited and the carriage, disposal and recovery of waste oils require a permit from the Director-General for Environmental Quality. [23]

61. Since 1997, moreover, under Decree-Law No 239/97 the storage, treatment, recovery and disposal of waste have required prior authorisation [24] which, as far as residues from the combustion of waste oils are concerned, is granted by the Environment Minister. [25] Under Implementing Order No 961/98 [26] an application for such a permit must include documents relating in particular to technical provisions affecting the plant, the safety precautions to be taken, the disposal location and the treatment method used.

2. Analysis

(a) The permissibility of the reference to Article 9 of Directive 75/442, as amended by Directive 91/156, being made for the first time in the Commission's application

62. The Portuguese Government is claiming that it is impermissible for the Com-

23 — Articles 2 and 4(2) of Decree-Law No 88/91.

24 — Article 8(1) of Decree-Law No 239/97.

25 — Ibid., Article 9.

26 — Article 10 of Decree-Law No 239/97 and Article 3(c) of Implementing Order No 961/98 in conjunction with Annexes I and II thereto.

mission to mention for the first time in its application, with regard to implementation of Article 8(2)(a) of Directive 75/439, as amended by Directive 87/101, not just Article 9 of Directive 78/319 but also Article 9 of Directive 75/442, as amended by Directive 91/156.

63. Because of the complexity of the various references it is necessary first of all to clarify whether Article 9 of Directive 75/442, as amended by Directive 91/156, did actually replace Article 9 of Directive 78/319.

64. As is apparent from the recitals in its preamble, Directive 91/689 replaced Directive 78/319; it did so with effect from the repeal of the latter on 27 June 1995.[27] It would therefore seem justifiable in this respect henceforth to construe the reference to Directive 78/319 contained in Article 8(2)(a) of Directive 75/439, as amended by Directive 87/101, as a reference to Directive 91/689.

65. In so far as Directive 91/689 does not contain any specific provisions, and in accordance with the reservation clause contained in Article 1(2) thereof, Directive 91/689 extends the application of Directive 75/442, as amended by Directive 91/156, to hazardous waste.

66. As Directive 91/689 does not contain any specific provisions in this connection Article 9 of Directive 75/442, as amended by Directive 91/156, constitutes one of the articles which apply to residues from the combustion of waste oils.

67. The Commission's view that the reference in Article 8(2)(a) must now be construed as a reference to Article 9 of Directive 75/442, as amended by Directive 91/156, can therefore be endorsed in this respect.

68. The issue which remains to be examined, however, is the scope of the subject-matter of the dispute in the reasoned opinion and in the application lodged by the Commission.

69. It is established case-law of the Court of Justice that the letter of formal notice and the reasoned opinion delimit the subject-matter of the dispute, so that it cannot thereafter be extended. Otherwise the Member State concerned would be denied an opportunity to submit its observations,

27 — Article 11 of Directive 91/689, as amended by Directive 94/31.

which constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for a declaration that a Member State has failed to fulfil its obligations under the Treaty. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice. [28]

70. The Court of Justice stated, however, in its judgment in Case C-365/97 *Commission* v *Italy*, on which the Commission is relying in this case, that 'it is none the less true that, where Community law is amended during the course of the *pre-litigation procedure*, the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the initial version of a directive, subsequently amended or repealed, and which were *maintained in force* under the new provisions'. [29]

71. In the present case, the pre-litigation procedure under Article 226 EC was initiated by the Commission's letter of formal notice dated 4 July 1994. During the course of the pre-litigation procedure, Article 9 of Directive 78/319, to which reference is made in Article 8(2) of Directive 75/439, as amended by Directive 87/101, and on which the Commission relied both in its letter of formal notice and in its reasoned opinion, was repealed, and replaced by Article 9 of Directive 75/442, as amended by Directive 91/156.

72. The judgment in *Commission* v *Italy* concerned the amendment of a directive during the pre-litigation procedure by which many of its provisions were tightened up. The Court ruled that a complaint of non-implementation based on a directive in its amended version (not the version referred to in the reasoned opinion) is admissible only in so far as it concerns obligations which were already in existence under the original version referred to in the reasoned opinion. [30]

73. It should admittedly be noted in the present case that the amendment during the pre-litigation procedure was not an amendment to the wording of Directive 75/439 as amended by Directive 87/101 itself, but an amendment by means of the replacement of Directive 78/319, to which the first of the aforementioned directives refers. However, this fact alone does not basically change anything.

74. Consideration should rather be given to the extent to which the obligations which apply under Article 8(2)(a) of Directive 75/439, as amended by Directive 87/101, to the disposal of residues from the combustion of waste oils, and which are now derived — according to the Commission's application — from Article 9 of Directive 75/442, as amended by Directive 91/156, already applied under Article 9 of Directive 78/319.

28 — See the judgment in Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55.

29 — Judgment in Case C-365/97 (cited in footnote 22), paragraph 36; emphasis added.

30 — See *Commission* v *Italy*, cited above, paragraphs 36 and 39.

75. Article 9 of Directive 78/319 contains an obligation to obtain permits for relevant activities of undertakings and establishments, details the specific aspects which the permits are to cover and makes it obligatory for Member States to exercise control over such undertakings. Article 9(3) provides that permits may include conditions and obligations, may be granted for a specified period and may be renewed.

76. Article 9(1) of Directive 75/442, as amended by Directive 91/156, imposes an obligation on establishments or undertakings which dispose of residues from the combustion of waste oils to obtain a permit. Article 9(1) also contains a non-exhaustive list of matters to be covered by permits. Under Article 9(2) permits may be subject to conditions and obligations, may be granted for a specified period or renewed *or* 'notably, if the intended method of disposal is unacceptable from the point of view of environmental protection, they may be refused'.

77. Like Article 9(1) of Directive 75/442, as amended by Directive 91/156, therefore, Article 9(1) and (2) of Directive 78/319 does not contain any preconditions for the grant of permits but, in addition to the obligation to obtain a permit, sets out individual matters which such permits should include. No power to refuse a permit if the preconditions for a permit are not met can therefore in principle be derived from the aforementioned provisions. In contrast to Article 9(3) of Directive 78/319, however, Article 9(2) of Directive 75/442, as amended by Directive 91/156, also provides that permits may be refused in certain circumstances ('notably, if the intended method of disposal is unacceptable from the point of view of environmental protection'). Even if Article 9(2) of Directive 75/442, as amended by Directive 91/156, like Article 9(3) of Directive 78/319, in principle contains only a discretionary power (both paragraphs state that permits 'may...'), under Article 9(2) of Directive 75/442, as amended by Directive 91/156, at any rate, Member States are required, in their implementation of the directive, to make appropriate provision not only for the possibility of permits being granted for a specified period, being renewed or being made subject to conditions and obligations, but *in addition* for the possibility of refusal as set out in that provision.

78. Since, so far as concerns the possibility of refusing a permit under Article 9(2) of Directive 75/442, as amended by Directive 91/156, the implementation obligation owed by the Member State concerned has been extended to this extent compared with the obligation under Article 9(3) of Directive 78/319 referred to in the reasoned opinion, an infringement in this respect is not to be examined in the present proceedings.

79. The subject-matter of the dispute has not been extended by the application lodged by the Commission, however, in so far as obligations already existed under Article 9 of Directive 78/319 and were incorporated from 27 June 1995 in Article 9 of Directive 75/442, as amended by Directive 91/156. The Portuguese Government did therefore to that extent — but only to that extent — have an opportunity to submit observations on the Commission's allegations with regard to the obligations deriving from Article 8(2)(a) of Directive 75/439 as amended by Directive 87/101, in conjunction with Article 9 of Directive 75/442 as amended by Directive 91/156. The fact that the references in the Commission's application and in its reasoned opinion are not identical does not constitute grounds for ruling this complaint inadmissible in so far as the same obligations already existed under Article 9 of Directive 78/319 and were incorporated in Article 9 of Directive 75/442, as amended by Directive 91/156; the complaint is inadmissible to the extent that obligations did not exist under Article 9 of Directive 78/319.

(b) Infringement of Article 8(2)(a)

80. As the complaint is partially inadmissible, the following analysis is correspondingly restricted.

81. It follows from Article 8(2)(a) of Directive 75/439 as amended by Directive 87/101, in conjunction with Article 9 of Directive 78/319 and, from 27 June 1995, in conjunction with Article 9 of Directive 75/442 as amended by Directive 91/156, that the Member States are obliged to make the disposal of residues from the combustion of waste oils subject to prior grant of a permit covering in particular the types and quantities of waste, the technical requirements, the security precautions to be taken, the disposal site and the treatment method. Hence there is an obligation to lay down an appropriate permit procedure. Provision is also to be made for the possibility of granting permits for a specified period, renewing them and making them subject to conditions and obligations. As already stated above, there is no need to consider any further obligations in the present proceedings.

82. The Portuguese Government claims that it has fulfilled its obligations with Decree-Laws No 88/91 and No 239/97 and Implementing Order No 961/98.

83. Decree-Law No 88/91 does not contain any appropriate implementation measures as Article 2 thereof, which relates to residues from the combustion of waste oils, does not provide for a permit procedure for the disposal of such residues but only imposes a prohibition on the tipping and landfilling of waste oils and residues resulting from their treatment, whilst Article 4

does contain a permit procedure but one which covers only waste oils and not residues from their combustion.

84. Articles 8 and 9 of Decree-Law No 239/97 merely provide that the disposal of residues from the combustion of waste oils requires a prior permit from the Environment Minister as they are 'waste'.

85. It is argued by the Portuguese Government that more detailed rules relating to this permit procedure are contained in Implementing Order No 961/98, but no account can be taken of that order in the present proceedings because it was not adopted until after expiry of the period laid down in the reasoned opinion. [31]

86. Since the cited provisions of Decree-Law No 239/97 in themselves lay down only an obligation to obtain a permit and do not provide for a permit procedure ensuring the appropriate examination of applications, the obligations under Article 8(2)(a) of Directive 75/439 as amended by Directive 87/101, in conjunction with Article 9 of Directive 78/319 and, from 27 June 1995, in conjunction with Article 9 of Directive 75/442 as amended by Directive 91/156, which are to be adjudicated upon here have not been appropriately implemented by Decree-Law No 239/97 either.

87. The Commission's second head of claim is therefore well founded to the restricted extent described and inadmissible as to the remainder.

C — *Third head of claim*

1. Arguments of the parties

88. The Commission is alleging that the Portuguese Republic has failed to make statutory provision for periodical inspections of undertakings which regenerate waste oils or use them as fuel, a requirement under Article 13(1) of Directive 75/439, as amended by Directive 87/101, and for the examination of trends in the state of technical development and/or of the environment, with a view to revising, where necessary, permits granted to undertakings, as required under Article 13(2). In its reply to the reasoned opinion, Portugal did not deny that the Waste Oils Regulation Annexed to Implementing Order No 240/92 in any event does not contain any such provisions.

31 — See above, point 46.

Periodical inspections

89. The *Commission* takes the view that none of the provisions cited by the Portuguese Government ensures that the inspections required under Article 13(1) will be carried out periodically and systematically. It points out in particular that this is not ensured by the mere fact that, according to the Portuguese Government, undertakings can undergo inspection 'at any time'.

90. So far as concerns the annual schedule of periodical inspections of refuse processing plants which is mentioned by the Portuguese Government, the Commission did concede at the hearing that this was not just a purely administrative practice but it still doubts whether Article 13(1) has been properly implemented.

91. The *Portuguese Government* first cites provisions contained in various decree-laws regulating the overseeing of compliance with the decree-laws in question. [32]

92. Furthermore, the Institute for Waste's duties include implementing national policy on waste and monitoring compliance with technical standards and regulations. The Institute for Waste carries out intersectoral action in cooperation with various other agencies, including in the field of industrial waste. [33]

93. The Portuguese Government adds that it is possible, in the event of serious risk, to adopt interim protective measures, and to impose fines and sanctions. [34]

94. It further submits that industrial law gives third parties the right to lodge a complaint, [35] which would be followed by appropriate steps, in particular by inspections. [36]

95. The Portuguese Government also states that the Office for Environmental Inspection and Supervision, which is responsible for inspecting industrial installations and other sources of pollution, is obliged *inter alia* to carry out both regular inspections in accordance with an annual schedule to be approved by the minister and *ad hoc* inspections, the outcome of which must be notified to the minister with responsibility for supervision in the sector. [37]

32 — Article 5 of Decree-Law No 88/91, Article 12 of Decree-Law No 109/91 and Article 18 of Decree-Law No 239/97.

33 — Articles 2(1) and 13(2) of Decree-Law No 236/97.

34 — Articles 19 to 21 of Decree-Law No 239/97.

35 — Article 7 of Decree-Law No 109/91 in conjunction with Article 8 of Implementing Order No 961/98.

36 — Article 7(2) of Implementing Order No 961/98.

37 — Article 6(4) of Decree-Law No 189/93.

Examination of trends in the state of technical development and/or of the environment and the revision of permits

96. The *Commission* argues that the Portuguese Government should not confuse this with the obligation to conform to standards in the environmental and technological field imposed by (new) Community provisions.

97. Article 13(2) requires Member States to keep developments in the technical field under permanent examination so that if, for example, more modern plant or equipment should come onto the market, a permit which has been granted to an undertaking may be amended accordingly. The authorities must also examine environmental developments so that, if the environmental situation should deteriorate in the vicinity of an undertaking, its permit can be amended accordingly. Reliance on inspection procedures alone is not sufficient to ensure fulfilment of the obligation to examine trends in the state of technical development and the environment.

98. In the opinion of the *Portuguese Government* there will be constant adaptation to trends in the state of technical development where new national rules, such as Decree-Law No 239/97 on waste management, essentially constitute implementation of Community provisions in the field of technical and scientific progress.

99. In amending its legislation the Portuguese legislature need not confine itself to the implementation of directives. In any event, these are not decisions of the administration, but of the legislature.

100. Furthermore, if there should be a serious risk to public health or the environment, the Environment or Health Minister is obliged to take interim protective measures; rights to exercise general control and take appropriate protective measures are also afforded under industrial law. [38]

101. Finally, various legal provisions prescribe penalties which may be imposed where infringements (of those provisions) take place. [39]

38 — Article 19 of Decree-Law No 239/97 and Articles 12 and 13 of Decree-Law No 109/91.

39 — Article 16 of Decree-Law No 109/91, Articles 20(1) and 8(1) of Decree-Law No 239/97.

2. Analysis

concerning the scope of the Institute for Waste's duties are inadequate for the same reasons.

Periodical inspections

102. In accordance with the recitals in the preamble to Directive 75/439, as amended by Directive 87/101, it is necessary for the protection of the environment that an appropriate authorisation mechanism should be set up together with a suitable system for (subsequent) supervision.[40] Member States are therefore obliged under Article 13(1) of that directive to ensure that undertakings disposing of waste oils pursuant to Article 6 are inspected periodically as regards their compliance with the conditions of their permits.

103. The provisions relating to supervisory powers contained in various decree-laws to which the Portuguese Government refers do not meet these requirements. First, they do not lay down any obligation to carry out regular or periodical inspections, but just general powers of inspection. Secondly, those powers clearly relate only to compliance with provisions of the respective decree-laws and not specifically to compliance with the conditions of permits as referred to in Article 13(1). The provisions

104. Nor can periodical — obligatory — inspection as regards compliance with the conditions of permits be ensured by the *possibility* of a complaint under industrial law which *can* be followed by an inspection. In so far as the Portuguese Government also relies in this connection on provisions contained in Implementing Order No 961/98, these once again cannot be taken into account.[41]

105. The interim protective measures envisaged by various provisions and the possible penalties likewise do not ensure that periodical inspections will be carried out as regards compliance with the conditions of permits. They can at most constitute a response to the consequences of an operation not being conducted in accordance with a permit.

106. Finally, with regard to the submission that the Office for Environmental Inspection and Supervision has to carry out inspections in accordance with an annual schedule to be approved by the Minister, it

40 — See the seventh and eighth recitals.

41 — See above, point 46.

does not follow therefrom that provision has been made for periodical inspection of undertakings which dispose of waste oils or that such inspections are specifically directed at compliance with the conditions of permits. In so far as the Portuguese Government has also made reference to Decree-Law No 549/99 with regard to the function of the Directorate-General for the Environment, it must be stated that the period laid down in the reasoned opinion expired before that decree-law entered into force. [42]

107. It can be seen from the foregoing that Article 13(1) of Directive 75/439, as amended by Directive 87/101, was not properly transposed into Portuguese law.

Examination of trends in the state of technical development and/or of the environment and the revision of permits

108. The inspection procedure provided for in Article 13(1) of Directive 75/439, as amended by Directive 87/101, is expanded in Article 13(2) by a dynamic element intended to ensure that permits, once granted, are adapted to trends in the state of technical development and/or of the environment.

109. It is necessary to dismiss at the outset the general argument put forward by the Portuguese Government that the necessary adaptation is ensured by continuing change in national legal provisions, particularly those implementing Community provisions. First, there is an obligation to implement Community legislation irrespective of Article 13(2) and, second, this provision is specifically concerned with a permanent ability to revise permits inasmuch as relevant developments could make it necessary for the competent authorities to make individual adjustments to permits.

110. So far as the provisions of national law cited by the Portuguese Government are concerned, they consist, on the one hand, of a general power to oversee observance of provisions of industrial law and, on the other, of provisions which enable interim protective measures to be adopted in the event of health or the environment being (seriously) endangered. Those provisions do not contain any obligation to carry out examinations and — where appropriate — make adjustments. Nor, again, can reliance upon specific penalty provisions contained in the various legislative measures refute the allegation of failure to implement this obligation.

42 — Decree-Law No 549/99 dates from 14 December 1999 whereas the period laid down in the reasoned opinion expired on 27 January 1998; see the observations in point 46, and footnote 21.

111. The Commission's third head of claim is therefore also well founded.

D — *Fourth head of claim*

1. Arguments of the parties

112. It is the view of the *Commission* that Portugal has infringed Article 17 of Directive 75/439, as amended by Directive 87/101, by failing to convey to it information concerning technical expertise and the experience gained and results obtained through the application of measures taken pursuant to the directive.

113. The Commission argues with regard to the Portuguese Government's assertion that it has not acquired any technical knowledge that there is still a duty to convey information even if a Member State should be of the opinion that it does not have any technical knowledge, because this too constitutes information which is worth conveying to it. Otherwise it would fall to a Member State to decide whether it is necessary to convey information, which would frustrate the intention of Article 17 and deprive the Commission of control over compliance with the duty to convey information. The Commission states, with regard to the fact that the directive does not define the frequency with which information is to be conveyed, that it must in any event be conveyed at periodical intervals the length of which must be reasonable having regard to the kind of information required.

114. When considered in this light, the time which has elapsed since the enactment between February 1991 and April 1993 of the national provisions intended, according to the Portuguese view, to implement Directive 75/439, as amended by Directive 87/101, is in any event sufficient to enable the experience and knowledge resulting from the application of those provisions to be assembled and conveyed.

115. The first report submitted by the Portuguese Government lists the national provisions implementing the directive in question and describes them but does not contain the information to which Article 17 refers. The same applies to its second report; although certain elements of the second report could be regarded as information within the meaning of that article, they were in any event not conveyed to the Commission until after the period laid down in the reasoned opinion had expired.

116. The *Portuguese Government* states in its defence that it has not acquired any technical knowledge and that the intervals

at which such information is to be conveyed are not specified in the provision in question.

117. It also states that it sent the Commission its first report under Article 18 of Directive 75/439, as amended by Directive 87/101, on 14 August 1995. Its second report, covering the years 1995 to 1997, was enclosed with its defence and sent to the Commission by letter of 29 November 1999.

2. Analysis

118. The Commission is correct in stating that the fulfilment of an obligation to convey information, as laid down in Article 17 of Directive 75/439, as amended by Directive 87/101, cannot depend upon whether the Member State considers that it has knowledge which is worth conveying. A Member State could otherwise argue that it has not acquired any knowledge, a claim which would probably be difficult to refute in most cases as a subjective assessment is involved. Furthermore, the Commission could not actually gauge whether a Member State which has not conveyed information is in breach of its obligation to convey that information or is merely of the opinion that it does not have any knowledge worth conveying. This would obstruct the Commission in its task of overseeing compliance with Community law and jeopardise the efficacy of the obligation to convey information.

119. Apart from this, however, disclosure that no new technical knowledge has been acquired in connection with the disposal of waste oils can also be informative for the purposes of the directive.

120. Under Article 17, moreover, information on the experience gained and results obtained is to be conveyed in addition to information relating to technical expertise and it would seem improbable once a certain amount of time has passed that no technical knowledge has been acquired nor experience gained or results obtained through the application of measures taken pursuant to the directive.

121. The argument that the directive does not specify the frequency with which information is to be conveyed is not a persuasive one either. Between the date on which the first Portuguese measure designed to implement the directive, Decree-Law No 88/91 of 23 February 1991, entered into force and the expiry of the period laid down in the reasoned opinion, a period of almost seven years

elapsed without any information being conveyed in accordance with Article 17. This means that, without it being necessary to consider in greater detail the issue of the frequency of reports, there obviously cannot be any question of Portugal having fulfilled its obligation to convey information periodically.

122. Even the two reports which were sent to the Commission on 14 August 1995 and 29 November 1999 respectively did not fulfil the duty to convey information under Article 17.

123. The report of 14 August 1995 cannot, having regard to its content, be considered a report for the purposes of Article 17 because, as rightly argued by the Commission, it contains only a description of the national provisions implementing Directive 75/439, as amended by Directive 87/101, and does not include the information relating to technical expertise, experience gained and results obtained which is specifically required under Article 17. The more recent report cannot be taken into consideration because it was not submitted until after the period laid down in the reasoned opinion had expired.

124. Furthermore, on the Portuguese Government's own admission, both reports are supposed to be reports under *Article 18*[43] of Directive 75/439, as amended by Directive 87/101. Implementation of Article 18 is not the subject-matter of the present Treaty infringement proceedings, however, so that there is also no need to consider the extent to which the obligations under that article were fulfilled by the reports cited by the Portuguese Government.

125. The fourth head of claim is therefore also well founded.

V — Costs

126. 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. Since the Commission has applied for costs and the Portuguese Republic is essentially unsuccessful, the Portuguese Republic must be ordered to pay the costs.

43 — Article 18 relates to situation reports on the disposal of waste oils whereas Article 17 relates to information concerning technical expertise and the experience gained and results obtained through the application of measures taken to transpose the directive.

VI — Conclusion

127. In light of the foregoing, I recommend that the Court should:

(1) declare that:

—by failing to adopt provisions by which the competent authority, before granting a permit to undertakings which regenerate waste oils or use them as fuel, may satisfy itself that health is appropriately protected where waste oils are used as fuel and that the best available technology not entailing excessive cost is used where waste oils are regenerated or used as fuel;

—by failing to lay down that the disposal of residues from the combustion of waste oils requires a permit which covers in particular the types and quantities of waste, the technical requirements, the security precautions to be taken, the disposal site and the treatment method and which may be granted for a specified period, be renewed and be made subject to conditions and obligations, in accordance with Article 9 of Directive 78/319/EEC and, from 27 June 1995, in accordance with Article 9 of Directive 75/442/EEC, which, as amended by Directive 91/156/EEC and pursuant to Directive 91/689/EEC, replaced Article 9 of Directive 78/319/EEC;

—by failing to provide for periodical inspection of undertakings which regenerate waste oils or use them as fuel, or for examination of trends in

the state of technical development and/or of the environment with a view to revising, where necessary, permits granted to those undertakings;

—by failing to convey to the Commission information concerning its technical expertise and the experience gained and results obtained through the application of measures taken pursuant to Directive 75/439/EEC, as amended by Directive 87/101/EEC,

the Portuguese Republic has failed to fulfil its obligations under Articles 6(2), 8(2)(a), 13 and 17 of Directive 75/439/EEC, as amended by Council Directive 87/101/EEC, Article 10 EC and the third paragraph of Article 249 EC;

(2) dismiss the remainder of the application;

(3) order the Portuguese Republic to pay the costs.