OPINION OF ADVOCATE GENERAL COSMAS

delivered on 30 September 1999 *

Table of contents

I — Introduction I-4789

II — Legal framework I-4789

A — Community legislation I-4789

B — National legislation I-4792

III — Facts I-4792

IV — Questions referred for a preliminary ruling I-4794

V — Answers to the questions referred for a preliminary ruling I-4795

A — Admissibility I-4795

B — Substance I-4796

(a) The issues raised by the provisions of Directive 91/689 ..... I-4796

(1) Articles 130s and 130t of the EC Treaty I-4796

(2) Directive 91/689 ..... I-4798

(b) The options available to the Court I-4803

(1) Finding the relevant provisions of Directive 91/689 invalid I-4803

(2) Answering the questions referred for a preliminary ruling irrespective of the issue of the validity or otherwise of the provisions of Directive 91/689 I-4806

(i) Answer to the first question I-4806

(ii) Answer to the sixth question I-4808

(iii) Answer to the second and third questions I-4808

(iv) Answer to the fourth and fifth questions I-4810

(c) Proposed solution I-4810

VI — Conclusion I-4811

* Original language: Greek.

I — Introduction

1. In this case the Court is asked to give a preliminary ruling on a series of questions submitted to it by the Pretura di Udine, Sezzione Distaccata di Cividale del Friuli, which were raised in criminal proceedings against several persons charged with discharging hazardous waste onto a waste tip not licensed for the disposal of such waste. The questions submitted relate to the interpretation of Article 1(4) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste [1] 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. [2]

II — Legal framework

A — *Community legislation*

2. The provisions of Directive 91/689 were adopted in the context of the Community rules on waste laid down by Council Directive 75/442/EEC, [3] as amended by Council Directive 91/156/EEC. [4]

3. Directive 75/442, as amended, laid down the Community legislation regarding the management (transport, collection, storage, tipping, treatment) of waste. For that purpose, it defined certain basic notions, including 'waste' (Article 1) and set the environmental objectives to be pursued by Member States regarding waste management (Article 4). Directive 75/442 also established the rules concerning the planning, authorisation and supervision of waste disposal operations, leaving extensive powers to Member States, including the power to designate the national authorities responsible for the implementation of these provisions (Articles 5 and 6).

4. Under the third recital in the preamble to Directive 91/689/EEC, 'the general rules applying to waste management which are laid down by Council Directive 75/442/EEC [...] also apply to the management of hazardous waste'. However, under the fourth recital 'the correct management of hazardous waste necessitates additional,

1 — OJ 1991 L 337, p. 20.
2 — OJ 1994 L 356, p. 14.
3 — Council Directive 75/442/EEC of 15 July 1997 on waste (OJ 1975 L 194, p. 39).
4 — Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste (OJ 1991 L 78, p. 32).

more stringent rules to take account of the special nature of such waste'.

5. Directive 91/689[5] is a *lex specialis* in relation to Directive 75/442, as evidenced by Article 1(3) of Directive 91/689, which refers to the definitions provided for by Directive 75/442 with the exception of 'hazardous waste', which is defined by Article 1(4),[6] whereby:

'4. 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. The list shall take into account the origin and composition of the waste and, where necessary, limit the values of concentration. This list shall be periodically reviewed and if necessary [revised] by the same procedure,

— 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.'

6. Annex I to Directive 91/689 is divided into two parts, Annex I.A and Annex I.B, respectively listing 18 and 22 categories or generic types of hazardous waste according to their nature or the activity that generated them. Annex II lists 51 constituents of the wastes listed in Annex I.B that render them hazardous when they have the properties described in Annex III. Annex III lists 14 properties of waste that render them hazardous.

7. Under the fifth recital in the preamble to Directive 91/689, '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 definition of these categories acts as the common denominator for the definition of hazardous waste across the Community.

8. Council Decision 94/904 established the list of hazardous waste (hereinafter 'the Community list') referred to in the first indent of Article 1(4) of Directive 91/689.

5 — That directive replaced Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43).

6 — The preceding directive, Directive 78/319, was autonomous legislation not legislation complementary to Directive 75/442/EEC.

To date the Community list has never been amended.

9. Following the adoption of that list, a series of different types of waste is at present defined as hazardous throughout the Community. These are the categories of waste covered by the first indent of Article 1(4) of Directive 91/689 and appearing in the Community list, which was established in accordance with the procedure laid down by Article 18 of Directive 75/442. [7]

10. However, other categories of waste exist that are only considered hazardous by one or more Member States. These concern the waste referred to in the second indent of Article 1(4) of Directive 91/689, that is, waste considered hazardous by the competent authorities of an individual Member State on the basis of the properties listed in Annex III to Directive 91/689. The particular origin of the waste does not need to be taken into account. [8]

11. An individual Member State that classifies a type of waste as hazardous has a duty to notify the Commission and can apply the provisions of Directive 91/689 to this type of waste. Furthermore, under point 4 of the Annex to Council Decision 94/904 'in accordance with Article 1(4), second indent, of Directive 91/689/EEC, any waste other than the ones listed below which is considered by a Member State to display any of the properties listed in Annex III to Council Directive 91/689/EEC on hazardous waste *is hazardous*. All such cases will be notified to the Commission and will be examined with a view to amending the list in accordance with Article 18 of Directive 75/442/EEC' (emphasis added).

12. Notification to the Commission of waste considered by the competent national authorities to display those properties enables the Commission to take such cases into account and adapt the list in accordance with the procedure laid down by Article 18 of Directive 75/442. [9]

7 — Under Article 18(1), as amended by Article 1(1) of Directive 91/156, the Commission is to be assisted within the framework of this procedure by a committee composed of the representatives of the Member States and chaired by the representative of the Commission. The representative of the Commission is to submit to the committee a draft of the measures to be taken. The committee is to deliver its opinion on the draft within a time-limit that the chairman may lay down according to the urgency of the matter. The Commission is to 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 no opinion is delivered, the Commission is to submit to the Council without delay a proposal relating to the measures to be taken. If the Council has not acted within a period of three months from the date of referral, the Commission is to adopt the proposed measures.

8 — The properties which render waste hazardous under Annex III are the following: 'explosive', 'oxidising', 'highly flammable' and 'flammable', 'irritant', 'harmful', 'toxic', 'carcinogenic', 'corrosive', 'infectious', 'teratogenic', 'mutagenic', substances and preparations which release toxic or very toxic gases in contact with water, air or an acid, substances and preparations capable by any means, after disposal, of yielding another substance, e.g. leachate, which possesses any of the characteristics listed above. The last property is waste characterised as 'ecotoxic'.

9 — The Commission reports in its written observations that it has received a large number of notifications from the national authorities of the Member States concerning the classification of waste as hazardous and will proceed to update the list for the first time. However, no such notification was submitted by the Italian Republic.

B — *National legislation*

13. As the national court explains, Directives 91/156 and 91/689, amongst others, were implemented in Italian law by Legislative Decree No 22/97 of 5 February 1997. [10] That Decree repealed a large part of the previous legislation and in particular Presidential Decree No 915/82, which had transposed into Italian law *inter alia*, Directive 75/442. [11] The new legislation substituted for the term 'toxic waste' the term 'hazardous waste'.

14. In particular, Article 7(4) of Legislative Decree No 22/97 provides that 'hazardous waste is non-domestic waste specified in the list referred to in Annex D on the basis of Annexes G, H and I'. [12] Annex D reproduces verbatim the Community list of hazardous waste adopted by Council Decision 94/904 and Annexes G, H and I correspond to Annexes I, II and III to Directive 91/689.

10 — GURI, supplemento ordinario No 33 of 15 February 1997.

11 — Presidential Decree No 915/82 of 10 September 1982, GURI No 343 of 15 December 1982, p. 9071. The national court further explains that Legislative Decree No 22/97 was subsequently amended by Legislative Decree No 389/97 of 8 November 1997, following which Ministerial Decree No 141/98 of 11 March 1998 ('Regulation laying down rules for the disposal of waste by dumping and for the classification of hazardous waste disposed of by dumping') was issued.

12 — The reference to Annexes G, H and I was introduced by Legislative Decree No 389/97.

15. Moreover, under Article 50 of Legislative Decree 22/97, collecting, transporting and discharging waste without the appropriate license constitutes a criminal offence.

III — Facts

16. On March 11 1994, during an inspection carried out at the waste tip of the company Verdeindustria Srl, toxic waste was discovered while waste was being discharged. An examination of the documentation subsequently showed that the waste originated from the Fincantieri works at Monfalcone. The waste tip was not licensed for the disposal of such waste.

17. The officials carrying out the inspection noticed a number of tin cans and a drum marked 'ICI polyurethane'. The material was seized, samples were taken, and it was handed over to the public prosecutor's office as classifiable as toxic-harmful waste within the meaning of Presidential Decree No 915/82. Criminal proceedings were instituted against those legally responsible under Article 26 of Presidential Decree 915/82, [13] who were charged with dischar-

13 — Fornasar and his co-defendants state in their written observations that criminal proceedings were instituted against two employees of Fincantieri, the head of the transport company and two waste tip managers.

ging 'toxic and harmful' waste, under the description 'special waste', without a prior permit.

18. In the course of the proceedings, Directive 91/689 and Legislative Decree No 22/97, as amended by Legislative Decree No 389/97, entered into force. Under Article 2 of the Italian Criminal Code, 'no person may be punished for an act which, in accordance with a subsequent law, does not constitute an offence'. Therefore, the national court had to examine whether the conduct of the accused, charged under Article 26 of Presidential Decree No 915/82, which had in the meantime been repealed, constituted an offence under Article 50 of Legislative Decree No 22/97 and in particular whether the waste discovered in the Verdeindustria waste tip constituted hazardous waste in respect of which the waste tip was unlicensed.

19. During the hearing, it became necessary to ascertain the nature of the substances contained in the drum and an expert report was commissioned. The expert was required to carry out analyses of the waste and to state whether or not it was classifiable as hazardous waste and whether the origin of the waste was of relevance to that classification.

20. The expert, after analysing the substance in the drum, ascertained that it contained diphenylmethane diisocyanate ('MDI') and an isomer thereof. Furthermore, the expert stated that isocyanates are highly dangerous for human health, as even very small concentrations of them in the air, of the order of one part per billion, may provoke very serious, and sometimes fatal, asthma attacks. The expert also referred to the difficulty of classifying that substance under the list in Annex D to Legislative Decree No 22/97, since those classifications refer to the origin of the waste, which according to the national court cannot be identified with certainty in this case.

21. The national court notes that in this case the origin of the waste, and consequently the identification of the production process from which it derives, cannot be ascertained with certainty. The documentation accompanying the waste and the witness statements show that the entire load of waste taken to the tip came from the Fincantieri Navali Italiani Spa works at Monfalcone. The size of and the multiplicity of activities carried out at the works make it impossible to establish what use the substance might have had. [14]

22. Nor, according to the national court, does the type of substance found in the drum allow for its use to be determined

14 — The national court states that the Fincantieri works have a number of carpentry workshops, since ships are constructed there, from the construction of the plate to the construction of the ship in dry dock and the rigging out of the internal fittings. Fincantieri carries out shipbuilding, mechanical and related activities, including the fitting out, repair and demolition of ships.

with certainty in this case because of the multiple uses of that substance. [15]

23. First, the national court raises the issue of how Article 1(4) of Directive 91/689 and Decision 94/904 are to be interpreted with regard to the term 'hazardous waste' and ask whether or not the list laid down by Decision 904/94 is exhaustive/binding. [16]

24. Secondly, it considers that it is necessary to ascertain how the procedure for making additions to the list of hazardous waste, laid down by the second indent of Article 1(4) of Directive 91/689, operates and whether it is possible to envisage automatic additions to the list, with effects extending to a single Member State.

IV — Questions referred for a preliminary ruling

25. To resolve the case pending before it, the Pretura di Udine, Sezione Distaccata di Cividale del Friuli, referred to the Court six questions for a preliminary ruling:

'— For the purposes of classifying waste as hazardous within the meaning of Article 1(4) of Council Directive 91/689/EEC and Council Decision 904/94/EC, is it necessary in each particular case to identify the origin of the waste, referred to for the purposes of classification by the list of hazardous waste adopted in that decision, or is it sufficient for such purpose that, by reason of its composition, the substance can only be used in theory in a given production process, or is derived as a final product from that process?

— Is the list adopted by Council Decision 904/94 exhaustive, so that waste which is not referred to in the list, but which nevertheless displays the characteristics referred to in Annexes I, II and III to Directive 91/689/EEC, is excluded?

— If the Court finds that the list of hazardous waste is not exhaustive, must automatic addition of hazardous waste to the list be deemed to operate on the basis of Annexes I, II and III to Directive 91/689/EEC?

15 — The national court explains that MDI is a basic substance for the production of many synthetic resins, subsequently used for the manufacture of parts of motor vehicles, furniture, plastics, coatings, paint components, etc., thus having a very broad range of uses for companies operating in different areas of manufacture.

16 — The national court states that Italian legal theory and case-law tend to regard that listing as exhaustive for the purpose of classifying waste as hazardous.

— For the purposes of Article 1(4), second indent, of Directive 91/689/EEC, what procedure must an individual Member State follow in classifying as hazardous waste other than that on the list adopted by Council Decision 904/94 which exhibits one of the characteristics set down in Annex III to the directive? What body is competent to make the assessment and subsequently notify the Commission?

— Can the judicial authorities of an individual Member State also be required to notify the Commission?

— Under Community legislation, is diphenylmethane diisocyanate (MDI) to be classified as hazardous waste or not?'

V — Answers to the questions referred for a preliminary ruling

A — *Admissibility*

26. Two of the co-defendants in the main proceedings raised an objection to admissibility. They contend that the Court of Justice has consistently held [17] that a Community directive may not by itself create obligations for an individual and that the Court should firmly restate that principle since the national court will rule on the defendants' criminal liability accordingly. They also contend that however the Court interprets the Community provisions, the national court will apply the national legislation most favourable to the defendants. According to the prevailing view in Italian case-law and legal theory, the acts for which they are being prosecuted no longer constitute an offence under current law. Therefore, the questions referred for a preliminary ruling are essentially a fabricated case aimed at obtaining an interpretation that would allow the national court illegally to extend the scope of obligations laid down by criminal law.

27. Regarding the issues of admissibility, I would first like to point out that while it is true, according to settled case-law, that the Court may not, under Article 177 of the EC Treaty (now Article 234 EC), decide upon the validity, in regard to Community law, of a provision of domestic law, as it would be possible for it to do under Article 169 of the EC Treaty (now Article 226 EC), [18] it nevertheless has jurisdiction to supply the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of

17 — They cite in particular Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 36.

18 — See for example Case C-6/64 *Costa* v *ENEL* [1964] ECR 1141 and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 36.

the compatibility of rules with Community law for the purposes of the case before it. [19]

28. Also, according to settled case-law, 'it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to decide, having regard to the particular features of each case, as to both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court of Justice. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject matter of the main action'. [20]

29. I consider that the national court explains the reasons why the replies given by the Court of Justice will help it to resolve the case before it and it does not appear that those replies will bear no relation to the subject-matter of the main action. Therefore, in the light of the above, the questions referred for preliminary ruling are admissible and I would suggest that the Court proceed to examine them.

19 — See for example C-223/78 *Grosoli* [1979] ECR 2621, paragraph 3, and *Tombesi*, paragraph 36, cited above.

20 — See in particular C-67/91 *Asociacion Española de Banca Privada and Others* [1992] ECR I-4785, paragraphs 25 and 26; Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 17; Case C-62/93 *BP Supergas* [1995] ECR I-1883; and *Tombesi*, cited above in footnote 18, paragraph 38.

B — *Substance*

30. The provisions of Directive 91/689 raise certain issues regarding their compatibility with Articles 130r (now, after amendment, Article 174 EC) and 130t (now Article 176 EC) of the EC Treaty (a). The Court has two options as to the interpretation of these issues (b): it may either rule that the relevant provisions of that directive are invalid or attempt to answer the questions referred for a preliminary ruling by the national court without examining the validity of the directive. I shall attempt to analyse the various aspects of the two options before giving my opinion on the latter.

(a) The issues raised by the provisions of Directive 91/689

(1) Articles 130s and 130t of the EC Treaty

31. Article 130s of the EC Treaty (now, after amendment, Article 175 EC) [21] constitutes the legal basis for Directive 91/689, which was enacted in the context of action taken by the Community to implement the objectives set out in Article 130r, concern-

21 — The Greek version of that directive mistakenly states that Article 130r is the legal basis rather than Article 130s, which is correct.

ing Community policy on the environment. Article 130r describes this policy and establishes the criteria and parameters within which Community institutions can intervene to protect the environment.

32. In particular, Article 130r(2), which lists the general principles of this Community policy, should be mentioned. It states 'Community policy on the environment shall aim at a high level of protection [...]'. In this way, it determines the content of the legislation to be enacted by Community legislature in the sensitive area of environmental protection by adopting a qualitative criterion. The notion of a high level of protection — which of course does not oblige the Community legislature to seek the highest possible level of protection [22] — is binding on the latter and could constitute grounds for the annulment of a Community rule that does not meet that qualitative criterion.

33. Under the precautionary principle, expressly referred to in Article 130r(2), the Community must take action even in cases where there is not an existing, but a potential risk to the environment. The Court has for that matter recognised the binding nature of this general principle. [23]

34. Of particular interest for the resolution of this case is the reference to a specific (negative) manifestation of the precautionary principle. It implies that the competence of public authorities to adopt for a particular purpose the measures deemed necessary to avert a risk to the environment cannot be restricted, particularly where this risk has not been ascertained or 'charted' by prior regulation. In other words, determining in advance and in a limitative manner the circumstances requiring the intervention of public authorities to avert a specific risk to the environment, even if it is impossible to define that risk in advance in a concrete manner, would be contrary to the precautionary principle.

35. Article 130t of the EC Treaty specifically implements, in the context of environmental protection, the principle of subsidiarity, which governs Community policy in this field. That article allows Member States to maintain or introduce more stringent protective measures, even if in doing so they deviate from the existing Commu-

22 — See, to that effect, G. Dellis 'Κοινοτικό Δίκαιο Περιβάλλοντος. Οι διαστάσεις της προστασίας του περιβάλλοντος στην κοινοτική έννομη τάξη' (Community Law of the Environment. The extent to which the environment in protected in the Community legal order); Athens, Pub. A.N. Sakkoulas, 1988 (431 pp.), para. 112.

23 — See Case C-157/96 *National Farmers Union* [1998] ECR I-2211 and the Opinion of Advocate General Tesauro. Also of interest are the Opinions of Advocate General Gulmann, point 28, in Case C-405/92 *Mondiet* v *Armement Islais* [1993] ECR I-6133 and Advocate General Fennelly in Case C- 67/97 *Bluhme* [1998] ECR 8033, which clearly indicate that even in the absence of tangible evidence of an existing risk to the environment the precautionary principle justifies the adoption of protective Community measures.

nity protective measures adopted under Article 130s, subject to the measures being compatible with the EC Treaty and notified to the Commission.

(2) Directive 91/689

36. Directive 91/689 lays down the specific rules for the correct management of hazardous waste in an environmentally safe way. [24] Given that this is the type of waste most likely to present a risk of serious damage to the environment, these rules are more stringent than the rules regarding the management of solid waste, as stated in the fourth recital of the preamble to Directive 91/689. Moreover, the sixth recital of the preamble to Directive 91/689 states that 'it is necessary to ensure that disposal and recovery of hazardous waste is monitored in the fullest manner possible'.

37. Directive 91/689 aims to regulate the matter at issue in an exhaustive manner. The Community legislature does not define the waste considered hazardous on the basis of a *general provision* that might have provided an *indicative list* of the properties under which waste could be classified as hazardous. [25] On the contrary, it adopts two categories of hazardous waste. The first category covers waste featuring on a limitative Community list (first indent of Article 1(4) of Directive 91/689). [26] The second category covers waste that is considered hazardous by a Member State, provided that the limitative but widely worded conditions in Annex III to that directive (second indent of Article 1(4) of Directive 91/689) are met. It should be noted that Member States are required to notify the Commission of waste they classify as hazardous pursuant to Annex III to the directive. That waste is

24 — For a more detailed analysis of the provisions of that directive see Nicolas de Sadeleer, *Le droit communautaire et les déchets*, 1995, L.G.D.J. and Bruyland, Paris, (671 pp); p. 293 et seq. at p. 296 et seq. in particular.

25 — It should be remembered that the Commission, in its proposal (93/C 271/06) for a Council directive amending Directive 91/689/EEC on hazardous waste (COM(93) 425 Final, OJ 1993 C 271, p. 16) which was ultimately rejected, had proposed that Member States identify hazardous waste on the basis of the criteria in Annexes I, II and III to the directive. Thus, the list of hazardous waste would be made indicative rather than binding (fourth and fifth recitals).
Moreover, it is significant that Directive 78/319 previously in force, which was adopted under Articles 100 and 235 of the EC Treaty (now Articles 94 EC and 308 EC respectively), had defined hazardous waste in a general manner. Specifically, under Article 1(b) 'toxic and dangerous waste' meant 'any waste containing or contaminated by the substances or materials listed in the Annex to this Directive of such a nature, in such quantities or such concentrations as to constitute a risk to health or the environment'. Furthermore, Article 1(1) of the Commission proposal for a Council Directive on hazardous waste (COM(88)391 Final — SYN 145, OJ 1988 C 295, p. 8) submitted to the Council on 16 August 1988, as amended by the European Parliament (Amendment No 30) (OJ 1989 C 158, p. 238) states, 'The object of this Regulation is to set minimum common rules for the management of toxic and hazardous waste'. Moreover, under Article 1(2) of the proposal in its original form, the definition of 'hazardous waste' referred to Annexes I, II and III. In particular, under the third indent, 'hazardous' was defined as 'any other waste displaying any of the properties listed in Annex III'.

26 — I would point out that the first recital in the preamble to Council Directive 94/31/EC of 27 June 1994 amending Directive 91/689/EEC on hazardous waste, which extended the time-limit for the implementation of Directive 91/689 by the Member States, expressly refers to the establishment of a binding list of hazardous waste.

considered hazardous only in the territory of the Member State that has classified it as such. However, the Commission also assesses the extent to which it would be appropriate to adapt the abovementioned list by adding the waste classified as hazardous by one or more Member States, pursuant to the second indent of Article 1(4) of Directive 91/689, to the list.

38. The abovementioned Community system for dealing with hazardous waste that is enacted by Directive 91/689 raises three issues of interpretation regarding its compatibility with the provisions of the primary Community legislation. These issues will be examined below, in order of increasing legal significance.

39. First, I consider that neither the need to classify waste as hazardous in advance nor the prior communication of that classification by a Member State as abovementioned can be considered essential elements for recognising such waste as hazardous under the directive.[27] Such an interpretation would go directly against the precautionary principle and the principle of preventive action. A situation where an individual Member State, acting as a Community authority and following a specific Community procedure, could ascertain that a particular waste was hazardous under Annex III to Directive 91/689 but the measures adopted by that directive for the protection of the environment did not immediately apply cannot be accepted. In other words, the fact that national authorities of a Member State ascertain that a type of waste fulfils the criteria of Annex III to Directive 91/689 *per se*, suffices for that directive to apply directly, even if that waste has not previously been classified as hazardous under a specific national procedure and/or the Commission has not been notified of that classification.

40. Second, the following issue of interpretation is clearly more significant. The wording of Directive 91/689 implies *a contrario* that Member States cannot classify waste as hazardous and adopt the appropriate measures where Annex III to the directive does not also apply. In other words, Annex III is the legislative framework within which Member States may take more stringent measures in relation to the existing Community list of hazardous waste. In this way, the Community legislature is aspiring to regulate hazardous waste in an exhaustive manner. This solution cannot be accepted, as it would be directly contrary to the provisions of Article 130t of the EC Treaty. Directive 91/689 may of course provide that within the specific Community system for environmental protection that it creates (the drawing up of a limitative Community list that will also be supplemented by contributions of Member States as abovementioned) Member States are given the opportunity of classifying waste that falls within the scope of Directive 91/689 and Annex III in

27 — See N. De Sadeleer, op. cit., p. 307.

particular, as hazardous, albeit within the meaning of that Directive. In that way the specific Community system for the protection of the environment and dealing with hazardous waste is supplemented. However, this power to classify waste can in no way exclude the competence of Member States, based directly on Article 130t, first to maintain or introduce their own autonomous definition of hazardous waste [28] and, secondly, to take the necessary measures for the protection of the environment from hazardous waste. It suffices that the conditions stipulated by Article 130t of the EC Treaty are satisfied, in other words, that the measures concerned achieve a more stringent protection of the environment that complies with the other Treaty provisions.

41. Therefore, if it were to be accepted that the present Community legislation aimed to restrict the possibility of the Member States' classifying certain waste as hazardous and taking measures for the protection of the environment by requiring the competent national authorities of the Member States, first, to classify this waste as hazardous in advance and, secondly, only to classify waste displaying the properties set out in Annex III to Directive 91/689, then the directive would infringe Article 130t of the EC Treaty.

42. In any event, if Directive 91/689 is interpreted in the light of Article 130t of the EC Treaty, it must be recognised that, apart from the specific Community system for the protection of the environment from hazardous waste established by that directive, there is always the possibility of creating an autonomous national system for protection against hazardous waste under Article 130t. In other words, a Member State that considers the list under the first indent of Article 1(4) of the Directive unsatisfactory has two options. It could, first of all, characterise waste displaying the properties listed in Annex III to the directive as hazardous and notify the Commission, so that the Directive will apply to the waste in question and the Commission will examine the possible adaptation of the list. Under Article 130t of the EC Treaty, however, the Member State is still able to adopt its own measures for more stringent protection of the environment from the hazardous waste outside the framework of Directive 91/689. That solution is imposed by the subsidiarity principle on the one hand and by the precautionary principle and the principle that preventive action should be taken by Community institutions in the field of environmental protection on the other.

43. Thirdly, the extent to which the abovementioned specific Community system for

28 — This means that under Article 130t of the Treaty, they may classify as hazardous waste that is proven to have certain other properties which scientific research (subsequent or not) has considered hazardous, or increase the scope of the criteria provided to establish whether the properties rendering waste hazardous listed in Annex III are present in waste. For example, Member States may consider that waste is 'corrosive' not only where it is made up of 'substances and preparations which may destroy living tissue on contact', as provided for by Annex III (H8) but also where it may simply harm living tissue. Regarding this interpretation, see N. de Sadeleer, op. cit., p. 307 et seq.

the protection of the environment from hazardous waste created by Directive 91/689 is compatible with the requirements and principles of primary Community law as formulated by Article 130r of the EC Treaty should be examined. This issue is of great practical significance, particularly where a Member State has not created an independent national system to deal with the issue of hazardous waste but relies exclusively on the Community protection established by that directive.

44. I consider that Directive 91/689 does not implement the objectives of Article 130r of the EC Treaty correctly and in compliance with the requirements of that article and the fundamental principles of Community environmental law. As mentioned above, that directive creates a specific system for managing hazardous waste characterised by the following four features: (a) the absence of a general definition of hazardous waste and of a general prohibition of the free disposal of hazardous waste; (b) the establishment of a limitative Community list of hazardous waste throughout the Community, to which the provisions of that directive apply; (c) a provision for supplementing that list, which remains limitative in any event; (d) the competence of Member States to classify certain waste as hazardous, specifically within their territory, provided it displays the properties limitatively laid down in Annex III to the directive. I consider that the abovementioned system infringes the principles of a high level of protection for the environment and the precautionary principle.

45. First of all, a system that does not provide for a general prohibition of free disposal of hazardous waste into the environment, a prohibition that presupposes a general definition as to what constitutes 'hazardous waste', cannot be considered to provide a 'high' level of environmental protection. I shall not dwell further on this issue, given that the level of environmental protection achieved is primarily determined through scientific and technical data, which are not available to the Court.

46. I do, however believe that the Court has available to it all the necessary interpretative material to rule on whether the provisions of that Directive 91/689 are compatible with the precautionary principle and the principle of preventive action. On this issue, one can only consider that the simple fact that Directive 91/689 attempts to establish when specific measures should be taken to avert certain risks to the environment in an exhaustive manner — since, even if it were ascertained today that certain waste presented a serious danger to the environment, the necessary restrictive measures laid down by that directive could not be applied throughout the Community — suffices for a finding

that the directive infringes the precautionary principle and principle of preventive action. These fundamental principles do not allow for the situation, which Directive 91/689 accepts, where, if it is ascertained ad hoc that the free disposal of a given waste is especially dangerous for the environment, nevertheless the general restrictive measures provided for under that directive cannot be taken, throughout the territory of the Community, against such disposal unless the Commission includes the waste in question within the limitative Community list under the first indent of Article 1(4), either on its own initiative or at the request of the Member States. In my opinion, only the formulation of a general prohibition of free disposal of any waste hazardous to the environment would be compatible with the fundamental principles of primary Community environmental law.

47. It should also be noted that it is not be possible to contend, in response to the above reasoning, that the formulation of a general provision prohibiting the free disposal of hazardous waste would jeopardise the protection of trade and that the existing system created by Directive 91/689 reconciles the protection of the environment with ensuring freedom of the market.

48. First, the protection of the legal interest of the environment in this case overrides the legal interest in the protection of trade, which is why Directive 91/689 was adopted under Article 130s rather than Article 100a (now, after amendment, Article 95 EC) of the EC Treaty.[29] Moreover, Directive 91/689 unsuccessfully attempts to combine the two, to the extent that, as analysed above, the protection it affords the environment is insufficient under Article 130r. The combination of environmental protection with the protection of the financial interests linked to the disposal, management and movement of hazardous waste (which fall under the Community legislation on the free movement of goods) could perfectly well be achieved through the enactment of a general prohibition of free disposal of hazardous waste on the one hand and an indicative list of the waste considered by the Community legislature to be hazardous at the time of its constitution on the other.

29 — The legal basis for Commission Proposal (88/C 295/04) was Article 100a but the Council regarded Article 130s as the legal basis. See Proposal for a Council Directive on hazardous waste COM(88) 391 Final, cited above, submitted by the Commission to the Council on 16 August 1988.
Also, regarding the question of choice of legal basis (as between Article 100a and 130s) see Case C-155/91 *Commission* v *Council* [1993] ECR I-939, regarding the legal basis of Council Directive 91/156. The Commission considered that the Council erroneously selected Article 130s rather than Article 100a. The Court rejected the Commission's application, however, holding that Directive 91/156 on waste has as its main object to ensure the effective management of waste with a view to protecting the environment and, accordingly, could be adopted on the sole basis of Article 130s of the Treaty (paragraphs 20 and 21). See also the Opinion of Advocate General Tesauro in the above case. Also on that question of the choice between Article 100a and Article 130s as the legal basis for the adoption of Community legislation concerning the environment (*inter alia*), see the earlier Case C-300/89 *Commission* v *Council* [1991] ECR I-2867 together with the Opinion of Advocate General Tesauro. That case concerned a directive on waste from the titanium dioxide industry and the Court held (paragraph 25) that Article 100a should have constituted the legal basis rather than Article 130s, which had been chosen by the Council.

(b) The options available to the Court

49. On conclusion of the foregoing analysis, however, the Court is faced with the following dilemma: it could either find Directive 91/689 incompatible with the overriding provisions of Articles 130r and 130t of the EC Treaty and consequently, in its collateral review of the legality of that directive, be led to remove the 'defective' provisions of the latter from secondary Community legislation (a), or attempt to answer the questions referred for a preliminary ruling without touching upon the issue of the directive's validity (b). At first sight, both options present drawbacks. Should the Court follow the first option, that is, find that the provisions in question are invalid, it will be faced with the issue of determining the legislation that would then be applicable to hazardous waste (1). Should it follow the second option, it will be faced with the equally delicate process of giving an interpretation of the directive compatible with the EC Treaty (2). Therefore, before presenting my opinion to the Court, I shall examine in more detail the aspects of both options.

(1) Finding the relevant provisions of Directive 91/689 invalid

50. I would like to point out that a finding of invalidity can relate only to those provisions of the Directive 91/689 and the Community list that define hazardous waste and in particular the four abovementioned features.

51. Such a finding would render the relevant provisions of that directive, as well, of course, as the provisions of Decision 94/904 and the national legislation that introduced these provisions into the Member States' legal system inapplicable. In such a case, however, the issue arises as to what the applicable law would be and whether there is any leeway for the direct applicability of Article 130r of the EC Treaty.

52. Before attempting to analyse this issue, I consider that certain preliminary observations should be made regarding the outcome of the questions referred for a preliminary ruling, in view of the changes that would necessarily occur under national law. More specifically, a finding that the abovementioned Community provisions were invalid, and consequently also the national law provisions transposing them into the Italian legal system, would appear to remove the grounds which, according to the order for reference, justified the questions referred for a preliminary ruling. In other words, once the legislative amendment which came into force in the course of the criminal proceedings were to be regarded as never implemented, there would, in principle, be no reason to apply Article 2 of the Italian Criminal Code, whereby 'no person may be punished for an act which, in accordance with a subsequent law, does

not constitute an offence'. Therefore, should the Court rule that the provisions of Directive 91/689 and Decision 94/904 are invalid as discussed above, there would appear to be no need for an answer to the questions referred by the national court.

53. However, at this point the question arises as to whether the national court is bound to review the national legal framework that would result from a finding that the Community provisions were invalid, in view of the above analysis of Articles 130r and 130t of the EC Treaty. I would point out that, under Italian criminal law, as well as the general principles of criminal law common to all Member States, such review could affect the course of the criminal proceedings pending only to the extent that it may be considered to result in a legal situation more favourable to the defendant. I shall now attempt to answer the above questions by examining whether it is possible for these articles of the Treaty to apply directly.

54. At first glance, it would not appear easy to support the view that Article 130r of the EC Treaty could apply directly. First, measures of Community policy established in Articles 130r(2) and 130s appear to be technical in nature, and rendered necessary for the specification and implementation of the provisions of Article 130r in the domestic law of the Member States. Secondly, even though the Court may declare provisions of secondary Community legislation to be invalid, it may not assume the role assigned to the Community institutions, particularly where the latter have the a broad discretion with regard to the choice of the most appropriate technical measures. [30]

55. Nonetheless, in exceptional circumstances such as this case, it can be accepted that there is a core content in the above articles of the Treaty which has become apparent through judicial review of the measures already adopted at Community level. This core forms part of the legislative content of those articles and it does not appear possible to subvert it by any subsequent provision of secondary Community legislation. [31] The possibility of direct application of the articles of the Treaty is based precisely on that core content, which in this case concerns the existence of a general prohibition on free disposal of hazardous waste and the possibility of drawing up a list of hazardous waste that is only indicative. That direct application of the articles of the Treaty, which is limited in scope, is not contrary to the general requirements for the direct application of the provisions of the Treaty or to the separation of institutional powers as between the Court and the other Community institutions.

56. The said core legislative content of Article 130r can be considered sufficiently clear and specific. As already mentioned,

30 — See point 49 of my Opinion in Case C-360/97 *Nijhuis* [1999] ECR 1919.

31 — Regarding the issues of altering such a core, see, for instance Meyer-Bisch (ed.), *Le noyau intangible des droits de l'homme*, 1991, Editions Universitaires, Fribourg, Switzerland.

there is no doubt that the free disposal of waste should be prohibited in all Member States. In the specific context in which the issue is raised in this case, that prohibition constitutes, in a negative manifestation, the direct consequence of the precautionary principle and the principle of preventive action analysed above.

57. However, how will hazardous waste be defined? Does such a definition not constitute a technical matter within the exclusive competence of the Council? It is my view that the Court may provide guidelines for such a definition which will have all the characteristics stipulated by the Treaty and slot into the semantic field of the core provisions, having direct effect, of Article 130r. However, the Court may not, in establishing such a definition (and nor does it need to) act as the initiator of rules. The most appropriate solution would be a definition based on the elements of the definition provided by the directive found invalid which, insofar as they do not infringe the Treaty, may be regarded as the technical basis for drawing up both a general definition and an indicative list of hazardous waste. [32]

58. In practice, in defining the potential components for the classification of hazardous waste as above, the Court would only be reformulating the provisions of the invalid directive in accordance with the aims of the Treaty. Specifically, the Court's intervention would result in the addition to the Community system as originally envisaged, to which Directive 91/689 attempted to give shape, of a general prohibition on the free disposal of hazardous waste on the one hand, and the transformation of the exhaustive Community list into an indicative list on the other. [33]

59. Such determination of the elements of the core content of Article 130r of the Treaty would render it directly applicable, protecting in this case the effectiveness of that Treaty article. At the same time it would enable the Court, abiding by all the technical matters decided upon by the legislative initiative of the competent Community institutions which, despite appearing in the provisions of the directive found to be invalid, cannot be regarded as contrary to the Treaty, to fill the gap seemingly

32 — For example, hazardous wastes are wastes that endanger human health or the environment because of their origin, composition or limit values of concentration of certain components. *In particular*, such wastes are those included in the Community list of hazardous waste.

33 — That reformulating in essence, of the rules of secondary Community law by the recognition of a core content protecting social rights is analogous to the standard case-law of national courts when reviewing the constitutionality of legislation. The constitutional provisions that protect social rights, whilst first and foremost imposing obligations for the State, do not generate actionable claims that are effective in practice against State authorities which have omitted to initiate the procedure to implement those rights, in the sense that the possible invalidity of that omission could not lead to the implementation sought, given the fact that there is no previous regime applicable and the courts may not assume the role assigned to the legislative or administrative authorities. If, however, those authorities have taken certain measures implementing the constitutional provisions, review on the substance can take place and the possible invalidity of those measures may form the core of the legislative content, which will have to be respected by any subsequent legislation or regulations. See my Opinion, in *Nijhuis*, cited in footnote 30.
It is worth emphasising that this is the opposite case to Case C-443/93 *Vougioukas* [1995] ECR I-4033, where the Court rightly held that it could not make good the Council's omission to take the measures required by Article 51 of the EC Treaty (now, after amendment, Article 42 EC) regarding the coordination of special schemes for civil servants. Indeed in *Vougioukas* the Court could not have undertaken any reformulation, inasmuch as the Council had not previously initiated legislation on that particular matter.

left by the defects in the secondary Community legislation until the adoption of new measures, without unlawfully taking on a primary legislative role. It should be emphasized that in reality this would not be filling a legal lacuna but would be the recognition required of the core legislative content of Article 130r which is directly applicable.

60. It must therefore be accepted that, should the relevant provisions of Directive 91/689 be found invalid, the national court should apply the national legislation which it deems valid — either the previously applicable legislation in revived form or the later legislation reformulated in accordance with the Community legislation, as reformulated through the 'quasi' direct application of the Treaty articles — once it has reviewed the national legislation on the basis of the directly applicable core of Article 130r as defined above. [34]

61. That review falls exclusively within the jurisdiction of the national court, which, in view of the rules and principles of the national criminal law applicable, is the sole body competent to establish accurately the national law applicable and define the issues requiring interpretation that may arise with regard to the above determination of the applicable Community law. In the context of that determination, the national court may again refer questions for a preliminary ruling to the Court if it considers it necessary to do so.

(2) Answering the questions referred for a preliminary ruling irrespective of the issue of the validity or otherwise of the provisions of Directive 91/689

62. I consider it best to deal with the questions referred for a preliminary ruling in the following order: the first question will be answered first, then the sixth question. Questions two and three will be answered together, and, lastly, so will questions four and five, this being necessary given that the issues raised are linked.

(i) Answer to the first question

63. By the first question referred for a preliminary ruling the national court seeks

34 — In prohibiting measures of secondary Community legislation from preventing any Member State from maintaining or introducing more stringent measures to protect the environment, Article 130t of the Treaty in no way prevents Member States from adopting such measures even where no Community measures have been adopted and, in any case, where measures of that type which were adopted initially have been annulled.

to ascertain in substance whether Article 1(4) of Directive 91/689 and Decision 94/904 should be interpreted as requiring specific proof that a waste derives from a production process or activity included in the Community list of hazardous waste for it to be classified as hazardous or whether the observation that the waste could in theory be used in a given production process or is derived from it as a final product suffices.

64. It appears from the wording of Directive 91/689 that the Community legislature attached great importance to the origin of the waste, laying down that the process or activity it derived from should be taken into account in classifying it as hazardous.

65. However, the fact that inclusion in the Community list is initially based on the waste's origin does not mean that the precise ascertainment of the waste's origin is the only decisive factor as regards its classification as hazardous. This is evidenced by the interpretation of the relevant provisions of Directive 91/689. Under the first indent of Article 1(4) the list features waste that meets the conditions of Annexes I, II and III to that directive. According to the wording of the list, account is taken not only of the origin but also of the composition of the waste and where appropriate limit values of concentration.[35] Therefore, even in the specific context of the directive, origin is not the sole criterion for classifying waste as hazardous.

66. In any event, in view of Article 130t of the Treaty as interpreted above, the criteria employed by the Community legislature for the classification of certain waste as hazardous cannot be binding for Member States in the sense that it must be shown in actual

35 — For certain waste to be classified as hazardous under the system established by Directive 91/689 and Decision 94/904 a specific three-stage procedure must be followed. First the origin of the waste must be determined in accordance with the type of sectoral activity from which it derives, the type of process or the type of waste. To that end, recourse must be had to the chapter headings (categories) of the list of hazardous waste published in Decision 94/904. Subsequently, within each chapter heading, the specific category takes precedence over the general category regarding the classification of waste as hazardous. Within the specific category, the specific definition overrides the general definitions of waste for the classification of waste as hazardous according to its origin. If the definition of the waste on the basis of its origin is included in the list, the waste is classified as hazardous. Conversely, if it does not appear in the list, the waste must be examined on the basis not of the chapter headings (categories) pertaining to origin, but of those relating to type of waste, such as those referred to in chapter headings 13 (oil wastes (except edible oils...)) and 14 (wastes from organic substances employed as solvents).
The specific chapter headings for types of waste include waste that may be classified under several categories/chapter headings according to their origin. If in this case it is impossible to classify waste according to its origin, because of the large number of possible different sectoral origins, ultimately the classification must be made, as pointed out by the German Government, not according to sector but according to type of waste, and the waste should be classified under the group whose typical properties it displays. The German Government uses the example of deposits produced by oil/water separators which are soaked up by suction vehicles in various operations used in the chemical industry (those operations fall under chapter headings 06 (wastes from inorganic chemical processes) and 07 (wastes from organic chemical processes)) which should be classified under different sectoral origins. Because these sludges are collected in only one tank, they cannot be classified under any of the headings regarding origin. They should therefore be classified under heading 13 according to the type of waste (oil wastes, except edible oils), subheading 1305 (oil/water separator contents), type 130502 (oil/separator sludges).

fact or theoretically that the waste originates from a production process or activity found in the Community list of hazardous waste.

(ii) Answer to the sixth question

67. By the sixth question referred for a preliminary ruling the national court seeks to ascertain whether, under Community law, diphenylmethane diisocynate (MDI) may or may not be classified as hazardous waste.

68. I shall first reply with regard to the specific framework of Directive 91/689. First, let us note that MDI is not included in the Community list of hazardous waste in Decision 94/904. Nonetheless, it is clear from the second indent of Article 1(4) of Directive 91/689 that Community law is not opposed to a Member State's classifying MDI as hazardous waste provided that it displays one or more of the properties listed in Annex III to Directive 91/689 which render it hazardous. The experience of Member States other than Italy leads to the conclusion that this waste satisfies the criteria of Annex III. [36]

36 — The Commission states, for instance that the Kingdom of Denmark, relying on the properties listed in Annex III to Directive 91/689, did in fact consider MDI to be hazardous waste and notified the Commission accordingly. The Republic of Austria states in its written observations that it has asked for MDI specifically to be added to the Community list.

69. In any event, in view of Article 130t as interpreted above, Directive 91/689 and Decision 94/904 cannot prevent the authorities of a Member State from considering other waste hazardous on the basis of properties other than those found in Annex III. In accordance with the foregoing analysis, the national court may seek to ascertain under national law whether MDI can be regarded as hazardous waste, guided by the need for more stringent protection of human health and the environment in the management of hazardous waste.

(iii) Answer to the second and third questions

70. By the second question referred for a preliminary ruling, the national court seeks to ascertain whether the list adopted under Decision 94/904 is exhaustive and binding, in which case waste not included in the list is excluded, despite displaying the properties set out in Annexes I, II and III to Directive 91/689. By the third question, which arises should the answer to the second question be negative, the national court asks the Court to rule on whether it is possible for the Community list to be supplemented automatically on the basis of Annexes I, II and III to Directive 91/689. In other words, the national Court wishes to ascertain in substance whether it is possible for the Community list to be adapted without the procedure established by Article 18 of Directive 75/442.

71. According to the Commission, a non-limitative Community list of hazardous waste would in practice mean that it would be possible to include all wastes that were ascertained to fulfil the requirements of Annexes I, II and III to Directive 91/689. Such verification alone would suffice, and there would be no need to observe the procedure under Article 18 of Directive 75/442. That is why the Commission contends that the Community list is limitative.

72. The Austrian Government contends that for technical and scientific developments to be consistently taken into account it is necessary to divide the sources for entry on the list into two sets, only one of which will correspond to the Community list of hazardous waste. This can also be concluded from the terms of the second indent of Article 1(4) of Directive 91/689, because if the list were to be considered exhaustive, that could essentially deprive that provision of any regulatory content.

73. In the interests of clarity, I would repeat that the answer to the second and third questions referred for a preliminary ruling is founded on the supposition that the provisions of Directive 91/689 are not invalid in the light of Articles 130r and 130t of the Treaty. On that view, it should be accepted that, even if the Community list provided for by the directive is limitative, it does not prevent Member States from classifying other wastes not included in the list as hazardous.

74. Specifically regarding the third question, it is worth emphasising the following points. Under the specific system established by Directive 91/689, there can be no doubt that the different stages of the procedure for adapting the Community list, which is based on the initiative taken by Member States to classify waste as hazardous if it displays one or more of the properties listed in Annex III, are necessary and useful for the correct functioning of the system. It is true that prior classification and notification to the Commission, which enables the latter to coordinate the updating of the list at Community level, are essential stages for the dynamic development of this system.

75. The omission of a Member State to fulfil its obligation of prior classification of waste as hazardous and notification thereof to the Commission could result in the Member State being liable for failing to comply with the particular obligations flowing from Directive 91/689. However, once it is recognised at national level that waste displays the properties listed in Annex III, the said omission in no way prevents the provisions for the protection of human health and the environment adopted by that directive from applying with regard to that waste. To adopt a contrary interpretation would be incompa-

tible with the precautionary principle and the principle of preventive action.

76. In any event, in view of Article 130t of the Treaty as interpreted above, the specific provisions of Directive 91/689 regarding prior classification and notification to the Commission do not prevent Member States from considering waste as hazardous on the basis of their national legislation and applying the relevant provisions for the protection of the environment to it.

(iv) Answer to the fourth and fifth questions

77. By the fourth question the national court asks the Court to rule on what procedure, for the purposes of Article 1(4), second indent, of Directive 91/689, an individual Member State must follow at national level in classifying waste as hazardous and what body is competent to make that assessment, in accordance with Annex III to the directive, and subsequently to notify the Commission. In the fifth question it asks the Court whether the judicial authorities of a Member State are also required to notify the Commission.

78. Article 1(4), second indent, of Directive 91/689 makes no reference at all to the national procedure which a Member State must follow or to the body competent to classify certain waste as hazardous and to notify the Commission accordingly. Since the Community legislature has not laid down rules on this matter, the procedure to be followed and the bodies responsible must be ascertained under national law. In any case, however, I consider that for the specific system established by that directive to function in the most effective way, the competence of national judicial authorities to carry out such assessments and notify the Commission must not be excluded *prima facie*.

(c) Proposed solution

79. In conclusion, in view of the foregoing analysis of the issues raised by the system adopted by Directive 91/689 and the options available to the Court if it adopts either solution suggested, I consider that it is certainly possible to rule that the provisions of Directive 91/689 at issue are invalid. However, given the facts of this case and the nature of the questions referred for a preliminary ruling I consider that it is not necessary to adopt such a radical solution and that the interpretation given under the second option enables the Court to provide the required answers to the questions referred by the national court for a preliminary ruling.

VI — Conclusion

80. In view of the above, I propose that the Court answer the questions referred to it for a preliminary ruling by the Pretura Circondariale di Udine, Sezione Distaccata di Cividale del Friuli, as follows:

(1) The origin of waste cannot be of decisive importance for the purposes of classifying it as hazardous within the meaning of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste and Council Decision 904/94 of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689.

(2) Diphenylmethane diisocynate (MDI) may be classified as hazardous waste under Directive 91/689.

(3) The Community list of hazardous waste adopted by Council Decision 904/94/EEC is limitative.

(4) In view of Article 130t of the EC Treaty (now Article 176 EC) and provided that the conditions for the application of that article are satisfied, the provisions of Directive 91/689 concerning the prior classification of the waste as hazardous and notification thereof to the Commission do not prevent Member States from classifying waste as hazardous on the basis of their national legislation and applying the relevant provisions for the protection of the environment even where the requirements of Annex III to that Directive are not satisfied or there has been no prior classification or notification to the Commission.

(5) Article 1(4), second indent, of Directive 91/689 makes no reference at all to the national procedure which a Member State must follow or to the body competent to classify certain waste as hazardous and to notify the Commission accordingly. Since the Community legislature has not laid down such rules, they must be ascertained under national law.