JUDGMENT OF THE COURT (Fifth Chamber)

9 September 1999 *

In Case C-102/97,

Commission of the European Communities, represented by Götz zur Hausen, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented initially by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same Ministry, and, subsequently, by Ernst Röder and Claus-Dieter Quassowski, Regierungsdirektor at the same Ministry, acting as Agents, Postfach 13 08, D — 53003 Bonn,

defendant,

APPLICATION for a declaration that, by failing to give priority to the recycling, rather than the thermal processing, of waste oils, notwithstanding that such processing is not precluded by any economic, technical or organisational

* Language of the case: German.

constraints, the Federal Republic of Germany has failed to fulfil its obligations under Article 3(1) of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ 1975 L 194, p. 23), as amended by Council Directive 87/101/EEC of 22 December 1986 (OJ 1987 L 42, p. 43),

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann, J.C. Moitinho de Almeida, L. Sevón (Rapporteur) and M. Wathelet, Judges,

Advocate General: N. Fennelly,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 11 February 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 10 March 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to give priority to the recycling, rather than the thermal processing, of waste oils, notwithstanding that such processing is not precluded by any economic, technical or organisational constraints, the Federal Republic of Germany had failed to fulfil its obligations under Article 3(1) of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ 1975 L 194, p. 23), as amended by Council Directive 87/101/EEC of 22 December 1986 (OJ 1987 L 42, p. 43).

2 The first and second recitals in the preamble to Directive 87/101 state:

'Whereas Council Directive 75/439/EEC provides that Member States shall take the necessary measures to ensure the safe collection and disposal of waste oils and to ensure that, as far as possible, the disposal of waste oils is carried out by recycling (regeneration and/or combustion other than for destruction);

Whereas regeneration is generally the most rational way of re-using waste oils in view of the energy savings which can be achieved; whereas, therefore, priority should be given to the processing of waste oils by regeneration, where technical, economic and organisational constraints allow it'.

3 Article 3 of Directive 75/439, as amended, provides:

'1. Where technical, economic and organisational constraints so allow, Member States shall take the measures necessary to give priority to the processing of waste oils by regeneration.

2. Where waste oils are not regenerated, on account of the constraints mentioned in paragraph 1 above, Member States shall take the measures necessary to ensure that any combustion of waste oils is carried out under environmentally acceptable conditions, in accordance with the provisions of this Directive, provided that such combustion is technically, economically and organisationally feasible.

3. Where waste oils are neither regenerated nor burned, on account of the constraints mentioned in paragraphs 1 and 2, Member States shall take the measures necessary to ensure their safe destruction or their controlled storage or tipping.'

4 Article 5(2) and (3) of Directive 75/439, as amended, provides:

'2. Where the objectives defined in Articles 2, 3 and 4 cannot otherwise be achieved, Member States shall take the necessary measures to ensure that one or more undertakings carry out the collection and/or disposal of waste oils offered to them by holders, where appropriate in the area assigned to them by the competent authorities.

3. To achieve the objectives defined in Articles 2 and 4, Member States may decide to allocate the waste oils to any of the types of processing set out in Article 3. To this end, they may institute appropriate checks.'

5 Articles 14 and 15 of Directive 75/439, as amended, provide:

'*Article 14*

As a reciprocal concession for the obligations imposed on them by the Member States pursuant to Article 5, indemnities may be granted to collection and/or disposal undertakings for the service rendered. Such indemnities must not exceed annual uncovered costs actually recorded by the undertaking taking into account a reasonable profit.

The amount of these indemnities must not be such as to cause any significant distortions of competition or to give rise to artificial patterns of trade in the products.

Article 15

The indemnities may be financed, among other methods, by a charge imposed on products which, after use, are transformed into waste oils, or on waste oils.

The financing of indemnities must be in accordance with the "polluter pays" principle.'

6 Pursuant to Article 2 of Directive 87/101, Member States were required to take the measures necessary to comply with the directive with effect from 1 January 1990.

7 By letter of 11 April 1991, the German Government informed the Commission that Directive 87/101 had been transposed by the following provisions:

— the Abfallgesetz (Law on Waste Products, BGBl. 1986 I, p. 1410), and, as regulations implementing that law;

— the Altölverordnung (Regulation on Waste Oils, BGBl. 1987 I, p. 2335);

— the Abfallbestimmungsverordnung (Regulation on the Destination of Waste Products), the Reststoffbestimmungsverordnung (Regulation on the Destination of Residues) and the Abfall- und Reststoffüberwachungsverordnung (Regulation on the Surveillance of Waste Products and Residues, BGBl. 1990 I, p. 613 et seq.).

8 Taking the view that those provisions did not properly transpose Article 3(1) of Directive 75/439, as amended, on the ground that they did not give the recycling of waste oils priority, but merely parity with thermal processing, without there being any justification on grounds of technical, economic or organisational constraints for so doing, the Commission, by letter of 10 August 1992, gave the Federal Republic of Germany notice to submit its observations on that infringement within two months.

9 On 10 March 1993, the German Government stated in reply that, with a view to giving priority to recycling, Paragraphs 2 and 4 of the Altölverordnung provide

that the waste oils which are most suitable for processing by regeneration are not to be mixed with other waste oils or other waste products. It also referred to technical and economic constraints such as the lack of demand for regenerated products, the high cost of processing by regeneration and the abolition of the subsidies paid under the former law on waste oils.

10 Taking the view, however, that the provisions cited did not give any priority to regeneration and that references to certain circumstances were not sufficient to establish the existence of constraints within the meaning of Article 3 of Directive 75/439, as amended, the Commission, on 14 March 1995, sent to the Federal Republic of Germany under Article 169 of the EC Treaty a reasoned opinion calling upon it to take the measures necessary to comply with the obligations arising from the aforementioned directive within two months of notification of the opinion.

11 By letter of 22 June 1995, the German Government stated in reply that the transposition of Article 3 of Directive 75/439, as amended, did not require the adoption of provisions expressly laying down the priority to be given to regeneration, provided that the hierarchy established by that article was guaranteed by binding provisions, which was the case in German law.

12 Since the German Government's reply was not considered to be satisfactory, and the German Government had not submitted any further information regarding the adoption of new measures, the Commission brought the present action.

13 Having been granted leave to intervene in support of the form of order sought by the Federal Republic of Germany by order of the President of the Court of 19 September 1997, the United Kingdom of Great Britain and Northern Ireland withdrew its intervention and was removed from the register as an intervener by order of the President of the Court of 26 March 1998.

Admissibility

14 The German Government raised a plea of inadmissibility alleging that the Commission had breached the principle of collegiality when it issued the reasoned opinion and brought the action. In the light of the judgment of the Court in Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, it withdrew that plea at the hearing. There is therefore no need to rule on that issue.

Substance

15 The Commission alleges that the Federal Republic of Germany has failed to give priority to the processing of waste oils by regeneration, without having shown, however, that it was prevented from so doing by technical, economic or organisational constraints, and that it has thus infringed Article 3 of Directive 75/439, as amended.

16 The German Government points to the Court's case-law to the effect that, in certain circumstances, a general legal context may be adequate for the purpose of transposing a directive. It submits that this is true of Article 3 of Directive 75/439, as amended. The priority given to the processing of waste oils by regeneration ensues in particular from the Altölverordnung, Paragraphs 2 to 4 of which prohibit the mixing of waste oils suitable for regeneration with other waste oils in order to ensure that all oils suitable for the purpose are available for regeneration. Similarly, Paragraph 5b of the 1986 Abfallgesetz ensures, by means of a collection system, that combustion-engine oils, which are particularly suitable for regeneration, are available for disposal by that method.

17 In the German Government's submission, it is not necessary to give regeneration greater priority than that provided for under existing statutory provisions, having regard to the technical, economic and organisational constraints with which it is faced.

18 In its submission, the term 'constraints' used in Article 3(1) of Directive 75/439, as amended, must not be interpreted restrictively. The very wording of that article indicates that the priority to be given to regeneration is subject to the negative condition that no constraint precludes it. If the Community legislature had intended the reference to constraints to be in the nature of a derogating provision to be interpreted restrictively, it would have laid down the principle of regeneration and then formulated an exception separately.

19 According to the German Government, the fact that the wording relating to constraints is not open to restrictive interpretation means, *inter alia*, that those constraints are not to be assessed in isolation and in the abstract, but cumulatively and within the context of the general situation.

20 Moreover, Directive 75/439, as amended, does not give any definition of technical, economic and organisational constraints, the meaning of which is not at all clear. The German Government concludes from this that Member States have a broad margin of discretion in determining whether there are constraints within the meaning of Article 3(1) of the directive.

21 By way of technical constraints, the German Government cites insufficient capacity to produce base oil by regenerating waste oil, and the inferior technical quality of certain secondary refining processes which do not meet consumer expectations.

22 The economic constraints, it submits, stem primarily from the non-profitability of secondary refining, itself a consequence, in particular, of the low price of base oil, the falling demand for that product and the difficulty of marketing oils produced by means of secondary refining. Giving greater priority to the regeneration of waste oils might induce undertakings to make bad investments, for example by expanding existing base-oil production capacity at a time when there is no corresponding demand. Moreover, raising the priority given to regeneration would alter the structure of the market and adversely affect the situation of other economic operators such as independent waste-oil collectors or the cement industry and other undertakings using waste oils as fuel.

23 With regard finally to organisational constraints, the German Government observes that there are only two undertakings in Germany which produce base oil by regenerating waste oils, and there is a danger that giving greater priority to regeneration would create a monopoly for those undertakings.

24 Against that background, it expresses doubts as to whether it is legally possible to give greater priority to regeneration. An obligation to offer waste oils first to base-oil production undertakings would not be in conformity with Community law. Similarly, voluntary agreements on the distribution of waste oils would be contrary to the law governing restrictive agreements and practices. Furthermore, the subsidies for regenerating waste oils into base oil have been abolished and the Federal Government does not wish to reintroduce them because they would place other undertakings at a disadvantage and would constitute State aid prohibited by the Treaty. Furthermore, since there is no specific duty on lubricants in Germany, it is not possible to take steps to encourage regeneration by means of tax advantages. Finally, the Bundesrat refuses to levy duty on waste oils used for combustion on the ground that such a duty would result only in increasing the costs borne by undertakings, such as cement works, which use waste oil as fuel, without for that matter redirecting the movement of waste oils towards regeneration undertakings. The German Government points out in this respect that Council Decision 97/425/EC of 30 June 1997 authorising Member States to apply and to continue to apply to certain mineral oils, when used for specific purposes, existing reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Directive 92/81/EEC (OJ 1997

L 182, p. 22), authorised the Federal Republic of Germany to continue to apply to waste oils re-used as fuel an exemption from excise duty provided for in Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), and that the Commission cannot require a Member State to do what a Council directive exempts it from doing.

25 The Commission points out that the provisions cited by the Federal Republic of Germany as transposing Directive 75/439, as amended, lay down conditions under which waste oils may be regenerated but do not give any priority to such regeneration. In this connection, it cites a Bundesrat resolution of 31 January 1997 calling upon the German Government to 'transpose Directive 75/439/EEC, which establishes the priority to be given to regeneration in the context of waste-oil processing'.

26 With regard to the reference to technical, economic and organisational constraints in Article 3(1) of Directive 75/439, as amended, the Commission argues that Article 3(1) is a derogating provision and that, as such, it must be interpreted restrictively.

27 It submits that the German Government has not established the existence of technical constraints because, on the one hand, new production capacity could be created if the Federal Republic of Germany gave priority to the regeneration of waste oils and, on the other hand, the use of other technical processes during regeneration would enable the manufactured products to meet technical requirements and consumer demand.

28 The Commission also points out that the economic constraint presented by the German Government as arising from the non-profitability of regeneration is precisely what Directive 75/439, as amended, seeks to combat by encouraging such regeneration.

29 With regard to the monopoly which regeneration undertakings would enjoy if priority were given to the regeneration of waste oils, the Commission submits that such a situation is unlikely to arise since making regeneration more attractive economically would have the effect of halting the process of decline experienced by regeneration undertakings. Moreover, the prospect of a change in the market structure is not an existing organisational constraint.

30 The Commission states that it does not see how organisational constraints within the meaning of Article 3(1) of Directive 75/439, as amended, would make it impossible to adopt the measures considered by the Federal Republic of Germany. It observes in this respect than an 'obligation to offer' waste oils to regeneration undertakings would not necessarily be contrary to Community law and refers to Article 5(2) of Directive 75/439, as amended, which makes provision for such a system where the objective defined, *inter alia*, in Article 3 cannot otherwise be attained. It points out that the reluctance of the Bundesrat to impose an excise duty on waste oils used for combustion purposes is the product of a political judgment, not an organisational constraint within the meaning of Article 3 of Directive 75/439, as amended. It submits that the imposition of an excise duty on waste oils could give a boost to regeneration and points out that the obligation to impose such a duty is laid down in Directive 92/81. The Federal Republic of Germany was authorised to continue to apply an exemption from excise duty to waste oils used as heating fuel only by way of exception.

31 At the hearing, the Commission also referred to the possibility, expressly provided for in Articles 14 and 15 of Directive 75/439, as amended, of paying collection and/or disposal undertakings indemnities, which could not therefore be regarded as aid contrary to Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

32 It should be pointed out in this respect that an examination of the German legislation has shown there to be no national provision expressly laying down that priority is to be given to regeneration in the processing of waste oils.

33 It is settled case-law, as the German Government points out, that the transposition of a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision, and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, in particular, Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 6).

34 However, while the provisions presented by the German Government as transposing Directive 75/439, as amended, form a legal context creating the conditions necessary for processing by regeneration — by organising the collection of waste oils and requiring that oils suitable for recycling be separated from other oils — and can be seen to attach greater importance to that type of processing, it is by no means apparent from that context that processing by regeneration is given priority over other types of processing, whether by means of compulsory measures or incentives.

35 It should be borne in mind in this regard that one of the objectives of Directive 87/101 was to give priority to the processing of waste oils by regeneration. That objective, expressed in the second recital in the preamble to Directive 87/101, is inspired by the fact that regeneration is the most rational way of re-using waste oils in view of the energy savings which can be achieved.

36 The existence in a Member State of technical, economic and organisational constraints which prevent priority from being given to processing by regeneration makes it necessary to give effect to the subsidiary obligation, laid down in Article 3(2) of Directive 75/439, as amended, to take the measures required to ensure that any combustion of waste oils is carried out under environmentally acceptable conditions, in accordance with the provisions of that directive. That obligation is itself made dependent on the condition 'that such combustion is technically, economically and organisationally feasible', which appears at the end of Article 3(2).

37 Only where waste oils are neither regenerated nor burned, on account of the constraints mentioned in Article 3(1) and (2) of Directive 75/439, as amended, are Member States subject to the even more subsidiary obligation, laid down in paragraph 3 of the same article, to take the measures necessary to ensure their safe destruction or their controlled storage or tipping.

38 With regard to the 'technical, economic and organisational constraints' referred to in Article 3(1) of Directive 75/439, as amended, it should be noted that that expression forms part of a provision giving general expression to the obligation imposed on Member States and that, as such, it is not to be interpreted restrictively as proposed by the Commission.

39 It is clear from Article 3(1) of Directive 75/439, as amended that, by its reference to 'technical, economic and organisational constraints', the Community legislature did not intend to provide limited exceptions to a rule having general application, but to define the scope and content of a positive obligation to give priority to the processing of waste oils by regeneration.

40 Contrary to the submission of the German Government, the definition of such constraints cannot be left to the exclusive discretion of the Member States. Apart from being contrary to the principle of the uniform interpretation and application of Community law, interpretation by the Member States alone would make the compatibility of processing by regeneration with technical, economic and organisational constraints a condition the fulfilment of which would depend entirely on the goodwill of the Member State concerned, which could thus render the obligation imposed on it worthless.

41 Accordingly, the provision relating to technical, economic and organisational constraints must be interpreted in the light of the other provisions of Directive 75/439, as amended, in order to ensure that the directive is effective in its entirety.

42 The provision relating to constraints must be understood as an expression of the principle of proportionality; accordingly, Member States are under an obligation to take measures appropriate and proportionate to the objective of giving priority to the processing of waste oils by regeneration, which is to say that the limit to that positive obligation is the existence of the technical, economic and organisational constraints referred to in Article 3(1) of Directive 75/439, as amended.

43 If, as the German Government contends, the technical, economic and organisational circumstances obtaining in a Member State were automatically to constitute constraints making it impossible to adopt the measures provided for in Article 3(1) of Directive 75/439, as amended, that provision would be deprived of all practical effect, since the obligation imposed on Member States would be limited by maintenance of the status quo, with the result that Article 3(1) would not impose a genuine obligation at all.

44 In the present case, the fact is that the Federal Republic of Germany has not adopted any specific measure aimed at giving priority to the processing of waste oils by regeneration and confines itself at present to referring to its own definition of constraints and to the circumstances obtaining in its territory in an attempt to justify the complete failure to introduce measures implementing Article 3(1) of Directive 75/439, as amended.

45 On the contrary, although an incentive used to exist in the form of the payment of an indemnity encouraging regeneration, and the principle of the payment of such an indemnity was in conformity with Article 14 of Directive 75/439, as amended, the indemnity was abolished by a recent law.

46 Similarly, the Federal Republic of Germany has chosen to continue to exempt oils used as heating fuel from the excise duty on mineral oils, thus encouraging the combustion of such oils, contrary to the objective pursued by Directive 75/439, as amended, notwithstanding that the levying of duty on those oils is prescribed

within the general framework of Directive 92/81, and the principle of imposing a specific duty is also authorised by Article 15 of Directive 75/439, as amended.

47 In this connection it should be made clear that the possibility of continuing to apply an exemption from the excise duty on waste oils intended for combustion, approved by a Council decision of 30 June 1997, does not have the effect of precluding consideration of the fiscal measures which the Federal Republic of Germany could have adopted in order to comply with its obligation to implement Article 3(1) of Directive 75/439, as amended.

48 While it is not for the Court to determine the measures which a Member State should have taken in order to implement Article 3(1) of Directive 75/439, as amended, it none the less has a responsibility, in determining whether there are constraints within the meaning of that article, to consider whether it was possible to adopt measures aimed at giving priority to the processing of waste oils by regeneration and satisfying the criterion of technical, economic and organisational feasibility.

49 Suffice it to say in this respect that there were a number of measures which could have contributed towards attaining the objective of giving priority to the treatment of waste oils by regeneration and whose adoption was technically, economically and organisationally possible, but the Federal Republic of Germany has not adopted any such measure; on the contrary, it has stopped applying one of them and has taken no other appropriate steps with a view to attaining the objective pursued by Directive 75/439, as amended.

50 It follows that, by failing to take the measures necessary to give priority to the processing of waste oils by regeneration, notwithstanding that technical,

economic and organisational constraints so allowed, the Federal Republic of Germany has failed to fulfil its obligations under Article 3(1) of Directive 75/439, as amended.

Costs

51 Under Article 69(2) of the Rules of Procedure, 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 applied for an order that the Federal Republic of Germany pay the costs and the latter has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by failing to take the measures necessary to give priority to the processing of waste oils by regeneration, notwithstanding that technical, economic and organisational constraints so allowed, the Federal Republic of Germany has failed to fulfil its obligations under Article 3(1) 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. Orders the Federal Republic of Germany to pay the costs.

Puissochet Jann Moitinho de Almeida

Sevón Wathelet

Delivered in open court in Luxembourg on 9 September 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber