# OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 17 September 2009 [1]

1. The Community secondary legislation dealing with the disposal of waste by its deposit in landfill sites [2] is based on the 'polluter pays' principle. The price charged for waste disposal in a landfill is meant to cover the full costs (both short- and long-term) of the waste disposal operation. This case presents the Court with the conundrum of national legislation that purports to implement the Landfill Directive; but which contains lacunae whose effect is that a waste disposal operator required to pay a levy calculated by reference to the quantity of waste deposited is faced with penalty charges for late payment of the levy, whilst having no apparent recourse against the municipal authorities for whom it disposes of the waste (the 'polluters') who have consistently failed to reimburse the levy to it and who are, at least in part, therefore responsible for it incurring the penalty charges for late payment.

2. In this reference for a preliminary ruling, the Commissione Tributaria Provinciale di Roma seeks guidance on whether certain provisions of Italy's national law are compatible with Articles 12, 14, 43 and 46 EC, the Landfill Directive and Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions. [3]

## Community law

### *Treaty provisions*

3. Article 12 EC prohibits any discrimination on grounds of nationality within the scope of application of the Treaty and without prejudice to any special provisions contained therein.

1 — Original language: English.

2 — Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (*OJ 1999 L 182, p. 1) ('Directive 1999/31' or 'the Landfill Directive').*

3 — OJ 2000 L 200, p. 35 ('Directive 2000/35' or 'the Late Payments Directive').

4. Article 14 EC states, inter alia, that the Community is to adopt measures to progressively establish the internal market.

5. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State.

6. Article 46 EC grants the Member States, in derogation from Article 43, the right to apply provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

*The Landfill Directive*

7. Directive 1999/31 is part of the Community 'waste strategy' under Council Directive 75/442/EEC. [4] It provides for measures, procedures and guidance to prevent or reduce as far as possible the negative effects on the environment from landfilling of waste. [5]

8. Recital 5 states that 'under the polluter pays principle it is necessary, *inter alia*, to take into account any damage to the environment produced by a landfill'. Recital 6 adds that 'like any other type of waste treatment, landfill should be adequately monitored and managed to prevent or reduce potential adverse effects on the environment and risks to human health'.

9. Recital 9 notes that 'Member States should be able to apply the principles of proximity and self-sufficiency for the elimination of their waste at Community and national level, in accordance with Council Directive 75/442/EEC of 15 July 1975 on waste; …

4 — Directive of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as last amended (before the enactment of Directive 1999/31) by Commission Decision 96/350/EC (OJ 1996 L 135, p. 32).

5 — This directive appears to have been transposed into national law by Legislative Decree No 36 of 13 January 2003 (Ordinary Supplement to GURI No 59 of 12 March 2003). This does not cross-refer to Law No 549/95 (see below, note 7) and is not referred to by the national court in its order for reference. Thus, the relationship between the two (a) in terms of national law and (b) as a method for implementing the directive remains unclear.

the objectives of this Directive must be pursued and clarified through the establishment of an adequate, integrated network of disposal plants based on a high level of environmental protection'.

10. Recital 29 states that the price charged for waste disposal in a landfill must cover all the costs involved in the setting-up and operation of the facility.

11. Article 10 then provides, in so far as is relevant, that:

'Member States shall take measures to ensure that all of the costs involved in the setting-up and operation of a landfill site, including as far as possible the cost of the financial security or its equivalent referred to in Article 8(a)(iv), and the estimated costs of the closure and after-care of the site for a period of at least 30 years shall be covered by the price to be charged by the operator for the disposal of any type of waste in that site…'

*The Late Payments Directive*

12. Directive 2000/35 aims to reduce late payments in commercial transactions. [6] Recital 7 recalls the heavy administrative and financial burdens which are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payment, and that these constitute a major cause of insolvencies. Recital 16 states that most Member States have made late payment financially attractive to debtors by low interest rates on late payments and/or slow procedures for redress. It notes that a 'decisive shift, including compensation of creditors for the costs incurred, is necessary to reverse this trend and to ensure that the consequences of late payments are such as to discourage late payment'.

13. Article 1 states that '[t]his Directive shall apply to all payments made as remuneration for commercial transactions'.

14. Article 2(1) defines 'commercial transactions' as 'transactions between undertakings or between undertakings and public author-

6 — This directive was transposed into national law by Legislative Decree No 231 of 9 October 2002 (GURI No 249 of 23 October 2002).

ities which lead to the delivery of goods or the provision of services for remuneration'; 'public authority' as 'any contracting authority or entity, as defined by the Public Procurement Directives …' and 'undertaking' as 'any organisation acting in the course of its independent economic or professional activity, even where it is carried on by a single person'. Article 2(2) defines 'late payment' as meaning 'exceeding the contractual or statutory period of payment'.

15. Article 3 provides that Member States shall ensure that interest is paid in cases of late payment and defines both the time at which such sums shall become payable by the debtor and the dissuasive rate of interest applicable in cases of late payment.

**National provisions**

16. Italy enacted Law No 549 of 28 December 1995 [7] to regulate the disposal of waste in landfill sites. Article 3 contains a number of particular provisions in that regard.

17. Paragraphs 24 and 25 establish a special levy on the disposal of solid waste in landfills, in order to promote a reduction in the amount of waste produced and the recovery of raw materials and energy from such waste. Under paragraph 26, the levy is charged to the landfill site operator, but is to be passed on to the waste provider. [8] The basis of assessment, according to paragraph 28, is the quantity of waste deposited.

18. Under paragraph 27, the levy is payable to the regions and, in accordance with paragraph 30, it must be paid quarterly, within a month from the end of each quarter, in respect of waste deposited during that quarter.

19. Paragraph 31 provides that in the event of non-payment, late payment or underpayment, a fine of between two and four times the amount concerned is to be imposed. [9]

7 — Ordinary Supplement to GURI No 302 of 29 December 1995 ('Law No 549/95').

8 — Each municipal authority does not, in general, produce the bulk of the waste that it *'provides'. Rather, it* collects waste from homes and businesses in its municipality. Those homes and businesses each then contribute the proportion of the levy that is attributable to their waste to the municipal authorities through their taxes. At the hearing the Italian Government indicated that those taxes are collected whether or not the levy is reimbursed to the landfill operator.

9 — The referring court indicates that the arrangements regarding penalties are now governed by Legislative Decree No 471 of 18 December 1997 (Ordinary supplement to GURI No 5 of 8 January 1998).

**Facts and questions referred**

20. Pontina Ambiente Srl ('Pontina Ambiente') is a landfill site operator whose legal rights and obligations are governed by Law No 549/95.

21. Under Law No 549/95, the Lazio Region duly designated the landfill site to be used by each particular municipal authority and set the price for the service provided by the operator of that site. Within that framework, the Lazio Region concluded an agreement with Pontina Ambiente for the storage and processing of waste from certain municipal authorities. Pontina Ambiente became liable to pay the levy to the Lazio region not later than the month following the end of the quarter in which the relevant waste was deposited. Failure to do so within these time limits led to Pontina Ambiente incurring a monetary penalty.

22. The levy was, however, payable in advance of Pontina Ambiente being put in funds by the municipal authorities. From the additional factual material that emerged during the hearing, it appears to be common ground, first, that the municipal authorities do not discharge their debts within the customary period for commercial transactions. Rather, since the municipal authorities' standard payment terms are 120 days, there is a significant chance that a landfill site operator will not have yet been reimbursed for one three-month 'tranche' of levy by the time that it becomes liable to pay the next tranche. Second, a number of municipal authorities are currently in insolvency administration. Under national law, operators such as Pontina Ambiente are not preferential creditors. Finally, landfill site operators cannot insist on a deposit from insolvent municipal authorities as a condition precedent for the treatment of waste. Nor, under Italian public health legislation, can they refuse to treat the waste delivered to them.

23. In the litigation pending before the referring court, Pontina Ambiente has sought the annulment of two assessments for unpaid levies, accompanied by fines for late payment. In the course of doing so, it has challenged Article 3(26) and (31) of Law No 549/95, in so far as these render a landfill site operator liable for payment of the levy and penalise it for late payments to the region, whilst making no provision for penalties to be imposed on the municipal authorities that have caused those payments to be late. In particular, payment of the levy by the landfill site operator is not conditional on the latter receiving payment from the municipal authorities for the services provided.

24. The national court has referred the matter to the Court of Justice. It wishes to know whether the national provisions are compatible with Articles 12, 14, 43 and 46 EC and with the Landfill Directive and the Late Payments Directive, and seeks guidance from the Court in that regard.

25. Written observations were presented by Pontina Ambiente and also by the Italian Government and the Commission (both of whom attended the hearing on 4 June 2009).

## Preliminary remarks

### *Admissibility*

26. At the hearing, the Italian Government implicitly questioned whether Article 3(31) of Law No 549/95 applied to the situation before the referring court. Although it agreed that the description of the legal situation in the order for reference was accurate, the Italian Government submitted that the penalty due in the event of non-payment of the levy was 30% of the levy (and not, as specified by Article 3(31) of Law No 549/95, between two and four times the amount due by way of levy). The sums shown as penalties in the case-file seem to bear out that analysis. [10]

27. In order to enable the Court to provide a useful interpretation of Community law, the referring court should settle the questions of purely national law. [11] That said, whether the penalty is specified in Article 3(31) of Law No 549/95 or in some other national legal provision does not alter the issue before the national court.

### *The matter referred*

28. In its request for a preliminary ruling the referring court has not formulated a specific question. Rather, it has confined itself to indicating that it has concerns as to whether national law is compatible with a number of provisions of Community law.

10 — The sums at issue cannot be regarded as insignificant. The two contested notices imposed penalties of EUR 26 588.21 and EUR 11 901.79 respectively.

11 — Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraph 37 and the case-law cited therein.

29. The Commission correctly notes that where an order for reference does not precisely indicate the question the national court is asking, the Court may reformulate the question. [12] Although a provisional reformulation appeared in the notification in the Official Journal, [13] it seems to me that further re-wording is required. Two points in particular should be addressed briefly.

30. First, the order for reference appears to ask the Court to rule on whether domestic law is compatible with Italy's Community law obligations. However, it is settled case-law that the Court's jurisdiction under Article 234 EC is confined to ruling on the interpretation (and, where relevant, the validity) of provisions of Community law. [14] In so doing, the Court may nevertheless provide a ruling that enables the national court then to assess the compatibility of national law with Community law.

31. Second, Article 3 of the Late Payments Directive (mentioned by the referring court in its order for reference) provides that Member States 'shall ensure' that interest is paid in cases of late payments covered by the directive. That raises the question of whether the system set up in (inter alia) Article 3(26) and (31) of Law No 549/95 is precluded by that provision of Community law.

32. I shall therefore take the questions implicitly contained in the order for reference to be as follows:

'(1) Are Articles 12, 14, 43 and 46 EC to be interpreted as precluding national provisions such as Article 3(26) and (31) of Law No 549 of 28 December 1995, which introduce a special levy for the depositing of waste in landfills and make provision for the period within which the levy is to be collected, without however requiring the levy to be reimbursed within a reasonable time, or prescribing any effective mechanism for such reimbursement?

(2) Is Article 10 of the Landfill Directive to be interpreted as precluding national provisions such as Article 3(26) and (31) of Law No 549 of 28 December 1995?

12 — Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-6995, paragraph 28 and the case-law cited therein. This includes instances where no specific question is apparent from the order for reference: Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 34.

13 — OJ 2008 C 183, p. 12.

14 — Case C-321/07 *Schwarz* [2009] ECR I-1113, paragraph 48.

(3) Can a landfill site operator recover from the waste provider a penalty imposed for late payment of such a levy?

(4) Is reimbursement of such a levy covered by Articles 1 and 2 of the Late Payments Directive, so that Article 3 thereof requires Member States to ensure that interest at a dissuasive rate can be collected in the event of late payment of such a levy?'

33. Behind the individual questions lies the central issue confronting the national court: do any of those provisions of Community law preclude a *system* such as that in place in Italy (of which Article 3(26) and (31) of Law No 549/95 form part), where such a system does not allow the site operator effectively to recover either the amount of the levy payable in due time or the cost of financing the advance payment of that amount in the case of delayed recovery?

**Articles 12, 43 and 46 EC**

34. It is settled case-law that Articles 12 and 43 EC apply only to situations which have a cross-border element. [15] Since Article 46 EC derogates from Article 43 EC, it likewise falls to be considered only if Article 43 EC applies.

35. This case concerns an Italian company, established in Italy, which disposes of an Italian municipality's waste. The company is challenging a decision taken by an Italian public authority, under Italian law, and is doing so in the Italian courts. The situation is one that is purely internal to a single Member State.

36. Pontina Ambiente seeks, however, to put forward a potential cross-border effect in its written observations. It argues that Italian law imposes a levy on landfill site operators without providing them with the means to enforce recovery from the waste providers of the sums they have paid. That weakens the

15 — Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 58.

landfill operators' financial situation and therefore places them at a competitive disadvantage as compared to other landfill operators operating in different markets within the Community.

37. The argument is ingenious but essentially hypothetical. It fails to explain how the actual exercise of freedom of establishment is plausibly adversely affected by the contested legislative provisions. I therefore do not consider that it demonstrates a sufficient cross-border element to trigger Article 43 EC, or, by necessary implication, Article 46 EC. If Articles 43 and 46 EC do not apply to the factual situation giving rise to the reference, I cannot see how Article 12 EC would be applicable either.

38. I therefore suggest that the Court should hold that Articles 12, 43 and 46 EC are inapplicable to the situation before the national court.

**Article 14 EC**

39. Article 14 EC obliges Member States to remove barriers to free movement within the internal market, so as to establish an 'area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with [the] Treaty'. It is a programmatic provision. In my view, a ruling on the interpretation of this article is neither necessary nor relevant to providing an answer to the referring court.

**Article 10 of the Landfill Directive**

*The situation before the national court*

40. The facts set out in the order for reference, as amplified by the answers given by the Italian Government at the hearing, [16] demonstrate clearly that, although the landfill site operator is obliged to pay the levy to the region and may be penalised for late, incorrect or non-payment, there is no corresponding mechanism that obliges the municipal authorities responsible for depositing the waste to reimburse the amount of the levy to the landfill site operator within a set period of time.

16 — See point 22 above.

41. Article 10 of the Landfill Directive is mandatory in its terms. It requires Member States to ensure that all of the costs involved in the setting-up and operation of a landfill site are covered by the price to be charged by the landfill site operator for the disposal of any type of waste in that site.

42. But what does the phrase '*all* of the costs involved in the setting-up and operation of a landfill site' cover? In particular, does it encompass (a) a levy on waste and (b) the extra costs and penalties incurred when a landfill site operator cannot pay such a levy on time because the municipal authority that has provided the waste is late in paying?

*The terms of Article 10*

43. Article 10 expressly refers to '*all* of the costs involved' in the setting-up and operation of a landfill site. [17] The municipal authorities supply waste to Pontina Ambiente for treatment. Pontina Ambiente duly performs its side of the contract and disposes of the waste. The levy becomes chargeable as a direct consequence of that sequence of events. It is a special levy on the disposal of solid waste in landfills. [18] The basis of assessment is the quantity of waste deposited. [19]

44. In those circumstances, it is abundantly clear that the levy is a cost that the landfill operator necessarily incurs; and one that is a cost inextricably bound up with the operation of a landfill site. To put the same point a different way: it is impossible to operate a landfill site for waste disposal in Italy without necessarily having to pay the levy.

45. The terms of Article 10 of the Landfill Directive are unequivocal: all such costs are to be included in the price to be charged by the operator for the disposal of any type of waste in that site. On a textual reading of that provision, the levy is a cost that is to be included in the price charged.

17 — The fact that Article 10 then identifies two specific cost elements that should be included 'as far as possible' cannot preclude the inclusion of other cost elements that form part of 'the costs involved' in the setting-up and operation of the site.

18 — See Article 3(24) and (25) of Law No 549/95.

19 — See Article 3(28).

*The purpose of Article 10*

46. The aims of the Landfill Directive likewise support that reading of Article 10. The Community legislature intended to protect the environment by, inter alia, dissuading people from creating landfill waste. Recitals 6 and 9 underline the need for adequate management of landfill waste. The wording of recital 29 anticipates the substantive wording of Article 10.

47. One mechanism to achieve that aim is to try to ensure that the full costs of setting up, running and managing a landfill site are borne by those who create the waste that is deposited there. That is what Article 10 does. In short, the Landfill Directive is a specific expression of the 'polluter pays' principle, [20] whilst also reflecting the principle that waste should be disposed of as close as possible to its source. The 'polluter pays' principle is only satisfied if the incentive to reduce waste is ultimately applied to the waste provider: that is, the municipal authorities. [21] That will only happen if the levy is treated as a 'cost' that is passed to the waste provider in the price paid for the waste disposal service.

*Does Article 10 preclude the system set out in the Italian legislation?*

48. Pontina Ambiente argues that the system set out by the Italian legislation violates the 'polluter pays' principle found in Article 10 of the Landfill Directive. By contrast, the Italian Government and the Commission consider that the determination of who should (initially) pay the levy falls within the sphere of competence of the Member States; and that the system set out in the Italian legislation is not precluded by Article 10.

49. I agree with the first part of the position espoused by Italy and the Commission. The wording of Article 10 does not oblige a Member State to organise the payment of the operating costs of a landfill in any particular way. Likewise, nothing precludes a Member State from imposing a levy on the waste deposited in a landfill site which is

20 — See recital 5 to the Landfill Directive, and Article 15 of Directive 75/442, cited above at footnote 4. See also Case C-1/03 *Van de Walle and Others* [2004] ECR I-7613, paragraphs 57 and 58 on the interpretation of that directive.

21 — And passed on in turn through local taxation to the homes and businesses that actually produce the waste.

initially payable by the landfill site operator and then passed on to the waste provider; [22] or from penalising an operator for the late payment of such a levy.

50. However, although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive. [23] A long line of case-law states that a Member State's obligation under the third paragraph of Article 249 EC requires the full application and enforcement of the directive concerned. [24]

51. In the present case, whilst the specific provisions of national law identified by the national court do indeed regulate the subject-matter covered by Article 10 of the Landfill Directive, they cannot be considered in isolation from the system of which they form part. Ultimately, the question with which the Court must grapple in order to provide a helpful answer to the national court is, do the provisions of the Landfill Directive preclude a *system* that predictably and demonstrably generates the result that the levy is not paid by the waste providers (but remains, effectively, as a burden on the landfill site operator) and that, in addition, frequently results in the imposition of penalty charges on the latter?

The recovery of the levy from the municipal authorities

52. From the material before the Court, [25] it is apparent that the operator cannot in practice effectively recover the levy from the municipal authorities. As a contractual creditor, Pontina Ambiente enjoys no preferential status to recover debts owed by insolvent municipal authorities. Even legal proceedings to recover

22 — The Commission stated at the hearing that this type of mechanism has been used by a number of Member States; and that, if operated properly, it was neither the best nor the worst of the available options for implementing the Landfill Directive.

23 — Case C-397/01 *Pfeiffer* [2004] ECR I-8835, paragraph 115 (and see more generally paragraphs 110 to 118), cited most recently in Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, paragraphs 60 to 64. See also Case C-131/97 *Carbonari and Others* [1999] ECR I-1103, paragraphs 48 to 50.

24 — See, for example, Case 14/83 *Von Colson and Kamann* [1984] ECR I-1891, paragraph 15, and Case C-62/00 *Marks and Spencer* [2002] ECR I-6325 paragraphs 22 to 28 and the case-law cited therein. For a useful précis of the principle of full effect, see also Prechal, S., *Directives in EC Law* (OUP 2005, pp. 51 to 54 and 87 to 91).

25 — See in particular point 22 above.

the levy from solvent municipal authorities are often both complex and lengthy. [26]

53. As Pontina Ambiente rightly points out, the Italian system gives the regional authorities the revenue from the levy whilst affording the municipal authorities an (undue) financial advantage because the landfill site operator cannot in practice enforce its right to reimbursement.

54. The landfill site operators thus become responsible for paying a particular cost of their operations. They cannot pass it on to the waste providers, as Article 10 requires. Furthermore, since the levy cannot in practice be recovered from the municipal authorities, the Italian system fails to provide any incentive to the latter to reduce the amount of waste produced. The result is not that the 'polluter pays'. Rather, it is that the landfill operator pays. It seems to me that both a textual and a purposive reading of Article 10 of the Landfill Directive must preclude a system which in practice leads to that result.

26 — At the hearing, the Commission suggested that municipal authorities enjoyed quasi-immunity from such recovery proceedings. The Italian Government, whilst contesting that assertion, indicated that a landfill site operator must first obtain a court injunction ordering the municipal authority to pay and then institute further proceedings if (or when) the authority in question fails to comply with the injunction.

The penalty for late payment of the levy

55. The Commission suggests that if the municipal authorities regularly fail to repay the levy promptly to landfill site operators, it would be legitimate for undertakings such as Pontina Ambiente to include within their operating costs the sums they incur to ensure that they can pay the levy on time and thus avoid a penalty. During the hearing, it was suggested that an operator might be able to do this by arranging appropriate insurance cover, or by securing credit from a bank.

56. The first suggestion can be dealt with shortly. It seems unlikely that an insurance company would be prepared to insure against the probability [27] of late payment for a premium that the landfill site operator could readily contemplate paying. It will, however, be for the national court to verify whether that is indeed the position.

57. The second suggestion has, at first glance, more merit. In principle, a landfill site

27 — The Italian Government did not suggest, either in its written observations or at the hearing, that Pontina Ambiente was exaggerating the frequency with which municipal authorities were late in paying landfill site operators.

operator should be able to calculate, from experience, the probability that one or more of the municipal authorities with whom it has waste disposal contracts will pay late. From that, it can then work out the cost of the necessary credit to avoid paying the levy late and hence incurring a penalty. That cost is an operating cost and, as such, is recoverable from the waste provider.

58. However, there are — it seems to me — two further problems that may arise.

59. First, it is possible that commercial banks may be unwilling to extend credit (or to do so only at higher rates of interest) if a long history of late payments has placed a particular operator in a financially precarious position. The Court does not have before it the necessary material to see whether this is (or is not) an actual difficulty faced by Pontina Ambiente. It will be for the national court to look at the evidence and to make the necessary findings of fact.

60. Second, it is quite true that in a normal commercial context, a service provider who has to secure credit in order to ensure that it can meet a foreseeable operating cost [28] on time will seek to pass on the cost of that credit to its customers. However, the price that landfill site operators can charge for their services is determined by the region, not by the service providers. [29] In such circumstances, although Pontina Ambiente can certainly draw the problem to the attention of its interlocutors within the region, it is unable to ensure that it can charge a price that will cover both the normal costs of providing the waste disposal service and the additional costs attributable to the tendency of the municipal authorities to be tardy in making payment.

61. Examination of the two specific suggestions made by the Commission leads me to address the underlying issue: can payment of a penalty ever be included as part of the recoverable costs of an economic operation?

28 — Pontina Ambiente suggested that, unless the landfill site was working at full capacity, it was unable to work out how much waste was deposited (and hence the amount of levy for which it was liable) but had to wait to be told the quantities by the municipal authorities depositing the waste. I am disinclined to accept that suggestion. It seems to me that a commercial operator can reasonably be expected to put in place some mechanism for checking what is being delivered to it. Indeed, it might be supposed to be both in Pontina Ambiente's own commercial interests and in the interests of achieving the objectives pursued by the Landfill Directive to have some means of verifying the quantities of waste being reported to the landfill site operator by the municipal authorities.

29 — See point 21 above.

62. In the present case, neither the levy nor the penalty for its late payment is to be found in the directive itself. [30] That said, both form part of a national law system that implements that directive. It is therefore appropriate to see what guidance is to be found in the Court's case-law on penalties.

63. The Court considered the link between the imposition of a penalty and the action (or inaction) of the operators involved in *Käserei Champignon Hofmeister*. [31] In that case, the Court held that, although the principle of *nulla poena sine culpa* is limited to criminal penalties, [32] Community law none the less treats the imposition of a penalty as lawful where an economic operator can inspect, verify, create back-to-back contractual guarantees or otherwise take steps to avoid finding itself in circumstances in which it becomes liable for that penalty. [33]

64. Against that background, the underlying rationale for the imposition of a penalty appears, essentially, to be that an economic operator *could* order his affairs in a way that meant that he avoided incurring the penalty.

30 — See point 49 above.
31 — Case C-210/00 [2002] ECR I-6453.
32 — Paragraphs 35 to 52.
33 — Paragraphs 60 to 68.

He does not 'necessarily' have to incur it as part of his ordinary economic activity.

65. What happens when we transpose that analysis to the present case?

66. It seems to me from the material before the Court that Pontina Ambiente has gone some way towards showing that it cannot avoid making late payment and hence having to pay a penalty. I do not know whether it might be able to adduce sufficient additional material to demonstrate that to the satisfaction of the national judge, as sole judge of fact. That is not, however, a matter for this Court.

67. In deciding that question, the test that the national court should apply is the following: is the penalty a cost that, in practical terms, Pontina Ambiente *necessarily* incurs, or is it an *avoidable* cost? If it is the former, it falls to be included together with the levy as a cost that should be passed on to the municipal

authorities as part of the price for the service, in accordance with Article 10 of the Landfill Directive. If it is the latter, it is a cost that Pontina Ambiente must bear and pay.

*Conclusion on the Landfill Directive*

68. I therefore conclude that Article 10 of Directive 1999/31 of 26 April 1999 on the landfill of waste is to be interpreted as precluding national provisions such as Article 3(26) and (31) of Law No 549 of 28 December 1995, which introduce a special levy for the depositing of waste in landfills and make provision for the period within which the levy is to be collected from the landfill site operator, when the levy system of which they form part does not, however, require waste providers to reimburse the amount of the levy to the landfill site operator within a reasonable time, or prescribe any effective mechanism for such reimbursement.

69. A penalty imposed on a landfill site operator for late payment of such a levy cannot be recovered from the waste provider under Article 10 of Directive 1999/31 unless the landfill site operator can demonstrate that the penalty is a cost that it necessarily incurs because of the waste provider's failure to reimburse the levy in a timely fashion. It is for the national court to determine whether that is the case.

**The Late Payments Directive**

70. The Italian Government contends that the present situation falls outside the scope of the Late Payments Directive. In its submission the levy is a tax; and the application and methods of recovering a tax cannot be assimilated to a 'commercial transaction'.

71. Whilst it is clear that the levy itself is indeed a tax, I cannot agree that that precludes its recovery under the Late Payments Directive.

72. I recall that Article 1 of the Late Payments Directive states that the directive applies to all payments made as remuneration for commercial transactions. Article 2(1) defines 'commercial transactions' as 'transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration'.

73. The landfill site operator is providing a service under a contract between an 'undertaking' and a 'public authority'. It is doing so 'for remuneration' since it should receive, under that contract, the price for that service fixed by the region. [34] The remuneration comprises recovery of the costs incurred by the operator in disposing of the waste plus the operator's profit.

74. The landfill site operator's liability to pay the levy arises as a direct result of the contract, at the moment when the waste is deposited by the municipal authority for processing. [35] The 'costs recovery' element of the remuneration therefore includes the levy which the landfill site operator has paid in advance on the waste deposited and which he is required to pass on to the municipal authority. [36] The landfill site operator can only obtain reimbursement from the municipal authority of the levy duly paid to the region by relying on the contract whose performance constitutes the 'commercial transaction' between itself and that authority. [37]

75. In those circumstances, I consider that recovery of the levy (together with any costs necessarily incurred in financing its advance payment so as to avoid incurring a penalty) is part of the remuneration that the landfill site operator is entitled to recover from the municipal authority in return for the service provided. [38] It is therefore covered by the provisions of the Late Payments Directive, in particular Article 3.

76. It follows that a landfill site operator such as Pontina Ambiente is entitled to interest in accordance with the national rules implementing Article 3 of the Late Payments Directive if a municipal authority fails to pay it the agreed remuneration within 'the contractual or statutory period of payment'. [39]

34 — See point 21 above.

35 — See Article 3(28) of Law No 549/95 and points 17 and 18 above.

36 — See Article 3(26) of Law No 549/95 and point 17 above.

37 — Indeed, the Italian Government stressed during the hearing that Pontina Ambiente was in the position of an ordinary contractual creditor when it sought to recover unpaid sums from solvent or insolvent municipal authorities.

38 — I add for the sake of completeness that it does so whether or not the reimbursement of the levy is invoiced separately from the municipal authority's payment for the services provided.

39 — C.f. the definition of *'late payment'* in Article 2(2) of the Late Payments Directive. Given that the municipal authorities' standard payment terms are apparently 120 days (see point 22 above), I confess to some doubt as to how effective recourse to the Late Payments Directive will prove to be in resolving the practical difficulties that have given rise to the proceedings before the national court.

## Conclusion

77. I therefore propose that, in answer to the matters raised by the Commissione Tributaria Provinciale di Roma, the Court should rule as follows:

(1) Articles 12, 14, 43 and 46 EC are inapplicable to the situation giving rise to the order for reference.

(2) Article 10 of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste is to be interpreted as precluding national provisions such as Article 3(26) and (31) of Law No 549 of 28 December 1995, which introduce a special levy for the depositing of waste in landfills and make provision for the period within which the levy is to be collected from the landfill site operator, when the levy system of which they form part does not, however, require waste providers to reimburse the amount of the levy to the landfill site operator within a reasonable time, or prescribe any effective mechanism for such reimbursement.

(3) A penalty imposed on a landfill site operator for late payment of such a levy cannot be recovered from the waste provider under Article 10 of Directive 1999/31 unless the landfill site operator can demonstrate that the penalty is a cost that it necessarily incurs because of the waste provider's failure to reimburse the levy in a timely fashion. It is for the national court to determine whether that is the case.

(4) Reimbursement of such a levy forms part of the remuneration for a commercial transaction between an undertaking and a public authority as defined in Article 2 of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions and accordingly falls within the scope of that directive as defined by Article 1. Member States are therefore required to ensure that interest can be collected in respect of late (re) payment of such a levy, together with any costs necessarily incurred in financing its advance payment so as to avoid incurring a penalty, in accordance with the provisions of Article 3.