JUDGMENT OF THE COURT (Second Chamber)

27 January 2005 *

In Case C-15/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 January 2003,

Commission of the European Communities, represented by J. Grunwald and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by E. Riedl, M. Hauer and E. Wolfslehner, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by:

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

and by

United Kingdom of Great Britain and Northern Ireland, represented by K. Manji, acting as Agent, and by M. Demetriou, Barrister, with an address for service in Luxembourg,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), C. Gulmann, G. Arestis and J. Klučka, Judges,

Advocate General: A. Tizzano,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 16 September 2004,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 By this application the Commission of the European Communities asks the Court to declare that, by failing to take the legal and practical measures necessary to give priority to the processing of waste oils by regeneration where technical, economic and organisational constraints so allow, the Republic of Austria 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 Directive').

Legal background

Community legislation

2 The aim of the Directive is to protect the environment against the harmful effects caused by the discharge and treatment of waste oils. Article 3 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.'

3 Under Article 1 of the Directive, 'regeneration' is defined as follows:

'any process whereby base oils can be produced by refining waste oils, in particular by removing the contaminants, oxidation products and additives contained in such oils'.

4 In accordance with Article 2 of Directive 87/101, the Member States were to take the measures necessary to comply with their obligations under that directive with effect from 1 January 1990.

National legislation

5 The Austrian Government notified the Commission of the following legal instruments concerning the management of waste oils:

— Regulation of 1986 on the implementation of the Law on Waste Oils (BGBl. 383/1987);

— Federal Waste Management Law of 6 June 1990 (Abfallwirtschaftsgesetz, BGBl. 325/1990) ('the AWG');

— that law was re-cast for the purpose, in particular, of establishing an approach whereby priority would be given to the regeneration of waste oils by a new Federal Waste Management Law which entered into force on 2 November 2002 (BGBl. I 102/2002, 'the AWG 2002').

6 Paragraph 1(2)(2) of the AWG is worded as follows:

'Waste is to be used in order to recycle substances or recover heat where that is environmentally advantageous and technically possible, the additional costs involved are not disproportionate in relation to other waste processing procedures, and either there is an existing market or it is possible to create a market for the substances or energy thus obtained (recovery of waste).'

7 Paragraph 2(5)(2) of the AWG 2002 defines the term 'recycling' in the following way:

'The processing for environmental purposes of waste, in order to exploit the properties of the original product, with the primary aim of directly substituting the waste or substances recovered therefrom for raw materials or products obtained from raw materials, with the exception of waste or substances recovered from such waste which are to undergo heat recovery.'

8 As regards waste oils, Paragraph 16(3)(1) of the AWG 2002 provides:

'Waste oils shall undergo recycling ... where it is technically possible to produce a base oil from the waste oil and where this is economically reasonable for the holder of the waste, taking into consideration the volumes produced, transport distances and the resulting costs. If waste oils undergo recycling, the petroleum products produced as a result must not contain more than 5 ppm PCB/PCT (polychlorobiphenyls/polychloroterphenyls) and not more than 0.03% halogens — in relation to the mass.'

9 Paragraph 22(1) of the AWG provides:

'Waste oils may be reused only by way of recycling (refining, treatment or processing) or energy recovery.'

The facts of the dispute and the pre-litigation procedure

10 The Commission sent a letter of formal notice to the Republic of Austria on 17 April 2001, on the ground that the national authorities had failed to take the measures necessary to give priority to the processing of waste oils by regeneration where technical, economic and organisational constraints so allowed.

11 In its reply of 22 June 2001 the Republic of Austria informed the Commission that the combined provisions of Paragraphs 22(1) and 1(1) of the AWG fulfilled one of the Directive's objectives by giving priority to the regeneration of waste. In that reply it also stated that Austria did not possess a regeneration plant for waste oils as the total annual production of 45 000 tonnes was insufficient to make such a plant economically viable, the threshold for viability being between 60 000 and 80 000 tonnes per year.

12 The Commission took the view, however, that the Austrian legislation did not satisfy the requirements of Community law. It therefore sent a reasoned opinion to the Republic of Austria, by letter of 21 December 2001, in which it maintained that the national authorities had not taken the practical and legal measures necessary to give priority to the processing of waste oils by regeneration where technical, economic and organisational constraints so allowed, and called on that Member State to take the measures necessary to comply with that reasoned opinion within two months from the date of its notification.

13 The Republic of Austria responded to that reasoned opinion by sending observations, by letters of 18 and 22 March 2002, in which it asserted that the amended version of the AWG's provisions clearly give priority to regeneration.

14 The Commission considered, however, that the Republic of Austria had not complied with the requirements of that reasoned opinion. It therefore decided to bring the present action.

15 By order of the President of the Court of 17 June 2003, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland were given leave to intervene in support of the forms of order sought by the Republic of Austria.

The action

Arguments of the parties

16 The Commission points out that the priority to be given by the Member States to processing by regeneration is laid down in the Directive itself, since all other types of disposal have been shown to be even more harmful to the environment.

17 The Commission takes the view that neither Paragraph 1(2)(2) nor Paragraph 22(1) of the AWG gives priority to the regeneration of waste oils, but rather that those provisions attach the same importance to regeneration and to energy recovery, that is the burning of waste oils, thereby abandoning the order of priority established between those two processes.

18 Furthermore, the Commission argues that Paragraph 16(3)(1) of the AWG 2002 also fails to give priority to the regeneration of waste oils. To the contrary, that provision subjects regeneration to two restrictive conditions which are not laid down as such in the Directive, namely, on the one hand, the criterion of acceptability and, on the other, the setting of certain limit values (5 ppm of PCB/PCT and 0.03% of halogens). Those two restrictive conditions are not conducive to either giving priority to or promoting regeneration.

19 The Commission considers that those conditions shift the responsibility for complying with the principle of priority to the holders of waste instead of making it the responsibility of the public authorities, as the Directive requires.

20 As regards the argument that regeneration is uneconomical in Austria because of the small quantity of waste oils generated on its territory, the Commission argues that the Directive applies not only to Member States that produce large quantities of waste oils but also to all the other Member States. Furthermore, no tangible argument has been put forward to show why the regeneration of waste oils is uneconomical in Austria.

21 The Commission states that the point from which the regeneration of waste oils may be financially viable depends on various economic factors, and that the capacity of regeneration plants is only one such factor. Furthermore, it cannot be concluded from the statements of the Austrian authorities that they have endeavoured to create the appropriate conditions to ensure the viability of a regeneration plant for waste oils or for using the regeneration capacities of other Member States.

22 The Austrian Government considers that the obligation in Article 3(1) of the Directive has been transposed by the various provisions of the AWG. In particular the amendments to the AWG, which entered into force in 2002, further highlight the priority given to the regeneration of waste oils. In accordance with Paragraph 16 (3)(1) of the AWG, waste oils are to undergo recycling, that is, regeneration, to the extent that such a procedure is technically possible and economically acceptable.

23 The Austrian Government asserts that, under Article 3(1) of the Directive, there must be regeneration only where it is not precluded by technical, economic and organisational constraints. According to the case-law of the Court, those constraints should not be interpreted restrictively and should be understood as reflecting the principle of proportionality.

24 The Austrian Government submits that it is not apparent, either from the Directive or the case-law, that such constraints should not be linked to the situation of the holder of the waste. The Directive does not, in any event, contain any indication that it is for the Member States themselves to collect and regenerate waste oils or that it is only the Member States that must be affected by such constraints. Against that background, the term 'constraints' for the purposes of Article 3(1) of the Directive was clarified, with a view to its effectiveness, in the amended version of the AWG.

25 As regards the setting of a number of limit values for the base oil produced by regeneration, the Austrian Government states that the Directive itself sets such values for regenerated oil. Furthermore, the conditions required for the re-use of regenerated base oils made it necessary to introduce such ceilings.

26 The Austrian Government submits that, having regard to the quantities concerned, the construction of a regeneration plant specifically for waste oils recovered from third parties was uneconomical. The viability of the regeneration of waste oils depends on several economic factors and the obligation to give priority to the regeneration of waste oils cannot extend so far as to require the Member State to construct itself a plant which is uneconomical, in order to allow regeneration to take place on its territory or to oblige holders of waste to carry out regeneration.

27 The Austrian Government points out that the amendment of the AWG sought to recast the applicable law on the subject, the scope of which now also covers the regeneration of waste oils within undertakings, rather than just regeneration by third parties as it did before. The fact that the national legislation gives priority to the regeneration of waste oils is demonstrated, in particular, by the fact that those oils are exported for the purposes of regeneration as well as by a number of financial measures.

28 The Finnish Government considers, in its intervention in support of the forms of order sought by the Republic of Austria, that the national provisions at issue do give priority to regeneration. Moreover, the priority required is not absolute given the existence of a condition of feasibility from the technical, economic and organisational perspectives.

29 The Finnish Government asserts that the Member States are not obliged to construct regeneration plants, because the viability of that process depends on several factors, such as the quantity of waste oil produced, transport distances, production costs and the market price. The existence of economic conditions permitting regeneration should be considered on a case-by-case basis, with account being taken of the relevant circumstances as a whole in the Member State concerned.

30 The United Kingdom Government, which has also intervened in support of the Republic of Austria, takes the view that Paragraph 16(3) of the AWG 2002 properly implements Article 3(1) of the Directive. In particular, the national legislation places a requirement on the holders of waste oils to process them by way of regeneration.

31 The United Kingdom Government states that the AWG correctly gives effect to the principle of proportionality by requiring holders of waste oils to process them by regeneration unless it is technically impossible or economically unreasonable for them to do so. It is legitimate for Member States to discharge the obligations imposed upon them by directives by arranging in the framework of domestic legislation the rights and obligations of individuals or undertakings.

32 The United Kingdom Government acknowledges that Article 3(1) of the Directive requires Member States to take measures on a macroeconomic level to prioritise regeneration and to tackle any obstacles to such regeneration, to an extent proportionate to the objective pursued. The scope of that obligation varies, however, according to the circumstances in each Member State and the actual form of the measures required depends on the nature of any constraints that exist in that State.

33 The United Kingdom Government argues, lastly, that the small quantities of waste oils produced in Austria and the fact that Austria does not possess a regeneration plant are relevant factors that the Austrian Government is entitled to take into account when assessing the economic constraints upon regeneration and the scope of its obligation under Article 3(1) of the Directive.

Findings of the Court

34 It must be noted, as a preliminary point, that the recasting of the AWG resulting from the second law on waste management, in particular the amendments to Paragraph 16(3), entered into force only on 2 November 2002, that is to say after the expiry of the two-month period fixed in the reasoned opinion to allow the Republic of Austria to comply with its obligations.

35 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, in particular Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7, and Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9).

36 In those circumstances the Republic of Austria's argument that the prioritisation of regeneration of waste oils was clarified in the framework of the recasting of the AWG cannot be taken into consideration by the Court.

37 As far as the legal situation before the recasting of the AWG in 2002 is concerned, it should be pointed out, as the Advocate General rightly observed in point 45 of his Opinion, that the national provisions applicable on the matter do not constitute a legal context calculated to ensure priority for regeneration. The provisions in question authorise the disposal of waste oils by recycling 'or' by energy recovery, thereby placing regeneration and combustion on exactly the same footing in disregard of the order of precedence laid down by Article 3(1) of the Directive.

38 As regards the argument relied on by the Republic of Austria, that putting in place regeneration plants on its territory is uneconomical and that in those circumstances and by reason of the principle of proportionality the obligations of the Member States concerned should be modified according to the actual circumstances prevailing in them, it must be recalled, as the Court held in paragraphs 35 to 43 of its judgment in Case C-102/97 *Commission* v *Germany* [1999] ECR I-5051, that one of the primary objectives of the Directive was to give priority to the processing of waste oils by regeneration. Therefore, to consider that the technical, economic and organisational circumstances obtaining in a Member State automatically constituted constraints making it impossible to adopt the measures provided for in Article 3(1) of the Directive would deprive that provision of all practical effect, since the obligation imposed on Member States would be limited by maintenance of the status quo, with the result that there would be no genuine obligation to take the measures necessary to give priority to the processing of waste oils by regeneration.

39 Furthermore, as regards such priority, it must be pointed out, as the Court stated in paragraphs 38 and 39 of the judgment in *Commission* v *Germany*, that the reference to 'technical, economic and organisational constraints' in Article 3(1) of the Directive forms part of a provision giving general expression to the obligation imposed on Member States and that the Community legislature did not thereby 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 It is clear from all of the foregoing that the Commission's action must be regarded as well founded.

41 Accordingly, it must be held that, by failing to adopt the measures necessary to give priority to the processing of waste oils by regeneration where the technical, economic and organisational constraints so allow, the Republic of Austria has failed to fulfil its obligations under Article 3(1) of the Directive.

Costs

42 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 asked that the Republic of Austria be ordered to pay the costs and the latter has been unsuccessful in its defence, it must be ordered to pay the costs. In accordance with Article 69(4), Finland and the United Kingdom are to bear their own costs.

On those grounds the Court (Second Chamber) hereby:

1. **Declares that, by failing to adopt the measures necessary to give priority to the processing of waste oils by regeneration where the technical, economic and organisational constraints so allow, the Republic of Austria 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 Republic of Austria to pay the costs;**

3. **Orders the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]