OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 16 March 1989 *

My Lords,

1. By Decision No 25 of 16 February 1987 the Mayor of Cinisello Balsamo in Lombardy ordered *inter alia* as follows:

'It is prohibited, from 1 September 1987 until the entry into force of similar provisions at the regional or national level, to provide customers with non-biodegradable bags or other containers in which to carry away their purchases, or to sell or otherwise distribute plastic bags, with the exception of those intended for the disposal of rubbish.'

That Decision was challenged before the regional administrative court of Lombardy by the plaintiffs, all of whom appear to have an interest in the manufacture of plastic bags. The challenge was based on the ground among others that the Decision was contrary to three Council directives on waste: Council Directive 75/442 of 15 July 1975 on waste (Official Journal 1975, L 194, p. 39), Council Directive 76/403 of 6 April 1976 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (Official Journal 1976, L 108, p. 41) and Council Directive 78/319 of 20 March 1978 on toxic and dangerous waste (Official Journal 1978, L 84, p. 43). Interim suspension of the Decision was granted [on 8 July 1987] and on 30 November 1987 the regional administrative court made this reference for a preliminary ruling, received at the Registry of this Court on 21 December 1987.

2. The first question referred asks whether the Directives mentioned above 'give individual EEC nationals the right under Community law, a right which national courts must uphold even as against Member States (and which Member States cannot therefore restrict), to sell or use the products concerned by those Directives, since the Directives provide for the observance of certain rules regarding the disposal of the products in question, not the prohibition of their sale or use'.

3. The second and third questions ask in substance whether a failure to observe any obligation under Community law to notify the Commission in advance of measures of the kind in issue in this case gives rise to individual rights; and the fourth question asks in substance whether Community law requires the administration to pay compensation in respect of infringement by the

* Original language: English.

administration of rights protected by Community law even where national law does not provide for such compensation.

The first question

4. It must first be pointed out that, of the three Directives relied upon by the plaintiffs in the national proceedings, only the first, the Directive on waste, is of possible application in this case. As the plaintiffs themselves recognize in the written observations submitted to this Court, no issue arises under the second or third Directives mentioned, because the plastic bags in question do not contain polychlorinated bi- or terphenyls nor are they toxic and dangerous waste.

5. The Directive on waste is broad in scope. As the first recital of the preamble indicates, it was designed in part to approximate the laws of the Member States on waste disposal on the ground that differences in national provisions might create unequal conditions of competition and thus directly affect the functioning of the common market. It was also designed, according to the second recital, to achieve one of the aims of the Community in the sphere of protection of the environment and improvement of the quality of life. Subsequent recitals refer to the objective of the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste; and to the conservation of natural resources by the recovery of waste and the use of recovered materials. 'Waste' is broadly defined in Article 1(a) of the Directive as meaning 'any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force'. Article 2(1) provides that, 'without prejudice to this Directive, Member States may adopt specific rules for particular categories of waste'. Article 2(2) excludes from the scope of the Directive certain forms of waste, including waste covered by specific Community rules. Article 3 reads as follows:

'1. Member States shall take appropriate steps to encourage the prevention, recycling and processing of waste, the extraction of raw materials and possibly of energy therefrom and any other process for the re-use of waste.

2. They shall inform the Commission in good time of any draft rules to such effect and, in particular, of any draft rule concerning:

(a) the use of products which might be a source of technical difficulties as regards disposal or lead to excessive disposal costs;

(b) the encouragement of:

(i) the reduction in the quantities of certain waste,

(ii) the treatment of waste for its recycling and re-use,

(iii) the recovery of raw materials and/or the production of energy from certain waste;

(c) the use of certain natural resources, including energy resources, in applications where they may be replaced by recovered materials.'

6. The plaintiffs' contention is in substance that, because the Directive does not prohibit the sale and use of the products concerned, but only contains provisions for the approximation of national legislation regarding their disposal etc., it must be taken to require Member States to allow the sale and use of the products. On the assumption that the plastic bags in question are waste within the meaning of the Directive, the contention is in my view far-fetched. It is clear that the Directive does not preclude Member States from taking measures to limit the sale or use of products liable to form waste. On the contrary, as the Commission points out, the Directive is concerned *inter alia* with the prevention of waste and Member States are required, by Article 3(1) to take appropriate steps to encourage the prevention of waste, and by Article 3(2) to inform the Commission in good time of any draft rules to such effect. It is clear that the Directive does not confer on individuals the right to sell or use the products covered by it.

7. That conclusion is subject of course to the observance of the general provisions of the Treaty and in particular Article 30. The plaintiffs seek to rely on Article 30 in support of their argument, but no question on Article 30 has been referred by the national court, and the issues which such a question would raise have not been argued in the other observations submitted to the Court. In those circumstances, the Court cannot in my view be invited to rule on the question; but if it were thought to arise, then it would be necessary to have regard to the facts of the case in order to see whether the measure in issue is capable of constituting a restriction on trade between Member States, and whether if so it is capable of being justified under Article 36 of the Treaty or under the principles stated in Case 120/78 *Rewe* ('Cassis de Dijon') [1979] ECR 649. In particular the question would arise whether in all circumstances the measure is liable to give rise to a restriction on trade between Member States which is disproportionate to the objectives of the measure: see among recent cases the judgment of the Court of 20 September 1988 in Case 302/86 *Commission* v *Denmark*. In the light particularly of that decision, it may be that the measure, although otherwise potentially constituting a restriction contrary to Article 30, would be justified by the aim of protecting the environment. At the hearing the plaintiffs contended that the present case differed from *Commission* v *Denmark*: here the environmental justification is more doubtful, and the measure in issue, involving as it does a complete prohibition of marketing, is in their submission in any event disproportionate. In the absence of further statements of fact and fuller argument, however, I consider it would not be appropriate to express a concluded view on the matter.

Second and third questions

8. The plaintiffs seek to rely on the obligation under Article 3(2) of the Directive to inform the Commission in good time of any draft rules in order to dispute the applicability of the measure in issue in this case where the Commission has not been informed of it. The plaintiffs rely by analogy on Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations (Official Journal 1983, L 109, p. 8) and on the provisions of Article 93(3) of the Treaty.

9. The second question is in the following terms:

'(a) Does it follow from the Community directives referred to or from Community law in general that any draft regulation or legislative measure (regarding the sale or use of the products in question) which may give rise to technical difficulties in their disposal or to excessive costs of disposal must be brought to the attention of the Commission before its adoption?

(b) Does that obligation bind the State and municipalities, with the result that they have no power to adopt provisions regarding the sale or use of products other than those included by Directive 76/403 in the exhaustive list of substances considered harmful unless it has first been determined at the Community level that the measure does not create unequal conditions of competition?'

10. It should first be noted that the obligation to inform the Commission in good time of any draft rules is contained in only the first Directive, the Directive on waste. The Commission submits that although the other Directives contain no such rule, Article 3 of the Directive on waste also covers draft rules on the waste covered by the other Directives. That seems doubtful since, as has been seen, Article 2(2) of the Directive on waste excludes from the scope of that Directive waste covered by specific Community rules. The point need not be decided in this case, since the other Directives in any event are not applicable. On the question whether the Directive on waste is applicable, the United Kingdom considers that plastic bags supplied for the purpose of carrying goods home are not waste. The Portuguese and United Kingdom Governments also argue that the marketing of the plastic bags is outside the scope of the Directive so that any proposal to ban the marketing is also outside its scope. The Italian Government and the Commission consider that there may be an obligation to inform the Commission under Article 3(2) of the Directive, but that, in response to the second part of the question, a failure to do so does not render the measure unlawful.

11. In my view, while I accept that plastic bags are not waste at the time when they are supplied to customers, account must be taken of the fact that they will commonly be thrown away after their contents have been taken home. Consequently in my view a measure of the kind in issue in this case can

properly be regarded as a measure to encourage the prevention of waste within the meaning of Article 3(1) of the Directive, and is therefore a measure which should be notified in draft to the Commission under Article 3(2). The fact that the measure is aimed at all non-biodegradable containers is a sufficient indication that its objective is to encourage the prevention of waste.

12. It makes no difference, in my view, whether the measure is adopted by a municipal authority. The Italian Government argued at the hearing that Article 3 of the Directive applies only to measures of a certain importance, not to measures adopted by a very small municipality; it might be different if the measure were adopted in Milan, Rome or Naples. I would reject that argument, first, because, as the plaintiffs suggest is in fact the case here, similar measures might be adopted by many municipal authorities with the same effect as a measure of wide application; secondly, because it would not be feasible to distinguish between municipal measures according to the area or population affected, in the absence of any legislative criterion; and thirdly because, as I shall point out, Community legislation provides for a specific exception for measures laid down by local authorities where it is appropriate to do so, and there is no such exception here.

13. The question also asks whether there is an obligation to notify under Community law in general, and the Commission refers in this connection to Directive 83/189 referred to above, laying down a procedure for the provision of information in the field of technical standards and regulations. Article 8 of that Directive requires Member States to communicate immediately to the Commission draft measures in that field. It does not seem to me, if it were necessary to decide the point, that the measure in issue falls within the scope of the Directive. The Commission considers that the measure might come within the notion of 'technical regulation' as defined in Article 1(5) of the Directive, but points out that that definition in any event excludes measures laid down by local authorities. It is therefore not necessary to consider that Directive further on this point.

14. On the second part of the second question, which raises the issue whether a failure to inform the Commission might render the measures unlawful, a comparison between Directive 83/189 and the Directive on waste is instructive. The former Directive contains detailed provisions enabling the Commission and other Member States to make comments on the notified drafts and requires Member States in certain circumstances to postpone the adoption of the drafts for certain periods. There are no corresponding provisions in the Directive on waste, which is confined in this respect to the obligation to inform the Commission. In consequence, in the absence of any prescribed procedure for suspension of introduction of the measure, or for Community control, it cannot be maintained that a failure to inform the Commission has the effect of rendering the measures unlawful. That is not to say that notification has no practical consequences: as the agent for the Commission pointed out at the

hearing, notification might lead the Commission to propose measures for the harmonization of national legislation where there might otherwise be an obstacle to the functioning of the common market; or it might lead the Commission to recommend the Member State to postpone implementation of the measure. But that is quite different from the cases where there is an obligation to suspend implementation, or where a failure to inform the Commission renders the measure unlawful.

15. The plaintiffs' attempt to rely on an analogy with Article 93(3) of the EEC Treaty must also be rejected. The plaintiffs contend that Article 93 has the effect of rendering unlawful the introduction of a new aid which has not been notified to the Commission or which has been put into effect before the period laid down for the Commission's consideration, notwithstanding the absence of any detailed procedural provisions in Article 93. However, a procedure for the examination by the Commission of proposed aids is contained in Article 93(2) of the Treaty; and the last sentence of Article 93(3) provides expressly that the Member State concerned shall not put its proposed measures into effect until that procedure has resulted in a final decision.

16. The third question is in the following terms:

'Having regard to the first recital in the preambles to the three Directives referred to in the first question, in particular where it states that any disparity between the provisions on the disposal of the products in question applicable or in preparation in the various Member States may create unequal conditions of competition and thus directly affect the functioning of the common market:

(a) do that recital and the three directives in general give rise to a right (diritto soggettivo comunitario) on the part of EEC nationals, and a corresponding obligation on the part of all the Member States, under which any draft regulation regarding the use of the products in question which may result in technical difficulties in their disposal or excessive costs of disposal must be brought to the attention of the Commission before its adoption?

(b) does that right (concerning the obligation to bring any draft regulation to the attention of the Commmission before it is adopted, as set out in part (a)), if it exists, extend to *general* measures issued by municipalities, which are thus limited in their territorial application?'

17. It follows from the view I have expressed in relation to the second question that the obligation of Member States to inform the Commission of draft measures under Article 3(2) of the Directive on waste does not have a suspensory effect, in contrast to the obligation under Article 8 of Directive 83/189 and that under Article 93(3) of the Treaty. The answer to Question 3(a) is therefore that Article 3(2) of the Directive on waste does not confer

on individuals any rights which can be relied upon before the national courts. The obligation in question arises only as between the Member State and the Community. Question 3(b) does not therefore arise. If it did fall to be answered, then in my view any obligation, and any corresponding right, would be applicable equally, for the reasons already given, to measures taken by the municipal authorities and having limited territorial effect.

The fourth question

18. The fourth question asks in substance whether Community law requires the administration to pay compensation in respect of infringement of rights protected by Community law even where national law does not provide for such compensation. In view of the answers to the previous questions it is unnecessary to answer that question.

19. The national court explains that the question is put because the operation of the Decision can be suspended under Italian law only if its implementation would cause serious and irreparable harm; but the harm would not be irreparable if damages could be awarded in respect of losses caused by the Decision. Since no claim for damages appears to be available otherwise under Italian law, it seemed necessary to the national court to know whether, in substance, Community law requires the national courts to provide a remedy in damages where Community law is infringed by the national authorities. Argument on that issue has been advanced by the plaintiffs and by the United Kingdom Government. I consider that it can be contended, on the basis of the Court's case-law, that where Community law confers rights on individuals, national courts must provide an appropriate and effective remedy in respect of infringement by the national authorities of those rights. However since, on the view which I have taken, the only infringement which might arise on the questions that have been referred in this case is the failure to notify the Commission under Article 3(2) of the Directive on waste, a failure which gives rise to no individual rights, the issue of the availability of a claim for damages based on Community law does not arise in this case.

Conclusion

20. Accordingly, in my opinion the questions referred by the regional administrative court of Lombardy should be answered as follows:

(1) Council Directive 75/442/EEC on waste confers no rights on individuals to sell or use the products concerned by that Directive.

(2) Article 3(2) of the Directive on waste must be interpreted as meaning that Member States shall inform the Commission in good time of draft measures for the prevention of waste; however a failure to inform the Commission does not confer on individuals any rights which can be relied upon before the national courts.