JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004 *

In Case C-194/01,

Commission of the European Communities, represented by G. zur Hausen, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by H. Dossi, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that the Republic of Austria has failed to fulfil its obligations under Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32), and under Council Directive 91/689/EEC of 12

* Language of the case: German.

December 1991 on hazardous waste (OJ 1991 L 377, p. 20), as amended by Council Directive 94/31/EC of 27 June 1994 (OJ 1994 L 168, p. 28),

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, A. Rosas (Rapporteur) and S. von Bahr, Judges,

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 May 2003, at which the Commission was represented by G. zur Hausen and the Republic of Austria by E. Riedl, F. Mochty and E. Wolfslehner, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 May 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to transpose correctly the concept of 'waste' in Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) ('Directive 75/442'), and the concept of 'hazardous waste' in Article 1(4) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20), as amended by Council Directive 94/31/EC of 27 June 1994 (OJ 1994 L 168, p. 28) ('Directive 91/689'), the Republic of Austria had failed to fulfil its obligations under those directives.

Legal background

Community legislation

2 Article 1(a) of Directive 75/442 defines 'waste' as

'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure'.

3 Article 2 of that directive lists the exclusions from its scope.

4 Under Article 168 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), the national measures transposing Directive 75/442 were to be brought into force as from the date of accession, 1 January 1995.

5 Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442 (OJ 1994 L 5, p. 15) established a list of wastes called the European Waste Catalogue (EWC). That decision was addressed to the Member States. The introductory note to the EWC reads as follows:

'1. Article 1(a) of Directive 75/442/EEC defines the term "waste" as: "any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard".

2. The second indent of Article 1(a) requires the Commission, acting in accordance with the procedure laid down in Article 18, to draw up a list of waste belonging to the categories listed in Annex I. This list is commonly referred to as the European Waste Catalogue (EWC), and applies to all wastes, irrespective of whether they are destined for disposal or for recovery operations.

3. The EWC is a harmonised, non-exhaustive list of wastes, that is to say, a list which will be periodically reviewed and if necessary revised in accordance with the committee procedure.

However, the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances. The entry is only relevant when the definition of waste has been satisfied.

4. The waste featuring in the EWC is subject to the provisions of the Directive unless Article 2(1)(b) of this Directive applies.

5. The EWC is to be a reference nomenclature providing a common terminology throughout the Community with the purpose to improve the efficiency of waste management activities. In this respect the European Waste Catalogue should constitute the basic reference for the Community programme on waste statistics launched pursuant to the Council resolution of 7 May 1990 on waste management policy ... .

6. The EWC will be subject to adaptation to scientific and technical progress in accordance with the procedure laid down in Article 18 of the Directive.

7. The reading of an individual code of waste in the EWC should not be isolated from its heading.

8. The EWC does not prejudge the list of "hazardous wastes" as required by Article 1(4) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste ...'

6 Under Article 1(4) of Directive 91/689, '"hazardous waste" means:

— wastes featuring on a list to be drawn up in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC on the basis of Annexes I and II to this Directive, not later than six months before the date of implementation of this Directive. These wastes must have one or more of the properties listed in Annex III. The list shall take into account the origin and composition of the waste and, where necessary, limit values of concentration. This list shall be periodically reviewed and if necessary [revised] by the same procedure,

— any other waste which is considered by a Member State to display any of the properties listed in Annex III. Such cases shall be notified to the Commission and reviewed in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC with a view to adaptation of the list.'

7 Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689 (OJ 1994 L 356, p. 14) was

addressed to the Member States. The introduction to the list of hazardous waste reads as follows:

'1. The different types of waste in the list are fully defined by the six-digit code for the waste and the respective two-digit and four-digit chapter headings.

2. Inclusion in the list does not mean that the material or object is a waste in all circumstances. The entry is only relevant when the definition of waste according to Article 1(a) of Directive 75/442/EEC has been satisfied, unless Article 2(1)(b) of the Directive applies.

3. The waste featuring on the list is subject to the provisions of Council Directive 91/689/EEC on hazardous waste, unless Article 1(5) of the Directive applies.

4. In accordance with Article 1(4), second indent of Directive 91/689/EEC, any waste other than the ones listed below which is considered by a Member State to display any of the properties listed in Annex III to Council Directive 91/689/EEC on hazardous waste is hazardous. All such cases will be notified to the Commission and will be examined with a view to amending the list in accordance with Article 18 of Directive 75/442/EEC.'

8 Under Article 10(1) of Directive 91/689, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive before 27 June 1995.

National legislation

9 Paragraph 2(1) of the Bundesgesetz über die Vermeidung und Behandlung von Abfällen, also known as the Abfallwirtschaftsgesetz (Federal Law on the prevention and treatment of waste), of 6 June 1990 (BGBl. 325/1990, in the version published in BGBl. I 151/1998, 'the AWG') defines 'waste' as follows:

'... movable objects

1. which the owner or possessor wishes to discard or has discarded, or

2. whose classification and treatment as waste is necessary in the public interest (Paragraph 1(3)).

Classification and treatment as waste in the public interest may also be required where payment may be obtained for a movable object.'

10 Paragraph 1(3) of the AWG lists the circumstances in which the public interest requires the collection, storage, transport and treatment of those objects as waste.

11 Under Paragraph 2(5) of the AWG, the Bundesminister für Umwelt, Jugend und Familie (Federal Minister for the Environment, Youth and the Family) is obliged to determine by regulation the waste which is to be regarded as hazardous for the protection of the public interest within the meaning of Paragraph 1(3) of the AWG and the conditions under which that waste may be classified as non-hazardous in a particular case. Paragraph 2(5) contains a list of 15 points which agrees with Annex III to Directive 91/689, listing all the properties relevant for assessing risks. The last indent of Paragraph 2(5) prescribes that that list of hazardous waste is to include all the categories of waste 'which correspond to those in the list of hazardous waste within the meaning of Article 1(4) of [Directive 91/689]. Austrian standards may be declared binding for specifying the relevant properties and determining the list of hazardous waste. Only waste covered by the regulation is regarded as hazardous'.

12 Austrian standard S 2100 of 1 September 1997 contains the national catalogue of waste. That catalogue includes both hazardous and non-hazardous waste, all listed and classified according to the catalogue's own method.

13 Pursuant to Paragraph 2(5) of the AWG, the Minister for the Environment, Youth and the Family made a regulation in 1997 on the determination of hazardous waste and problem substances (BGBl. II 227/1997). Until 30 June 2000, Paragraph 3(2) of that regulation provided as follows:

'As from 1 July 2000 waste covered by the decision concerning a list of hazardous waste on the basis of Article 1(4) of [Directive 91/689] is regarded as hazardous. The Federal Ministry of the Environment, Youth and the Family will publish this list in the Bundesgesetzblatt before 1 July 2000.'

14 A regulation amending the above regulation was published on 30 June 2000 (BGBl. II 178/2000). It repealed Paragraph 3(2) of the 1997 regulation and introduced a provision stating that the regulation as amended transposed Directive 91/689 and Decision 94/904.

Pre-litigation procedure

15 By letter of 14 July 1999, the Commission informed the Republic of Austria that it considered, on the basis of the examination of the national transposition measures it had carried out following a complaint, that the above provisions did not correspond in a number of points to the requirements of Directives 75/442 and 91/689. The Commission set out its criticisms of the Austrian legislation and gave the Republic of Austria formal notice to submit its observations within two months.

16 By fax of 8 October 1999, the Republic of Austria replied to the letter of formal notice, disputing the correctness of the Commission's conclusions.

17 As it was not convinced by the arguments put forward in the reply, the Commission on 27 July 2000 sent the Republic of Austria a reasoned opinion. It invited it to take the necessary measures to comply with the opinion within two months from its notification.

18 The Republic of Austria replied by fax of 2 November 2000. It maintained its position that the directives in question were correctly transposed into national law. It stated, however, that an amendment to the AWG was about to be enacted.

19 Since it found that the Republic of Austria had not complied with the reasoned opinion within the prescribed period and considered that the legal argument presented by the Republic of Austria could not be accepted, the Commission decided to bring the present action.

The action

20 At the hearing on 14 May 2003 the Commission expressly abandoned some of the heads of claim it had made in support of its action, thus agreeing to take account of the amendments to the legislation which were formally notified to it by the Republic of Austria after the closure of the written procedure in the present case. However, the Commission stated that it wished to maintain three of the complaints it had raised against the measures taken by the Republic of Austria to transpose Directives 75/442 and 91/698. Consequently, the subject-matter of the present action is now limited to the complaints, first, of incorrect transposition of the EWC established by Decision 94/3, second, of incorrect transposition of the list of hazardous waste established by Decision 94/904, and, finally, of incorrect transposition of Annexes I and II to Directive 91/689.

The complaint of incorrect transposition of the EWC

21 The Commission essentially asks the Court to declare that, by failing to transpose correctly the EWC established by Decision 94/3 pursuant to Article 1(a) of Directive 75/442, the Republic of Austria has failed to fulfil its obligations under that directive. As may be seen from the application, the Commission criticises the Republic of Austria more precisely for failing to transpose that list of waste into national law. The defendant submits that it has fulfilled its obligations and contends that the Commission's claim should be rejected.

Arguments of the parties

22 According to the Commission, the Republic of Austria has failed to fulfil its obligation to transpose into national law the EWC established by Decision 94/3. It observes, first, that under the fourth paragraph of Article 249 EC the decision is binding on the addressees listed in Article 2, in other words the Member States. It then points out that the EWC is closely linked to Annex I mentioned in Article 1(a) of Directive 75/442, since it constitutes 'a list of wastes belonging to the categories listed in Annex I'. The Commission refers, finally, to point 5 of the introductory note to the EWC, from which it is apparent that the EWC 'is to be a reference nomenclature providing a common terminology throughout the Community with the purpose to improve the efficiency of waste management activities'. It is therefore essential to apply the EWC at national level in order to ensure the effectiveness of the European waste management policy on the basis of terminology harmonised at Community level.

23 The Commission acknowledges that, as stated in point 3 of the introductory note to the EWC, the EWC is not an exhaustive list. However, that does not exclude its binding nature, in that it is apparent from points 1, 3 and 4 of the introductory note that substances or objects in the EWC are subject to the provisions of Directive 75/442 if they satisfy the definition of 'waste', with the exception of the cases provided for in Article 2(1)(b) of that directive.

24 Point 5 of the introductory note does not support the Austrian Government's view that the role of the EWC is solely to serve as a common reference for the purposes of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1) or of a regulation concerning statistics on waste.

As regards compliance with the Republic of Austria's obligations under Regulation No 259/93, the Commission states that its application does not relate to those obligations but to those under Directive 75/442 read together with Decision 94/3.

25 The Republic of Austria cannot avoid the latter obligations by claiming that the national catalogue is better able to improve the effectiveness of waste management and protection of the environment. The measures taken by the Community pursue that objective precisely by means of a common reference nomenclature. Consequently, submits the Commission, the Member States are not entitled to depart from the EWC on the ground that their national provisions are of better quality than the Community provisions. The Commission points out, moreover, that the EWC was the subject of a favourable opinion from the committee set up by Article 18 of Directive 75/442. The argument that the non-transposition into Austrian law of the EWC does not harm the proper functioning of the internal market cannot be accepted either, since a finding of a failure to fulfil obligations does not depend on a finding of damage caused by the Member State (Case C-263/96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 30).

26 At the hearing, the Commission added that the obligation to transpose the EWC was confirmed by the Court in its judgment in Case C-196/01 *Commission* v *Luxembourg* [2002] ECR I-569. It also referred to Article 4 of Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3 and Decision 94/904 (OJ 2000 L 226, p. 3), which provides that Member States are to take the measures necessary to comply with that decision by 1 January 2002 at the latest. According to the Commission, that article explicitly imposes an obligation to transpose on the Member States. Such an obligation is already implicit in Decisions 94/3 and 94/904.

27 The Commission further considers that the divergences between the system of classification used by the Austrian waste catalogue and that used by the EWC are harmful to Austrian operators in their commercial relations with operators from

other Member States. In its view, Austrian operators know and apply only the national catalogue, since no binding provision in Austria requires them to apply the Community lists of waste. The use of the Community lists is, however, prescribed by Commission Decision 94/774/EC of 24 November 1994 concerning the standard consignment note referred to in Regulation No 259/93 (OJ 1994 L 310, p. 70), which prescribes that the consignment note must mention the national code and the Community code of the waste in question.

28 The Austrian Government for its part submits that Community law does not impose an obligation on Member States to reproduce the EWC word for word in a national legislative act.

29 First, the Government expresses doubt as to the existence of a formal obligation to transpose that list in the context of the obligation to transpose the concept of 'waste' laid down by Directive 75/442. It is apparent from points 3 and 5 of the introductory note to the EWC that the EWC does not form part of that concept of 'waste' but constitutes a non-exhaustive list of substances which is intended to serve as a reference nomenclature, in particular for the purposes of Regulation No 259/93 or of a regulation relating to statistics on waste.

30 According to the Austrian Government, that view of the legal nature and objective of the EWC was originally shared by the Commission itself. It observes, moreover, that because of practical difficulties the use of the EWC is not mandatory even in the field of statistics for which it was created. In those circumstances, mandatory use of the EWC in other fields requires an additional obligation laid down by Community law. That is the case with the obligation under Commission Decision 96/302/EC of 17 April 1996 establishing a format in which information is to be provided pursuant to Article 8(3) of Directive 91/689 (OJ 1996 L 116, p. 26) and with that laid down in point 15 of the model of the standard consignment note annexed to Decision 94/774.

31 In those fields the Republic of Austria of course uses the EWC reference nomenclature. As regards waste shipments governed by Regulation No 259/93, the EWC or the list of hazardous waste is also used in addition to the national list. The Austrian Government therefore submits that a finding of a failure to fulfil obligations under Community law is not possible, nor, a fortiori, is a finding of an obstacle to the working of the internal market. It also points out that, as regards the shipment of waste mentioned in Annex II to Regulation No 259/93, it suffices, in accordance with Article 11 of that regulation, to indicate the usual commercial description of the waste. Moreover, in the context of the application of that regulation, the determining system of classifying waste is that of the regulation, not the EWC system.

32 The Austrian Government submits, second, that the waste mentioned in the EWC also appears in the national catalogue in Austrian standard S 2100, which constitutes a list of waste which is more detailed than the EWC and contains additional information.

33 At the hearing, the Austrian Government observed that, unlike the situation examined by the Court in *Commission* v *Luxembourg*, the Republic of Austria always maintained that the national catalogue is an adequate transposition, materially, of the requirements of the Community lists of waste. The mandatory nature of those provisions was thus acknowledged and implemented by the national catalogue, which is itself mandatory. The Austrian Government further maintained that from the point of view of rational and ecological management of waste, which constitutes the objective of the Community legislation, the Austrian catalogue has advantages over the EWC which facilitate its application by operators and by the competent authorities. Moreover, where the Community legislation prescribes the use of the EWC, the codes of the reference nomenclature are applied directly by the Austrian authorities. The Republic of Austria therefore complies with its obligations with respect to the relevant Community provisions.

Findings of the Court

34 According to settled case-law, in an action for failure to fulfil obligations it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission which must provide the Court with the evidence necessary for the Court to establish that the obligation has not been fulfilled, and it may not rely on any presumption (see, inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 26; and Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21).

35 In the present context, it is for the Commission to show that the national provisions relied on by the Republic of Austria to contest the failure to fulfil obligations, namely the catalogue of waste in Austrian standard S 2100, do not ensure adequate implementation of the EWC.

36 It is apparent from the arguments of the parties that the Commission does not dispute that all the substances and objects listed as waste in the EWC appear also in the Austrian catalogue of waste. However, the Commission submits that the Republic of Austria has failed to transpose the EWC, and relies on the fact that the national catalogue does not reproduce faithfully the waste nomenclature and classification system used in the Community catalogue. The Commission's position must therefore be understood as an assertion that it follows from Directive 75/442 and Decision 94/3 that the Member States are obliged to reproduce the EWC word for word in a domestic legal act and that only the adoption of such an act constitutes correct and complete transposition of the concept of 'waste' in Article 1(a) of that directive.

37 It must be stated that that provision, which defines the concept of 'waste' for the purposes of Directive 75/442, does indeed refer to the list of waste which was subsequently drawn up by Decision 94/3. However, no provision of Directive 75/442 expressly imposes an obligation on the Member States to reproduce that list of waste word for word in a domestic legal act. Moreover, an obligation to reproduce the EWC word for word cannot necessarily be derived from the obligation of the Member States to bring into force the necessary measures to comply with Directive 75/442, which currently appears in Article 19. It should be recalled that under the third paragraph of Article 249 EC a directive is binding on each Member State to which it is addressed as to the result to be achieved, but leaves the choice of form and methods to the national authorities.

38 It must also be recalled that, according to settled case-law, each of the Member States to which a directive is addressed is obliged to adopt, in its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues (see, inter alia, Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 15, and Case C-72/02 *Commission* v *Portugal* [2003] ECR I-6597, paragraph 18).

39 The obligation to ensure the full effectiveness of the directive, in accordance with its objective, cannot be interpreted as meaning that the Member States are released from adopting transposing measures where they consider that their national provisions are better than the Community provisions concerned and that the national provisions are therefore better able to ensure that the objective pursued by the directive is achieved. According to the Court's case-law, the existence of national rules may render transposition by specific legislative or regulatory measures superfluous only if those rules actually ensure the full application of the directive by the national authorities and, where the relevant provision of the directive seeks to create rights for individuals, the legal situation arising from those national rules is sufficiently precise and clear and the persons concerned are in a position to know the full extent of their rights and obligations and, where appropriate, to rely on them before the national courts (see, to that effect, Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 55, and the case-law cited).

40 In the present case, the Austrian Government referred on several occasions to the advantages from the point of view of waste management which the national catalogue of waste is said to have over the EWC. It also said that the latter appeared to it to be inadequate in several respects. In so far as this argument is aimed at challenging the Commission's decision to adopt the EWC, and hence at providing justification for the failure to transpose that decision in the Austrian legal order, the Court can only reject it.

41 The Republic of Austria cannot, outside the period laid down by Article 230 EC, contest the lawfulness of an act adopted by the Community legislature which has become final with respect to it. It is settled case-law that a Member State cannot properly plead the unlawfulness of a directive or decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision or comply with that directive (see, inter alia, Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 10, and Case C-154/00 *Commission* v *Greece* [2002] ECR I-3879, paragraph 28).

42 As regards Decision 94/3, it is not in dispute that that decision is, by virtue of the fourth paragraph of Article 249 EC, binding in its entirety on those to whom it is addressed, nor that it was addressed to all the Member States. The question nevertheless arises of whether the decision imposes an obligation on them to reproduce the EWC word for word in an act of domestic law.

43 On this point, it must be observed that, as point 5 of the introductory note to the EWC states, the EWC is intended to be a reference nomenclature providing a common terminology throughout the Community with the purpose of improving the efficiency of waste management activities. Point 5 states, however, that the EWC 'should constitute the basic reference for the Community programme on waste statistics ...'. Moreover, according to point 3 of the introductory note, the EWC is a non-exhaustive list of wastes. However, point 3 also states that the

inclusion of a material in the EWC does not mean that the material is a waste in all circumstances.

44 Since neither Directive 75/442 nor Decision 94/3 or the introductory note to the EWC provides any further indications as to the content of the obligations imposed on the Member States by that decision, it is not possible to conclude on that basis that the Republic of Austria is bound to reproduce the EWC word for word in a domestic legal act. The binding nature of Decision 94/3 for Member States allows only the conclusion that they are obliged to guarantee the use and application of the EWC as a reference nomenclature, since it provides a common terminology valid within the Community. The Republic of Austria has asserted, without being contradicted by the Commission on this point, that its competent authorities ensure the use of that reference nomenclature where that is required by Community legislation, for example where the code attributed by the EWC to a particular type of waste has to be stated on the uniform consignment note referred to in Regulation No 259/93.

45 Nor does the judgment in *Commission* v *Luxembourg* allow the conclusion that Community law requires the national waste nomenclature used by a Member State to be replaced by a domestic legal act reproducing the EWC word for word. Paragraphs 6 and 7 of that judgment show that the Luxembourg Government admitted that the introduction of a purely national nomenclature which differed from the EWC and had the effect of excluding the use of the latter for a large number of operations did not ensure integral and accurate use of the EWC. In the present case, the Austrian Government submits that the existence of a national catalogue of waste does not prevent the use of the EWC where its use is prescribed by Community law.

46 In this connection, it must be pointed out that the existence of a national waste nomenclature is not in itself incompatible with the application of the relevant Community legislation. Both the Austrian Government and the Commission noted that the model of the standard consignment note adopted by Decision

94/774 provides for the mention not only of the code corresponding in the EWC to the waste to be shipped but also of the respective code in the national catalogue. The mere coexistence of the EWC and the Austrian waste catalogue does not therefore allow it to be established that the Republic of Austria has failed to fulfil its obligations under Directive 75/442 and Decision 94/3.

47 Admittedly, it is not impossible that the differences between a national list of waste and the EWC may be such as to create difficulties and a state of uncertainty for the operators concerned, who would not then be in a position to know the extent of their rights and obligations in a field governed by Community law. However, even after being expressly invited by the Court to give an account of those difficulties, the Commission did not sufficiently identify the actual difficulties for operators and the competent authorities which derive from the fact that the Austrian catalogue follows a different system of classification of waste from the EWC. The Republic of Austria asserted that the two systems, despite their differences, are not incompatible, while the Commission did no more than submit that, in so far as the Austrian waste catalogue does not reproduce faithfully the system of the EWC, it does not constitute an appropriate transposing measure.

48 Since the Commission has not shown that the differences between the Austrian waste catalogue and the EWC are such as to harm the interests of the operators concerned and affect the principle of legal certainty, the complaint of incorrect transposition of the EWC cannot be upheld.

49 In the light of the foregoing, it cannot be held in the present case that the Republic of Austria has failed to fulfil its obligations under Directive 75/442.

The complaint of incorrect transposition of the list of hazardous waste established by Decision 94/904

Arguments of the parties

50 The Commission complains that the Republic of Austria has failed to fulfil its obligations under Directive 91/689 in that it has not correctly transposed the list of hazardous waste ('LHW') established by Decision 94/904 pursuant to that directive.

51 It considers that the definition of 'hazardous waste' in Article 1(4) of Directive 91/689 is essential for the application of that directive. The definition refers to Annexes I to III to Directive 91/689 and to the LHW established in accordance with the procedure laid down in Article 18 of Directive 75/442. Furthermore, according to the fifth recital in the preamble to Directive 91/689, it is necessary to use a precise and uniform definition of hazardous waste in order to improve the effectiveness of the management of hazardous waste in the Community. It follows that Annexes I to III to Directive 91/689 and the LHW adopted by Decision 94/904, which supplements that directive (Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 44) constitute the foundation on which the measures taken by the Member States to implement that directive must be based.

52 The Commission observes that the Republic of Austria has still not yet adopted the necessary measures to transpose the LHW established by Decision 94/904. It states that the ministerial regulation of 1997 on the determination of hazardous waste and problem substances provided for recognising the relevance of the list adopted by Decision 94/904 only from 1 July 2000, and that provision was simply repealed in the meantime without being replaced. The amending regulation made in 2000 introduced for the first time, in the new subparagraph 3 added to Paragraph 1 of the 1997 regulation, a reference to the transposition of Directive 91/689 and Decision 94/904.

53 The Commission acknowledges that both Directive 91/689 and the list adopted by Decision 94/904 are non-exhaustive. The Member States may thus classify waste other than that in Annexes I and II to that directive or on the list of hazardous waste as hazardous, and thus take more stringent protective measures in order to prohibit the abandonment, dumping and uncontrolled disposal of such waste (*Fornasar and Others*, paragraphs 46 to 51). It observes, however, that if they do so they must notify those cases to the Commission in accordance with Article 176 EC and the second indent of Article 1(4) of Directive 91/689 (*Fornasar and Others*, paragraph 51).

54 The Commission stresses that the possibility left to Member States of taking more stringent protective measures in the environmental fields harmonised by Community legislation cannot be equated to the freedom not to transpose those harmonising measures. It submits that the Member States are obliged to transpose Directive 91/689 in its entirety, including Annexes I and II and the supplement represented by Decision 94/904, and that they may go further only on certain conditions and in compliance with the procedure.

55 According to the Commission, the latitude which the Member States have in transposing directives does not, in the case of the transposition of a list of hazardous waste which supplements a basic definition in a directive and follows a precise and defined system allocating specific codes to substances and objects, allow the national measures adopted to confine themselves to including the same substances and objects and classifying them as hazardous. The Commission therefore submits that the national transposing measures must follow precisely the system laid down at Community level.

56 It observes in this respect that Decision 94/904 is mandatory for the Member States and is so closely linked with Directive 91/689 that the deadline for transposition of that directive was postponed by Directive 94/31 in order to take account of the delay in adopting the LHW. It further observes that point 1 of the

introduction to that list provides that the different types of waste are fully defined by their respective codes and that it is not disputed that, by referring to the Austrian standards, the national legislation in force makes use of a different system and other codes.

57 The criticisms which the Austrian Government makes of the content and insufficient quality of the list adopted by Decision 94/904 cannot, according to the Commission, justify the failure to fulfil the obligation of transposition. While it is undeniable that the LHW is open to improvement, the Commission notes that the Community legislature itself provided for that purpose a procedure for adaptation in Article 9 of Directive 91/689. Moreover, it submits that a Member State may not rely on Article 176 EC as a defence to an action for failure to fulfil obligations brought against it on the ground of incorrect transposition of a directive, if it has not complied with the procedure laid down by that provision of the Treaty. The Republic of Austria did not rely on Article 176 EC when it notified the regulation on the determination of hazardous waste and problem substances adopted in 1997.

58 The Austrian Government submits that it transposed Directive 91/689 and the LHW by the regulation on the determination of hazardous waste and problem substances adopted in 1997, most recently amended in 2000, in conjunction with the provisions of Austrian standard S 2100.

59 It points out that under Article 1(4) of Directive 91/689 the Member States may, under certain conditions, declare other waste hazardous. In view of the fact that the LHW was drawn up pursuant to that provision, the Austrian Government considers that the objective of the directive has been achieved by the national transposing measure. It notes that the third paragraph of Article 249 EC leaves it to the Member States to decide the form and methods for achieving the intended result of a directive. It submits that the provisions of the 1997 regulation in conjunction with Austrian standard S 2100 have the result that all waste declared to be hazardous by Directive 91/689 and the LHW is also regarded as hazardous in national law.

60 With the 1997 regulation, the Republic of Austria made use of the possibility given to it by Article 1(4) of Directive 91/689 and point 4 of the introduction to the list established by Decision 94/904 of declaring wastes other than that on that list to be hazardous, since it considered that they had one of the properties of hazardousness. That regulation was formally notified to the Commission as a transposing measure.

61 The Austrian Government considers that it demonstrated, in the letter accompanying the formal notification of that regulation, that the regulation transposed in its entirety the content of the list adopted by Decision 94/904. The Republic of Austria made sure that all the waste on that list was classified under a hazardous waste code of Austrian standard S 2100 and that there was complete concordance between the two lists.

62 According to the Austrian Government, the fact that under the fourth paragraph of Article 249 EC a decision is binding in its entirety on those to whom it is addressed does not entail an obligation to reproduce word for word the list of hazardous waste annexed to Decision 94/904.

63 It observes that, while the binding nature of that list for the Member States is not in doubt, the obligation to transpose the list into national law derives in turn from the general obligation to transpose Directive 91/689 and the concept of 'hazardous waste' it defines. In this context of transposition into national law, the list of hazardous waste is binding only as regards determination of the waste which is to be considered as hazardous, and it is for the Member States to choose the form and methods for achieving that result.

64 As regards the relationship between the LHW and the national waste catalogue, the Austrian Government states that Austrian standard S 2100 contains a more precise enumeration and lays down stricter criteria than the Community list. It observes that the Republic of Austria is cooperating actively in the revision of the LHW. However, since that revision cannot yet be regarded as completed, it is necessary to maintain the national waste catalogue in force in order to guarantee the high level of protection provided by Austrian law.

65 The Austrian Government observes that Community law does not intend to carry out a complete harmonisation in the environmental field and that both Article 176 EC and Directive 91/689 provide for the possibility of Member States adopting more stringent protective measures. In that context, maintenance of the Austrian provisions with their stricter content is justified.

66 The Community list is unsatisfactory in that, first, it is strongly influenced by the origin of the waste and, second, it is not exhaustive. Consequently, numerous wastes are not mentioned if they come from a particular sector, whereas they are classified as hazardous in another field of application. The fact that numerous wastes may in principle be classified under several different codes also creates a problem. The Austrian Government illustrates those problems with the aid of an example, comparing the classification of residues of cables containing PCBs under the Community list and the Austrian list, to show that the application of the stricter national criteria means that the waste in question can always be classified as hazardous.

67 The Austrian Government then states that the Austrian list is altogether consistent with the case-law of the Court, under which the determining criterion for declaring waste hazardous is the properties of the waste rather than its origin (*Fornasar and Others*, paragraph 56). It also refers to reflections in the context of the current revision of the Community list and to other initiatives relating to the

criteria for determining hazardous waste and possible contamination. It concludes that the codes and descriptions in the Community lists, whether the LHW or the EWC, are not sufficient to guarantee protection of the environment, especially in the case of recovery of waste, and that taking those lists over directly in national law would mean a deterioration of the ecological standards in force in Austria without the functioning of the internal market being thereby improved.

68 Having regard to the advantages of the national system of classification of waste, the Austrian Government submits that the use of the national list, while ensuring coordination with the LHW, is consistent with the objectives and principles of the Community legislation on waste management.

Findings of the Court

69 The arguments put forward by the parties in the context of this complaint are largely analogous to those put forward in the context of the first complaint. It therefore suffices, as regards these arguments, to recall the essential aspects of the Court's assessment of the points already raised by the parties.

70 Thus, for the reasons stated in paragraphs 39 to 41 above, all the arguments put forward by the Republic of Austria to show that its national provisions are better than the LHW adopted by the Council and that they ensure protection of the environment at a higher level than that guaranteed by the Community legislation must be rejected at the outset.

71 As regards the latitude enjoyed by the Member States in adopting measures to transpose the LHW into national law, it must be examined whether, as the Commission submits, Directive 91/689 and Decision 94/904 limit the exercise of that competence to the adoption of an internal transposition measure reproducing word for word the codes and classification system of the Community list.

72 It is common ground that the LHW was established pursuant to Article 1(4) of Directive 91/689, which defines the concept of 'hazardous waste' for the purposes of that directive, and that Decision 94/904 is binding on the Member States. It is also common ground that, as is apparent from the second indent of Article 1(4) of Directive 91/689 and also from point 4 of the introduction to the LHW, that list is not exhaustive. Nevertheless, it would appear that the Commission and the Republic of Austria have contrary views on the possibility for a Member State to regard waste other than that listed in the LHW as hazardous waste, and in particular on the procedure to be followed in making use of that possibility.

73 The Commission rightly points out that, under the second indent of Article 1(4) of Directive 91/689, the Member States concerned must notify the Commission of cases in which it classifies waste other than that in the LHW as hazardous (*Fornasar and Others*, paragraph 51). It has not, however, replied to the argument of the Republic of Austria that it complied with that obligation when it formally notified the Commission of the 1997 regulation transposing the LHW.

74 Nor has the Commission disputed that the Austrian catalogue of waste classifies as hazardous all the waste in the LHW. It has not therefore shown that, by adopting a list classifying other waste as hazardous, the Republic of Austria is in breach of its obligations under Directive 91/689 and Decision 94/904.

75 The Commission cannot, moreover, rely on point 1 of the introduction to the LHW, which merely explains the system of codes used in that list, to insist that Member States follow that system precisely, which would amount to doing away with any latitude enjoyed by them. Nor do the close link between Directive 91/689 and the LHW and the fact that the LHW is intended to complement a fundamental concept of that directive allow the conclusion that the Republic of Austria had to confine itself to reproducing the list in question word for word in an act of national law, having regard to the provisions of the third paragraph of Article 249 EC.

76 In those circumstances, and since the Commission has not sufficiently identified the specific difficulties for operators and the competent authorities caused by the fact that the Austrian catalogue follows a different waste classification system from that of the LHW (see paragraphs 47 and 48 above), it must be considered that the Commission has not provided the Court with the evidence necessary for the Court to establish the alleged failure to fulfil an obligation (see paragraph 34 above).

77 The complaint of incorrect transposition of the LHW must therefore be rejected.

The complaint of incorrect transposition of Annexes I and II to Directive 91/689

78 The Commission also criticises the Republic of Austria for not having transposed Annexes I and II to Directive 91/689, which it considers form an integral part of the provisions of that directive and are covered by the obligation to transpose the directive. The Austrian Government submits that the Member States are not required to transpose those annexes into national law, as they are intended to define a mandatory framework for the decision-making process described in Article 18 of Directive 75/442 and that decision-making process falls outside the obligation to transpose directives.

79 It should be observed here that Annexes I and II to Directive 91/689 are mentioned only in the first indent of Article 1(4) of that directive. According to that provision, a list of hazardous waste was to be drawn up in accordance with Article 18 of Directive 75/442 on the basis of those annexes, not later than six months before the date of implementation of Directive 91/689. The Republic of Austria is therefore correct in considering that, in view of that wording, Annexes I and II to Directive 91/689 are instruments which were to be used in the process of establishing the LHW.

80 Moreover, the Commission has not put forward any argument to show that there was any need to transpose those annexes into national law or that the absence of transposition jeopardised the application of the Community legislation on the management of hazardous waste. It confined itself to submitting that Annexes I and II, as an integral part of Directive 91/689, had to be the subject of transposition measures on the same basis as the other provisions of the directive.

81 It follows from the foregoing that the Commission has not shown that the Republic of Austria was obliged to adopt measures transposing Annexes I and II to Directive 91/689. The complaint of incorrect transposition of those annexes cannot therefore be upheld.

82 Since the Court has not considered any of the complaints maintained by the Commission against the Republic of Austria (see paragraph 20 above) to be well founded, the application must consequently be dismissed.

Costs

83 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 Republic of Austria has applied for costs against the Commission and the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Commission of the European Communities to pay the costs.**

Jann Rosas von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President