OPINION OF ADVOCATE GENERAL JACOBS

delivered on 15 November 2001 [1]

1. In this case the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) has referred a series of questions concerning the interpretation of Directive 75/442 on waste [2] and of Regulation No 259/93 on shipments of waste. [3]

2. The Regulation lays down procedures to be followed where waste for recovery or disposal is transported from one Member State to another. The procedures vary depending on whether the waste is for recovery or for disposal; in particular there are more grounds on which the authorities of the Member State of dispatch may object to the proposed shipment where the waste is for disposal.

3. The main proceedings have arisen because, in brief, ASA Abfall Service AG ('ASA') wishes to transport slag from Austria to Germany where it will be placed in a disused salt-mine to secure hollow spaces. ASA described the proposed shipment as concerning waste for recovery. The Austrian authorities disagree, considering that the waste is for disposal.

4. The national court essentially asks, first, whether those authorities are competent under the Regulation or any other provision of Community law to challenge ASA's classification of the waste and prohibit the shipment and, second, what criteria determine whether a delivery of waste to a mine is a disposal operation.

5. Before setting out in more detail the background to the main proceedings and the questions referred, it is helpful to review the relevant provisions of the Community legislation regulating waste and its transport. It will be seen that the distinction between waste for disposal and waste for recovery is fundamental to the scheme of the legislation.

1 — Original language: English.

2 — Council Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 L 194, p. 39. The substantive provisions of Directive 75/442 were replaced wholesale by Council Directive 91/156/EEC of 18 March 1991, OJ 1991 L 78, p. 32.

3 — Council Regulation (EEC) No 259/93 of 1 February 1993 on supervision and control of shipments of waste within, into and out of the European Community, OJ 1993 L 30, p. 1.

The Directive

6. The preamble to Directive 75/442 states:

'Whereas the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste;

Whereas the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources; ...' [4]

7. Article 3(1) of the Directive requires Member States to take appropriate measures to encourage first 'the prevention or reduction of waste production and its harmfulness' and second '(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or (ii) the use of waste as a source of energy'.

8. Article 5 of the Directive enshrines the principles of self-sufficiency and proximity. It provides as follows:

'1. Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste.

2. The network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.'

9. The Directive defines 'disposal' as 'any of the operations provided for in Annex II, A' [5] and 'recovery' as 'any of the operations provided for in Annex II, B'. [6]

4 — Third and fourth recitals.

5 — Article 1(e).

6 — Article 1(f).

10. Annexes IIA and IIB to the Directive [7] are headed 'Disposal operations' and 'Recovery operations' respectively. Each annex is prefaced by a note to the effect that it is intended to list the operations 'as they occur in practice' and that in accordance with Article 4 [8] 'waste must be [disposed of/recovered] without endangering human health and without the use of processes or methods likely to harm the environment'.

11. Annex IIA includes the following among the listed disposal operations:

'D1 Deposit into or onto land (e.g. landfill etc.) ...

D3 Deep injection (e.g. injection of pumpable discards into wells, salt domes or naturally occurring repositories, etc.) ...

D12 Permanent storage (e.g. emplacement of containers in a mine, etc.)'.

12. Annex IIB includes among the listed recovery operations:

'R5 Recycling/reclamation of other inorganic materials'.

The Regulation

13. Regulation No 259/93 is based on Article 130s of the EC Treaty. Its aim is to provide a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment. [9]

14. The origins of Regulation No 259/93 are to be found in a proposal [10] issued by the Commission in response to the invitation extended to it by the Council in its resolution of 7 May 1990 on waste policy, [11] in which that institution considered

7 — Those annexes were, in accordance with Articles 17 and 18 of the Directive, replaced by Commission Decision 96/350/EC of 24 May 1996, OJ 1996 L 135, p. 32.

8 — Which requires Member States to take the necessary measures to the same effect.

9 — Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857, paragraph 26 of the judgment.

10 — Proposal for a Council Regulation (EEC) on the supervision and control of shipments of waste within, into and out of the Community, submitted by the Commission on 10 October 1990 (COM(90) 415 final), OJ 1990 C 289, p. 9.

11 — OJ 1990 C 122, p. 2.

in particular that 'movements of waste should be reduced to the minimum necessary for environmentally safe disposal and should be subject to proper controls'. [12]

15. The preamble to Regulation No 259/93 states:

'Whereas shipments of waste must be subject to prior notification to the competent authorities enabling them to be duly informed in particular of the type, movement and disposal or recovery of the waste, so that these authorities may take all necessary measures for the protection of human health and the environment, including the possibility of raising reasoned objections to the shipment; ...' [13]

16. The Regulation adopts the definitions of 'disposal' and 'recovery' used in the Directive. [14]

17. Title II of the Regulation is entitled 'Shipments of waste between Member States'. Chapters A and B of Title II lay down the procedures to be followed for the shipment of waste for disposal and of waste for recovery respectively.

18. The procedure for shipments of waste for recovery varies according to the type of waste. Annexes II to IV to the Regulation classify specific waste in one of three lists. Annex II contains the 'Green list of wastes', which 'should not normally present a risk to the environment if properly recovered in the country of destination'. [15] Annex III contains the 'Amber list of wastes' and Annex IV the 'Red list of wastes', regarded as particularly hazardous. Shipments of waste shown in Annex II for recovery are simply to be accompanied by a document containing prescribed information. [16] Shipments of other waste for recovery (including the waste at issue in the main proceedings [17]) and shipments of waste for disposal are subject to the following procedure.

19. Where the notifier, essentially defined as the producer or holder of waste, [18] intends to ship such waste from one Member State to another, he must notify the competent authority of destination and send a copy of the notification to the

12 — Seventh recital in the preamble.

13 — Recital 9.

14 — Article 2(i) and (k).

15 — Recital 14 in the preamble to the Regulation.

16 — Article 11.

17 — There appears to be some dispute as to whether the waste at issue in the main proceedings is hazardous waste or not. The procedure followed under the Regulation suggests that it is waste listed in Annex III to the Regulation ('Amber list of wastes').

18 — Article 2(g).

competent authority of dispatch [19] and to the consignee. [20]

20. Notification is to be effected by means of the consignment note to be issued by the authority of dispatch. [21] In making notification, the notifier is to complete the consignment note and, if requested by the competent authorities, supply additional information and documentation. [22] The notifier is to supply on the consignment note information with particular regard to a number of factors including (i) (first indent) the source, composition and quantity of the waste and (ii) (fifth indent) the operations involving disposal or recovery as referred to in Annex IIA or IIB to the Directive. [23]

21. In the case of shipments of waste for recovery, the consignment note must also include details of (i) the planned method of disposal for the residual waste after recycling has taken place; (ii) the amount of the recycled material in relation to the residual waste and (iii) the estimated value of the recycled material. [24]

22. In the case of waste for disposal, the Member State of destination is responsible for granting authorisation for shipment. The Member State of dispatch [25] has the right to raise objections and the Member State of destination may issue the authorisation only in the absence of any such objections. [26] In the case of waste for recovery, the Member States of dispatch and destination [27] have the right to object to a shipment but, as a general rule, [28] no express authorisation is required. [29]

23. The most significant difference between the procedures applying to the shipments of waste for recovery and for disposal lies in the grounds on which the various competent authorities concerned may oppose the proposed shipment.

24. In the case of waste for disposal, the objections must be based on Article 4(3). [30] That article in particular permits (i) Member States to prohibit generally or partially or to object systematically to shipments of waste in order to implement the principles of proximity, priority for recovery and self-sufficiency at Community

19 — And, if relevant, of transit.

20 — Articles 3(1) (waste for disposal) and 6(1) (waste for recovery).

21 — Articles 3(3) and 6(3).

22 — Articles 3(4) and 6(4).

23 — Articles 3(5) and 6(5).

24 — Article 6(5), sixth, seventh and eighth indents.

25 — And, if relevant, of transit.

26 — Articles 4(1) and 4(2).

27 — And, if relevant, of transit.

28 — Where the waste is listed in Annex IV ('Red list of wastes', comprising particularly hazardous waste) or has not been assigned to Annex II, III ('Amber list of wastes') or IV, the competent authorities concerned must give their consent in writing (Article 10).

29 — Article 7(1) and (2).

30 — Article 4(2)(c).

and national levels in accordance with the Directive [31] and (ii) the competent authorities of dispatch and destination to raise reasoned objections to planned shipments if they are not in accordance with the Directive in order to implement the principle of self-sufficiency at Community and national levels. [32]

25. In the case of waste for recovery, the objections are to be based on Article 7(4). [33] Article 7(4)(a) [34] lists five grounds on which the competent authorities of destination and dispatch may raise reasoned objections. The second, third and fourth grounds are not at issue in the present case. The first and fifth grounds — set out in the first and fifth indents of Article 7(4)(a) — are as follows:

'— in accordance with Directive 75/442/EEC, in particular Article 7 thereof [which concerns national waste management plans], or ...

— if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.'

26. Article 30(1) requires Member States to take the measures needed to ensure that waste is shipped in accordance with the provisions of the Regulation. Checks to that end may include the inspection of documents, the confirmation of identity and, if appropriate, the physical control of the waste. [35]

The background to the main proceedings and the questions referred

27. In March 1998 ASA, an Austrian company, notified the Austrian competent authority, the Bundesminister für Umwelt, Jugend und Familie (Federal Minister for the Environment, Youth and Family), hereafter 'the Bundesminister', of its intention of transporting 7 000 tonnes of waste to the Südwestdeutsche Salzwerke AG in Germany.

28. According to the notification, the waste to be transported was slag produced in

31 — Article 4(3)(a)(i).

32 — Article 4(3)(b)(i).

33 — Article 7(2).

34 — Article 7(4)(b) concerns the objections which may be raised by the competent authorities of transit, not relevant to the present case.

35 — Article 30(3).

Austria as a byproduct in the operation of a special-waste incineration plant and of two waste-fired power stations and processed in a waste-treatment plant in Vienna into what is termed by the applicant company a 'specific product'. The waste was to be taken to a disused salt-mine in Germany in order to secure hollow spaces (mine-sealing). It appears that the relevant regional authority in Germany considered that the proposed operation was a recovery operation. In the notification documents ASA classified the proposed use of the waste to be transported as 'recovery' under R5 of Annex IIB ('Recycling/reclamation of other inorganic materials').

29. By a decision of 19 June 1998 the Bundesminister raised an objection to the proposed shipment on the basis of the fifth indent of Article 7(4)(a) of the Regulation. [36] In his decision the Bundesminister expressed the view that, although the ground of objection set out in the fifth indent of Article 7(4)(a) was based on the ratio of recoverable to non-recoverable waste, it was also applicable by analogy where the proportion of recoverable material was nil, since otherwise the ground of objection would be meaningless: the notifier could simply assert that the waste was to be taken to a depot for 100% recovery and the authority at the place of dispatch would be unable to raise an objection.

36 — Set out in paragraph 25 above.

30. The Bundesminister also expressed the view that any deposit of waste for storage in a mine was a disposal operation under D12 of Annex IIA.

31. ASA challenged the Bundesminister's decision before the Verwaltungsgerichtshof, disputing his view that any deposit of waste for storage in mines comes under D12 of Annex IIA. ASA submitted that before a proposed operation could be classified as an operation listed under Annex IIA or IIB it must first be ascertained whether the operation amounted to disposal or recovery and that the fifth indent of Article 7(4)(a) of the Regulation did not provide for an objection on the ground that the proposed operation constituted not recovery but disposal.

32. The Verwaltungsgerichtshof notes in the order for reference that the procedure for transporting waste for recovery is less strict than that applicable to the transport of waste for disposal, which would appear to suggest that the competent authority of dispatch may prohibit the transport of waste classified by the notifier as a shipment of waste for recovery if it finds that that classification is incorrect and that the shipment is for disposal. However it considers that it is questionable whether the

Regulation confers any such power on the authority and in particular whether the fifth indent of Article 7(4)(a) of the regulation may be used in those circumstances.

33. The Verwaltungsgerichtshof also expresses doubts concerning the Bundesminister's view that the dumping of waste into hollow spaces of a mine (mine-sealing) in order to secure the mine is to be regarded as a disposal of waste irrespective of the circumstances of the individual case.

34. Finally, it notes that it is not clear what procedure is to be followed in classifying the use of the waste to be transported under the operations listed in Annex II to the Directive. The annex merely contains brief descriptions of operations which on their own say little and make it almost impossible to classify a shipment of waste in a given case since the descriptions are couched in such general terms that in many cases it will be possible to classify a use of waste in a specific instance under several of the operations listed in the annex. In particular the distinction between disposal operations and recovery operations is unclear since the annex does not define recovery.

35. The Verwaltungsgerichtshof accordingly stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is the competent authority at the place of dispatch under Council Regulation No 259/93 on supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1) competent to verify the correctness of the classification by the notifier as waste for recovery under the fifth indent of Article 6(5) of Regulation No 259/93 of waste to be transported for an intended recovery operation under Annex IIB to Directive 75/442/EEC and, in the event that the classification is incorrect, prohibit the transport of such waste?

2. In the reasoned objection to the transport of waste on the ground that the planned transport is not for purposes of recovery but for disposal, contrary to the classification indicated by the notifier in the accompanying notification, may the competent authority at the place of dispatch rely on the matters constituting grounds for an objection under the fifth indent of Article 7(4)(a) of Regulation No 259/93?

3. Should the reply to Question 2 be in the negative, on what provision of

Regulation No 259/93 or other provisions of Community law may the competent authority at the place of dispatch rely in refusing to authorise a transport of waste, where contrary to the information given by the notifier, the transport is for purposes not of recovery but of disposal?

4. Is any delivery of waste to a mine to be regarded, irrespective of the actual circumstances of such delivery, as a disposal of waste within the meaning of Regulation No 259/93 in conjunction with Annex IIA (D12) to Directive 75/442/EEC?

5. If Question 4 is answered in the negative, according to what criteria is classification under the operations listed in Annex II to Directive 75/442 to be carried out?'

36. Written observations have been presented by ASA, the Austrian, German and Netherlands Governments and the Commission. ASA, XXX the Bundesminister, the French and German Governments and the Commission were represented at the hearing.

The principles on which Community waste legislation is based

37. Before turning to the analysis of the questions referred, it is helpful to recall the fundamental principles on which Community waste legislation is now based.

38. The Directive expressly articulates the principle of self-sufficiency, providing for Member States to move towards self-sufficiency in waste disposal. [37] That principle is referred to in the preamble to the Regulation [38] and as a ground for a Member State (of dispatch or destination) to object to shipments of waste for disposal, either generally or specifically. [39]

39. The Directive also states that movements of waste are to be reduced and that Member States may take the necessary measures to that end in the waste management plans which they are required to draw up under Article 7 thereof [40] and to prevent movements of waste which are not in

37 — Article 5(1).

38 — Seventh recital.

39 — Article 4(3)(a)(i) and 4(3)(b)(i), summarised in paragraph 24 above.

40 — Recital 9 in the preamble.

accordance with their waste management plans. [41]

40. Those propositions must now be read in the light of the distinction between shipments of waste for disposal and of waste for recovery established by the Regulation, the effect of which is that waste for recovery 'should be able to move freely between Member States for processing, provided that transport poses no threat to the environment'. [42]

41. The principle that environmental damage should as a priority be rectified at source is laid down by Article 174(2) EC (formerly Article 130r(2) of the EC Treaty) as a basis for action by the Community relating to the environment; it is also enunciated in Directive 75/442. [43] In the context of waste that principle is often referred to as the principle of proximity; the Court has stated that the principle requires waste to be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste. [44] A national rule requiring disposal of waste on national territory reflects the pursuit of an objective which is in conformity with that principle and was accordingly considered by the Court not to be contrary to Directive 84/631, the predecessor of the Regulation. [45]

The first three questions referred

42. The first three questions referred ask essentially whether Community law empowers the competent authority of the Member State of dispatch to verify the correctness of the notifier's classification of the proposed waste operation and prohibit the shipment if that classification is incorrect.

May the competent authority of dispatch verify the correctness of the classification?

43. In the first part of its first question the referring court asks whether the competent authority of dispatch may verify the correctness of the notifier's classification of waste to be shipped for recovery.

41 — Article 7(3).

42 — Case C-203/96 *Dusseldorp* [1998] ECR I-4075, paragraph 33 of the judgment.

43 — Article 5(2).

44 — Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, paragraph 34 of the judgment.

45 — Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 34 of the judgment.

44. Only ASA submits that that question should be answered in the negative, the Austrian, French, German and Netherlands Governments and the Commission concurring in the view that it should be answered in the affirmative.

45. ASA essentially bases its submission on two grounds.

46. First, certain of the objections which the Regulation provides for in the case of shipments of waste for recovery [46] concern only one of the authorities of dispatch and destination: since the authorities may raise only those objections within their competence, certain objections may be invoked by the authority of destination alone. The objection raised by the Bundesminister on the basis of the fifth indent of Article 7(4)(a) assumes knowledge of the recovery installation at the place of destination, the costs of recovery and disposal in the country of destination, etc., which clearly cannot be verified by the authority of dispatch (in particular because of the 30-day time-limit prescribed by the Regulation [47]) but which clearly can be verified by the authority of destination. Moreover if both authorities could object on the basis of the fifth indent of Article 7(4)(a) there would be a risk of divergent decisions.

47. Second, ASA submits that, given that waste comes within the concept of 'goods', [48] the Regulation must be interpreted in the light of the principle of the free movement of goods. Since neither the principle of self-sufficiency nor that of proximity applies to the shipment of waste intended to be recovered, [49] the Regulation enshrines the primacy of recovery (Article 3 of the Directive). The authority of destination may raise an objection based on the incorrect classification of the operation and imposed for the protection of health and the environment; from the point of view of the free movement of goods, however, there is no justification for conferring the right to raise such an objection on the authority of dispatch, since to do so would facilitate protectionism.

48. The Austrian, French, German and Netherlands Governments and the Commission put forward a number of arguments in support of their view that the first part of the national court's first question should be answered in the affirmative. Their observations moreover suggest a common concern that, if the authority of dispatch is unable to verify the correctness of the classification, the procedure will be open to abuse by unscrupulous operators who may be tempted to classify as for recovery waste in fact intended for a disposal operation, thereby evading the stricter procedure which should apply to such a shipment.

46 — Listed in Article 7(4)(a), see paragraph 25 above.
47 — Article 7(2).
48 — *Commission* v *Belgium*, cited in note 44.
49 — *Dusseldorp*, cited in note 42.

49. I do not find ASA's arguments persuasive.

50. First, I do not accept its argument based on the free movement of goods. It is clear that in the context of the transport of waste, the importance of the environmental concerns fully justifies the derogation from the normal principles of free movement. As the Court noted in *Parliament* v *Council*,[50] the aim of the Regulation is not to define those characteristics of waste which will enable it to circulate freely within the internal market, but to provide a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment. In the case of waste for disposal in particular, the principles of proximity and self-sufficiency clearly imply a duty on Member States not to ship waste for disposal elsewhere if it can be disposed of in a closer national installation in an environmentally sound manner.

51. Similarly, the fact that the Regulation envisages the application of dual controls (by the importing and exporting Member States) is in my view also — albeit exceptionally — justified on environmental grounds. The need for dual controls is particularly evident in the case of shipments of waste for disposal: the State of dispatch may have a particular interest in preventing the export of hazardous waste for disposal in an adjacent Member State, since such disposal may have serious environmental consequences for the State of dispatch;[51] the State of destination may also have an interest in preventing the import of waste for disposal in its territory.[52]

52. Nor am I convinced by ASA's argument to the effect that the authority of dispatch is not in a position to verify whether the proposed operation is recovery or disposal. The Regulation requires the notifier to include detailed information in the consignment note concerning the waste itself and the proposed operation.[53] The competent authorities may moreover request additional information and documentation.[54] I do not agree with ASA that the authority of dispatch cannot verify details of the proposed recovery operation within the 30-day time-limit imposed by Article 7(2). It may also be noted that in the case of a shipment of waste for disposal, where it is accepted that the

50 — Cited in note 9, paragraph 26 of the judgment.

51 — See *Commission* v *Germany*, cited in note 45, paragraph 41 of the judgment.

52 — See generally *Commission* v *Belgium*, cited in note 44.

53 — See the first, fourth and fifth indents of Article 3(5) (concerning disposal) and the first, fourth, fifth, sixth, seventh and eighth indents of Article 6(5) (concerning recovery).

54 — Articles 3(4) (waste for disposal) and 6(4) (waste for recovery).

competent authority of dispatch has more extensive powers of objection, the time-limit imposed by Article 4(2)(b) is 20 days.

53. I consider on the other hand that many of the arguments advanced by the Member States and the Commission in support of an affirmative answer to the first part of the first question are persuasive.

54. In particular, it appears to me that the whole scheme of the Regulation and the principles on which it is based would be undermined if the authority of dispatch were unable to verify the correctness of the classification of the proposed waste operation. There would be little point in having a procedure applicable to shipments of waste for disposal which is stricter than that applicable to shipments of waste for recovery, and in giving the competent authority of dispatch broad grounds for objection to shipments of waste for disposal, if that power to object could be — in effect — irrevocably overridden where the notifier makes an error in classifying the proposed operation.

55. As will be seen below in the context of the fourth and fifth questions referred, the line between disposal and recovery operations is sometimes hard to draw. It may therefore be expected that on occasion a notifier will incorrectly classify waste to be shipped, whether in good faith or — as some of those submitting observations to the Court fear — with a view to evading the stricter procedure applicable to shipments for disposal. Preventing the authority of dispatch from checking that the notifier's initial classification is correct would to my mind be inconsistent with the principle that waste should be disposed of as close as possible to the place where it is produced in order to limit as far as possible the transport of waste and with the principle that Member States should work towards self-sufficiency in waste disposal. Moreover, it is not inconceivable that a notifier may itself raise a doubt in the notification about the correctness of the classification; it would however surely be absurd if in that circumstance the competent authority of dispatch had no power to verify.

56. Further support for that view may be found in the wording of the Regulation. The fifth indent of Article 7(4)(a),[55] for example, clearly envisages that the competent authority of dispatch may make certain findings of fact about the proposed recovery operation; it is accordingly not correct to state — as does ASA — that that authority cannot verify such matters. Moreover the requirement (in Articles 3(5) and 6(5)) that the notifier provide detailed prescribed information in the notification, and the power (under Articles 3(4) and 6(4)) of all competent authorities to call for further information and documentation, are presumably intended to facilitate verifi-

55 — Set out in paragraph 25 above.

cation by the competent authorities concerned, and the competent authority of dispatch may — as I have explained [56] — legitimately be concerned to prevent a shipment of waste in reality destined for disposal.

57. But perhaps the simplest and most cogent reason for the view that the authority of dispatch may verify the correctness of the classification is that thereby — and in some cases only thereby — they can ensure that waste is shipped in accordance with the Regulation, as required by Article 30(1).

May the competent authority of dispatch prohibit a shipment of waste incorrectly classified as waste for recovery?

58. In the second part of its first question the referring court asks whether the competent authority of dispatch may prohibit a shipment of waste incorrectly classified as waste for recovery.

59. ASA has not submitted observations on that point, since on the basis of its approach to the first part of the first question it does not arise. ASA does however concede in the context of its observations on the third question that a classification which is deliberately and fraudulently incorrect may be regarded as contrary to the national law of the Member State of dispatch and that the competent authority of dispatch may in those circumstances — but only in those circumstances — object to the classification on the basis of the second indent of Article 7(4)(a), which permits the competent authorities of dispatch and destination to raise reasoned objections if the shipment contravenes national laws relating to environmental protection, public order, public safety or the protection of health. In such a case, the authority of dispatch may prohibit the shipment since the effectiveness of Community law would otherwise be undermined.

60. The Austrian, German and Netherlands Governments do not specifically address the question whether the authority of dispatch may prohibit a shipment of waste incorrectly classified as for recovery, although it is tolerably clear from the tenor of their observations on the first question as a whole that they support an affirmative answer. The French Government on the other hand considers that an incorrect classification does not in itself entail the power to prohibit the shipment.

56 — See paragraph 51 above.

61. The Commission submits that, since the scheme of the Regulation — which aims to ensure the monitoring and effective control of shipments of waste — is based on notification of a proposed shipment to a given recipient with a view to a specific use, it seems logical that an 'incorrect' procedure — namely where the classification does not reflect the legal reality as determined by one of the competent authorities — should not be pursued.

62. In my view, once it is accepted that the authority of dispatch may object to the proposed shipment, the objectives of the legislation and indeed common sense dictate that that authority must be able to prohibit the shipment. It would clearly be contrary to the purpose of the Regulation and the principles underlying it if a competent authority of dispatch were unable to prevent a proposed shipment where it had found that that shipment, albeit formally classified by the notifier as a shipment of waste for recovery, was in reality a shipment of waste for disposal.

63. The exercise by the authority of dispatch of its power to prohibit such a shipment will not of course leave the notifier without a remedy. If it accepts that authority's decision that the waste should be reclassified as waste for disposal, it may amend the notification to that effect, or submit a fresh notification; if it does not accept the decision, it may seek judicial review thereof.

Which provision of Community law empowers the authority of dispatch to verify the classification and prohibit an incorrectly classified shipment?

64. The national court's second and third questions may usefully be considered together. By its second question the referring court asks whether the fifth indent of Article 7(4)(a) of the Regulation may found a reasoned objection by the competent authority of dispatch on the ground that the planned shipment is of waste intended for disposal and not, as indicated by the notifier, for recovery. In its third question, which arises only if the second question is answered in the negative, the referring court asks what provision justifies the authority of dispatch in refusing to authorise a shipment of waste on the ground that, contrary to the information given by the notifier, the shipment is intended for disposal rather than recovery.

65. It will be recalled that under the fifth indent of Article 7(4)(a) the competent authority of destination and dispatch may raise reasoned objections to the planned shipment 'if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non recoverable fraction do not justify the recovery under economic and environmental considerations'. Under the first indent of that provision, the

competent authorities may raise reasoned objections 'in accordance with Directive 75/442, in particular Article 7 thereof'. Article 7 of the Directive requires the Member States to draw up waste management plans.

66. ASA submits that even if — contrary to its principal submission on the first question — the authority of dispatch has power to verify the correctness of the classification and prohibit an incorrectly classified shipment, its objection cannot be based on the fifth indent of Article 7(4)(a) since that ground of objection unquestionably presupposes that the proposed operation is from a technical point of view a recovery operation. The Netherlands Government essentially concurs, while the French Government submits that, once the authority of dispatch has reclassified a proposed operation as disposal rather than recovery, it may no longer invoke the grounds of objection to shipments for recovery set out in Article 7(4).

67. The Austrian and German Governments on the other hand consider that the objection in the fifth indent of Article 7(4)(a) may be invoked by the authority of dispatch where the planned shipment of waste is intended for disposal and not, as indicated by the notifier, for recovery, while the Commission submits that, although the wording of Articles 4(2)(c) and 7(2) of the Regulation suggest that the grounds of objection set out in Articles 4(3) and 7(4) are exhaustive, an objection on the ground that the classification of the proposed operation is incorrect is of a different kind and may be raised even though not explicitly mentioned in those provisions.

68. I agree with ASA and the Netherlands Government that the ground of objection mentioned in the fifth indent of Article 7(4)(a) is not designed for the circumstances envisaged by the national court. In my view that ground is clearly intended to be used where the data given in the consignment note pursuant to the last three indents of Article 6(5) (the planned method of disposal for the residual waste after the recycling has taken place, the amount of the recycled material in relation to the residual waste and the estimated value of the recycled material) suggest that the proposed recovery operation would not make economic or environmental sense. It must in that context be borne in mind that, although the Community waste legislation enshrines the primacy of recovery over disposal, that does not mean that any proposed recovery operation must be approved: the legality of recovery operations is itself subject to the overriding consideration of environmental protection. [57]

57 — Article 4 of the Directive: see paragraph 10 above.

69. However, the fact that the competent authority of dispatch may not invoke the fifth indent of Article 7(4)(a) as a ground of objection to a proposed shipment of waste incorrectly classified as for recovery does not mean that that authority is powerless to prevent such a shipment. Article 30(1) of the Regulation requires Member States to 'take the measures needed to ensure that waste is shipped in accordance with the provisions of this Regulation'. That general provision in my view amply empowers the competent authority of dispatch to prevent a shipment of waste incorrectly classified as for recovery: it seems to me abundantly clear that such a shipment cannot be in accordance with the Regulation, since *ex hypothesi* an operation has been incorrectly classified contrary to the definitions of those operations adopted by the Regulation.

70. I accordingly conclude on the first three questions referred that the competent authority of dispatch may pursuant to Article 30 of the Regulation both verify whether waste intended to be shipped has been correctly classified as waste for disposal or waste for recovery and prohibit a shipment of waste which has been incorrectly classified.

The fourth and fifth questions referred

71. The national court's fourth and fifth questions may also usefully be considered together. The fourth question asks whether any delivery of waste to a mine is to be regarded as a disposal within the meaning of the legislation, regardless of the specific circumstances. The fifth question, which arises only if the fourth question is answered in the negative, asks which criteria determine classification under the operations listed in Annex II to the Directive.

72. The French and Netherlands Governments and the Commission submit that the fourth question should be answered in the affirmative: any delivery of waste to a mine is by definition a disposal operation under head D12 of Annex IIA, 'Permanent storage (e.g. emplacement of containers in a mine, etc.)'; the Netherlands Government and the Commission add that it may also be classified under D1 ('Deposit into or onto land (e.g. landfill, etc.)') or D3 ('Deep injection (e.g. injection of pumpable discards into wells, salt domes or naturally occurring repositories, etc.)').

73. ASA and the Austrian and German Governments consider that the fourth

question should be answered in the negative, and conclude that whether a mine-fill operation is recovery or disposal must be assessed on a case-by-case basis. There is considerable consensus between the observations as to the relevant criteria, although as may be expected different conclusions are drawn from the application of those criteria to the operation at issue. ASA and the German Government conclude that it is a recovery operation under head R5 of Annex IIA. The Austrian Government in its written observations did not seek to classify the operation at issue in the main proceedings, simply setting out (in accordance with the terms of the question referred) what it regarded as the relevant criteria, although at the hearing the Bundesminister suggested that it was a disposal operation under head D12 of Annex IIB

74. Both the German Government and the Commission accept that a particular use of waste may in practice be both a recovery operation and a disposal operation, but draw different conclusions. The German Government submits that automatically to regard such operations as disposal rather than recovery operations would be contrary to the Directive, which requires recovery to be encouraged. The Commission in contrast considers that the objectives of the waste legislation dictate that the stricter procedure governing shipments of waste for disposal will none the less apply.

75. In my view it would not be appropriate to answer the national court's fourth question in the absolute terms in which it is framed. The observations submitted to the Court have not surprisingly focussed on the type of operation at issue in the main proceedings and I consider that it would be imprudent in the context of the present case to seek to impose a definitive answer which would apply to all other types of delivery to a mine which may be envisaged. Moreover it seems to me that it is perfectly possible to give the national court the guidance which it needs in order to resolve the dispute before it without laying down any such general rule. I will accordingly turn to the fifth question, to which many of the observations submitted on the fourth question are also relevant.

76. By its fifth question the national court essentially asks what criteria determine whether a given operation — in the present case, a delivery of waste to a mine — is a disposal or a recovery operation. It will be recalled that the immediate significance of that distinction for the outcome of the main proceedings is that the Regulation prescribes procedures for the cross-border shipment of waste which differ depending on whether the waste is intended for recovery or for disposal. There are additionally consequences for the operation itself, since under the Directive the conditions for holding a permit to carry out disposal operations are stricter than in the case of recovery operations. There is thus a real risk of disposal operations being delib-

erately categorised as recovery operations with a view to evading those stricter requirements; it is accordingly imperative that proposed operations are carefully scrutinised and their classification verified.

77. I do not accept the submission of the German Government and the Commission to the effect that a particular use of waste may be both a recovery operation and a disposal operation. Community waste legislation has historically reposed on a distinction between waste for recovery and waste for disposal. [58] The coherence and effectiveness of that legislation would be at risk if a given operation could fall within both categories. It is not inconceivable, however, that a given operation may have elements of both recovery and disposal, in which case it is clear to my mind that the objectives of the legislation require that the operation be treated as a disposal operation with the consequences which that classification entails.

78. Nor do I accept the German Government's submission that — in effect — where the correct classification is not obvious, an operation should be classified as recovery to reflect the fact that the Directive gives priority to recovery over disposal. The principle of priority of recovery over disposal articulated in Article 3(1)(b) of the Directive [59] means — as it says — simply that recovery should be encouraged: common sense suggests that recovery will overall be more environmentally sound than disposal. The priority given to recovery recognises that it is likely to be more in the interests of environmental protection than disposal. It is therefore all the more essential to ensure that waste intended for an operation involving elements of disposal — and hence liable to be less reconcilable with those interests — is not shipped subject to the less rigorous procedure applicable to shipments of waste for recovery.

79. The observations on the fourth and fifth questions essentially propose the following as relevant criteria: (i) whether the waste can be re-used after the operation; (ii) the extent to which the waste is hazardous and (iii) the purpose of the operation and the utility of the waste for that operation.

80. First, both the French and the Netherlands Governments regard as decisive whether the waste can be re-used after the operation. The Netherlands Government

58 — See paragraph 5 above.

59 — Set out in paragraph 7 above.

notes that Article 3(1)(b)(i) [60] of the Directive gives as examples of recovery 'recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials'. 'Recycling/reclamation of other inorganic materials' under head R5 of Annex IIB means operations to reclaim raw materials from waste and make them re-usable. Putting waste into a mine does not come under that head since there is no question of reclamation and the waste can no longer be used as a secondary raw material in a new cycle.

81. The Commission in contrast considers that 'recovery' may be understood to include the direct and profitable use of the waste for a particular purpose. Although the Directive contains no explicit definition of recovery, simply giving examples, the Commission also considers that some assistance may be found in Article 3(1)(b)(i). It concludes that even a direct and targeted use of waste in its unchanged form may in principle be a recovery, for example by way of 'Land treatment resulting in benefit to agriculture or ecological improvement' as referred to in point R10 of Annex IIB. Putting waste into a mine as landfill with a stabilising effect may therefore be a recovery in the sense of a re-use of the waste at the same time as a disposal in the sense of deposit or permanent storage.

82. Although I consider that it may be inferred from the term 'recovery operation' itself and from the list in Annex IIB that what is entailed by 'recovery' will generally be a process by which goods are restored to their previous state or transformed into a usable state or by which certain usable components are extracted or produced, [61] I accept the Commission's suggestion that certain uses of waste in its unchanged form may exceptionally be a recovery, for example by way of 'Use principally as a fuel or other means to generate energy' under head R1 of Annex IIB or 'Land treatment resulting in benefit to agriculture or ecological improvement' under head R10. I accordingly conclude that whether waste can be re-used after a given operation is not a decisive criterion for the classification of that operation as disposal or recovery.

83. Second, ASA and the Austrian Government submit that the extent to which the waste used is hazardous is relevant: the more hazardous the waste used, the more likely that the operation is disposal. ASA adds that where there is no risk of harm to the environment, as in the case of non-hazardous waste such as that which —

60 — Set out in paragraph 4 above.

61 — See further paragraphs 52 to 54 of my Opinion in Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561.

according to ASA [62] — is at issue in the main proceedings, there is no need to adopt a classification such as disposal which entails stricter legal consequences.

84. I do not accept the argument that the hazardous nature of the waste used is relevant to determining whether a given operation is recovery or disposal. The recovery of hazardous waste is not a contradiction in terms: indeed the recovery of specific categories of such waste is governed by various Community instruments. [63] Moreover ASA's submission that there is no need to classify an operation involving non-hazardous waste as disposal since there is no risk of harm to the environment is clearly untenable: the classification of waste as hazardous or non-hazardous is distinct from the classification of an operation as recovery or disposal; it is possible for non-hazardous waste to be disposed of or recovered in a way which harms the environment; equally it is possible [64] for hazardous waste to be disposed of or recovered in an environmentally sound manner.

85. Third, ASA and the Austrian and German Governments agree that the object of the operation and the utility of the waste therefor are relevant criteria, although ASA simply submits that the operation must have recovery as its object and that the waste used must be suitable for the operation, which is of limited help. Both Governments focus essentially on whether the operation is necessary for technical or safety reasons, for example (in the case of mine-fill) to ensure stability, and on whether the waste used has specific qualities which make it suitable for that operation, for example (again in the case of mine-fill) hydraulic properties and ability to withstand pressure. ASA and the German Government add that, since the object of the Directive is to protect natural resources by encouraging the recovery of waste by recycling, re-use, reclamation or any other process, [65] it is also relevant to consider whether the operation uses waste instead of primary raw materials (for example in the case of mine-fill excavations from new mines or natural resources such as sand or gravel), in which case it will be recovery. I agree with that proposition. However, it seems to me that that criterion is essentially another aspect of the more general test mentioned above, namely the

62 — See note 17.

63 — See for example 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; Council Directive 94/67/EC of 16 December 1994 on the incineration of hazardous waste, OJ 1994 L 365, p. 34; and Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances, OJ 1991 L 78, p. 38.

64 — And indeed in principle requisite: Article 4 of the Directive — reflected in the note prefacing Annexes IIA and IIB, set out in paragraph 10 above — requires Member States 'to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment'.

65 — See in particular the preamble and Article 3(1)(b)(i).

purpose of a given operation and the utility for that operation of the waste used.

86. In my view the test of the overriding purpose of an operation is the correct criterion for determining whether that operation should be classified as disposal or recovery. The decisive question is whether the waste is used — or re-used — for a genuine purpose. Put another way, if waste were not available for a given operation, would that operation none the less be carried out using some other material? Applying that criterion to the case of a deposit of waste to fill hollow spaces in a disused mine, it would need to be determined whether, in the absence of that waste, those responsible for the mine would have had to arrange for the mine to be filled with other material for a purpose independent of storing the waste, for example for safety or technical reasons to do with the mine itself.

87. That test seems to me best to reflect the scheme of the Directive; it also has the merit of simplicity. It moreover accommodates the criteria of the suitability of the waste for the operation and whether the use of waste spares natural resources without making either of those tests decisive in itself. Thus if the operation — for example, filling hollow spaces in a disused mine — was necessary for safety or technical reasons, one would clearly expect the waste used to be particularly suitable for that operation because of its specific properties. That in turn would suggest that if the waste had not been delivered, another substance which shared those properties would have been needed, which would suggest that the operation was recovery rather than disposal. However, whether that was the case would need to be verified: the mere fact that a disused mine is filled with waste which happens to be suitable for that purpose would not be sufficient to categorise the operation as recovery if there was no independent need for that operation.

88. The test suggested above similarly accommodates a further factor which, although it has not been mentioned by those submitting observations, may in my view be helpful in determining whether the waste is used for a genuine and independent purpose, namely whether the holder of the waste pays for the operation or is paid for it. The Commission effectively suggested this approach in its 1989 Communication, 'A Community strategy for waste management', [66] which sowed the seeds for the Regulation. In its Communication the Commission concludes its discussion on the movement of waste for disposal with the statement: 'The situation is different with waste to be recycled by the recipient. The holder must pay for the final disposal of waste. Where waste is for recycling, the holder of the waste is paid by the recycler.' While that proposition may not be absolute — it appears that in some sectors, such as the solvent recovery market, it is normal practice for the holder to pay the consignee in order to make the recovery

66 — Communication from the Commission to the Council and to Parliament, SEC (89) 934 final, 18 September 1989.

operation economically viable — the direction in which payment is made seems to me to be potentially significant.

89. I accordingly conclude on the national court's fifth question that whether a deposit of waste in a disused mine is a disposal or a recovery operation depends on the overriding purpose of the operation and in particular on whether, in the absence of waste, another substance would have had to be used to fill the mine for reasons unconnected with the storage of waste.

Conclusion

90. I am accordingly of the opinion that the questions referred by the Verwaltungsgerichtshof should be answered as follows:

(1) Article 30 of Council Regulation (EEC) No 259/93 of 1 February 1993 on supervision and control of shipments of waste within, into and out of the European Community empowers the competent authority of dispatch (i) to verify whether waste intended to be shipped has been correctly classified as waste for disposal or waste for recovery and (ii) to prohibit a shipment of waste which has been incorrectly classified.

(2) Whether a deposit of waste in a disused mine is a disposal or a recovery operation depends on the overriding purpose of the operation and in particular on whether, in the absence of waste, another substance would have had to be used to fill the mine for reasons unconnected with the storage of waste.