JUDGMENT OF THE COURT (Third Chamber)

18 December 2007 *

In Case C-194/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 2 May 2005,

Commission of the European Communities, represented by M. Konstantinidis, acting as Agent, assisted by G. Bambara, avvocato, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J.N. Cunha Rodrigues, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

Advocate General: J. Mazák,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 17 January 2007,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities claims that the Court should declare that, in so far as Article 10 of Law No 93 of 23 March 2001 concerning provisions on the environment (GURI No 79 of 4 April 2001; hereinafter 'Law No 93/2001') and Article 1(17) and (19) of Law No 443 of 21 December 2001 delegating to the Government matters of infrastructure and strategic installations of

production and of other action to boost production (Ordinary Supplement to GURI No 299 of 27 December 2001; hereinafter 'Law No 443/2001') excluded from the scope of the national legislation on waste excavated earth and rocks intended for actual re-use for filling, backfilling, embanking or as aggregates, with the exception of materials from contaminated and decontaminated sites with a concentration of pollutants above the acceptable limits laid down by the regulations in force, the Italian Republic 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) ('the directive').

Legal background

Community legislation

2 Points (a) and (c) of Article 1 of the directive provide that, for the purposes of that directive:

'(a) "waste" shall mean 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;

...

(c) "holder" shall mean the producer of the waste or the natural or legal person who is in possession of it'.

3 Article 1(e) and (f) of the directive define the meanings of 'disposal' and 'recovery' as 'any of the operations provided for in' Annexes II A and II B thereto, respectively.

4 Article 2 of the directive provides:

'1. The following shall be excluded from the scope of this Directive:

...

(b) where they are already covered by other legislation:

...

(ii) waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;

...

2. Specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of individual Directives.'

5 The Commission adopted 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). That list was updated by Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3 and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (OJ 2000 L 226, p. 3). The European Waste Catalogue thus established by Decision 2000/532 has been amended a number of times, most recently by Council Decision 2001/573/EC of 23 July 2001 (OJ 2001 L 203, p. 18). That list contains Chapter 17, entitled 'Construction and demolition wastes (including excavated material from contaminated sites)', which contains, among others, Section 17 05, itself entitled 'soil (including excavated material from contaminated sites), stones and dredging spoil' and including headings 17 05 03, 'soil and stones containing dangerous substances', and 17 05 04, 'soil and stones other than those mentioned in 17 05 03'.

National legislation

6 Article 6(1)(a) of Legislative Decree No 22 of 5 February 1997 on the implementation of Directives 91/156/EEC on waste, 91/689/EEC on hazardous waste and 94/62/EC on packaging and packaging waste (Ordinary Supplement to GURI No 38 of 15 February 1997, 'Legislative Decree No 22/97') is worded as follows:

'For the purposes of this Decree:

(a) "waste" shall mean any substance or object in the categories set out in Annex A which the holder discards, or intends or is required to discard.

...'

7 Article 8(1) of Legislative Decree No 22/97 excludes from its scope certain substances and materials, including, under point (b), 'waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries', in so far as they are covered by specific legislation.

8 Article 10 of Law No 93/2001 added a new point (f-a) in Article 8(1) of Legislative Decree No 22/97, which reads as follows:

'excavated earth and rocks intended for actual use for filling, backfilling, embanking or as aggregates, with the exception of materials from contaminated and decontaminated sites with a concentration of pollutants above the acceptable limits laid down by the provisions in force'.

9 Article 1(17) of Law No 443/2001 provides that Article 8(1)(f-a) of Legislative Decree No 22/97 is to be interpreted 'as meaning that excavated earth and rocks, including from tunnels, are not waste and, consequently, are excluded from the scope of that legislative decree, even if they are contaminated during the production cycle by pollutant substances from excavation, drilling or construction, in so far as the average composition of the total mass does not have a concentration of pollutants above the maximum limits laid down by the provisions in force'.

10 Moreover, Article 1(19) of Law No 443/2001 provides that:

'[f]or materials referred to in paragraph 17, actual use for filling, backfilling, embanking or as aggregates shall also mean use for different cycles of industrial production, including the filling of worked quarries and the tipping on another site, authorised for any reason whatsoever by the competent administrative authority, provided that the limits referred to in paragraph 18 are complied with and that the

dumping is effected in accordance with the detailed rules for environmental redevelopment of the site concerned'.

11 By Article 23 of Law No 306 of 31 October 2003 fulfilling obligations arising from Italy's membership of the European Community (GURI No 266 of 15 November 2003; hereinafter 'Law No 306/2003'), the Italian legislature amended Article 1(17) and (19) of Law No 443/2001.

Pre-litigation procedure

12 The Commission, taking the view that the combination of Article 10 of Law No 93/2001 and Article 1(17) and (19) of Law No 443/2001 (collectively 'the provisions at issue') does not comply with the directive, initiated the infringement procedure laid down by Article 226 EC.

13 Since the Italian authorities did not reply to the letter of formal notice of 27 June 2002, the Commission, on 19 December 2002, delivered a reasoned opinion requesting the Italian Republic to adopt the measures necessary to comply with the directive within two months from the receipt of that opinion, which occurred on the same day.

14 In their reply of 5 March 2003 to that opinion, the Italian authorities sent the Commission a draft amendment to the national legislation concerning excavated earth.

15 At a joint meeting held on 25 June 2003, the Commission maintained that the draft law continued to require a narrow construction of the concept of waste and was therefore contrary to the directive.

16 By letter of 3 February 2004, the Italian authorities sent the Commission a copy of the text of Law No 306/2003, which effected the amendments referred to in their letter of 5 March 2003.

17 Since it considered that the situation remained unsatisfactory, the Commission decided to bring the present action.

The action

Admissibility

18 In its defence, the Italian Republic contends, first of all, that the present action is inadmissible since the Commission did not take into account the amendments effected by Law No 306/2003, which was adopted on 31 October 2003 and entered into force on 30 November 2003, that is to say before this action for failure to fulfil obligations was brought.

19 In that regard, it is sufficient to observe, first, that the Court has repeatedly held that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end

of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, in particular, Case C-168/03 *Commission* v *Spain* [2004] ECR I-8227, paragraph 24, and Case C-23/05 *Commission* v *Luxembourg* [2005] ECR I-9535, paragraph 9).

20 Secondly, the subject-matter of an action under Article 226 EC for failure to fulfil obligations is delimited by the pre-litigation procedure provided for by that article, so that the application cannot be founded on any objections other than those stated in that procedure (see, to that effect, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23, and Case C-221/03 *Commission* v *Belgium* [2005] ECR I-8307, paragraph 38).

21 In this case the amendments effected by Law No 306/2003 were not introduced until after the expiry of the period prescribed in the reasoned opinion.

22 Whilst the Commission considers that those amendments have not brought the Italian legislation into compliance with the directive, it has none the less been at pains to point out, both in its reply and at the hearing of oral argument, that it does not seek to challenge that law in the context of the present action.

23 In those circumstances, since the subject-matter of the action brought under Article 226 EC is not founded on complaints other than those made during the pre-litigation procedure, the Italian Government's plea of inadmissibility must be rejected.

Substance

Arguments of the parties

24 The Commission claims that the provisions at issue exclude, generally and by default, excavated earth and rocks intended for certain re-uses from the scope of the national legislation on waste, with the result that the directive's provisions relating to waste management do not apply to those materials.

25 The Commission submits that excavated earth and rocks, which are mentioned in the European Waste Catalogue, are materials which the holder intends to discard and are covered by the definition of the concept of 'waste' in Article 1(a) of the directive. The provisions at issue do not limit the exclusion of the application of the provisions of national law arising from the directive to the cases expressly described in the Court's case-law, but lay down a more general exclusion.

26 In the Italian Republic's submission, the Community concept of waste is subject to reasonable exceptions in the case of by-products which an undertaking does not intend to 'discard' as waste. A careful reading of the Court's case-law relating to that concept shows that the essential requirement for the classification of residue as a by-product rather than as waste is not the re-use of the materials concerned in the same process of production as that from which they derive but rather the certainty that they will be re-used without any prior processing. In that regard, the Commission is relying on an erroneous construction of the judgment in Case C-457/02 *Niselli* [2004] ECR I-10853, paragraph 52, which is confined to declaring illegal general exclusions from the category of waste in the absence of proof of the actual re-use of the materials concerned.

27 That Member State submits that residues which are certain to be used without any prior processing in a process of production other than that from which they derive must be regarded as by-products, if the process of re-use either occurs at the same time as the process from which they originate, or serves to ensure their re-use in good time, that is to say before the storage of residues can cause damage.

28 The Italian Republic emphasises the connection between the provisions at issue and the realisation of a vast public works programme relating to the country's road and rail links, for which the use of excavated earth and rocks is indispensable, since it probably constitutes the most important part of that programme. The re-use of those materials is thus guaranteed. Such a guarantee arises also from the obligation undertaken by those responsible for the various aspects of that programme to complete them.

29 In that context, the provisions at issue, far from laying down a general exclusion, determine, through that programme and the supervision of the carrying out of the works concerned, the situations in which excavated earth and rocks are to fall outside the rules on waste, in so far as they are materials which may be re-used in accordance with a coherent plan which assesses in advance specific effects on the environment and on health.

Findings of the Court

30 By its argument, the Commission claims, in essence, that the provisions at issue are contrary to the directive, and particularly to Article 1(a) thereof, on the ground that they misconstrue the concept of 'waste' applicable by virtue of the directive, thereby

excluding excavated earth and rocks intended for certain re-uses from the scope of the national legislation transposing the directive's provisions relating to waste management.

31 Under Article 1(a) of the directive, '"waste" shall mean any substance or object in the categories set out in Annex I [to the directive] which the holder discards or intends or is required to discard'.

32 The annex referred to clarifies and illustrates that definition by providing a list of categories of substances and objects which may be classified as 'waste'. That list is intended only as guidance, however, and the classification of a substance or object as waste is to be inferred primarily from the holder's actions and the meaning of the term 'discard' (see, to that effect, Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26, Case C-1/03 *Van de Walle and Others* [2004] ECR I-7613, paragraph 42, and Case C-252/05 *Thames Water Utilities* [2007] ECR I-3883, paragraph 24).

33 The term 'discard' must be interpreted in the light not only of the fundamental aim of the directive, which, according to the third recital in the preamble thereto, is 'the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste', but also of Article 174(2) EC. The latter provision states that 'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken ...'. It follows that the term 'discard' — and, accordingly, the concept of 'waste', within the meaning of Article 1(a) of the directive — cannot be interpreted restrictively (see, to that effect, inter alia, Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraphs 36 to 40, and *Thames Water Utilities*, paragraph 27).

34 Certain circumstances may constitute evidence that the holder has discarded a substance or object, or intends or is required to discard it, within the meaning of Article 1(a) of the directive (*ARCO Chemie Nederland and Others*, paragraph 83). That is the case in particular where a substance is a production or consumption residue, that is to say, a product which it was not, as such, sought to produce (see, to this effect, *ARCO Chemie Nederland and Others*, paragraph 84, and *Niselli*, paragraph 43).

35 Thus, the Court has stated that leftover stone from a granite quarry, which is not the product primarily sought by its operator, is, in principle, waste (see, to that effect, Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, *'Palin Granit'*, paragraphs 32 and 33).

36 Moreover, neither the method of treatment reserved for a substance nor the use to which that substance is put determines conclusively whether or not it is to be classified as waste (see *ARCO Chemie Nederland and Others*, paragraph 64, and Case C-176/05 *KVZ retec* [2007] ECR I-1721, paragraph 52).

37 The Court has thus stated, first, that the fact that a substance or object undergoes one of the disposal or recovery operations listed, respectively, in Annexes II A and II B to the directive does not, by itself, mean that a substance or object involved in such an operation is to be classified as waste (see, to that effect, inter alia, *Niselli*, paragraphs 36 and 37); and, secondly, that the concept of waste does not exclude substances and objects which are capable of economic re-use (see, to that effect, inter alia, Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraphs 47 and 48). The system of supervision and control established by the directive is intended to cover all objects and substances discarded by their owners, even if they have a commercial value and are collected on

a commercial basis for recycling, recovery or re-use (see, inter alia, *Palin Granit*, paragraph 29).

38 However, it is also clear from the case-law of the Court that, in certain situations, goods, materials or raw materials resulting from an extraction or manufacturing process, the primary aim of which is not their production, may be regarded not as residue, but as by-products which their holder does not seek to 'discard', within the meaning of Article 1(a) of the directive, but which he intends to exploit or market on terms advantageous to himself in a subsequent process — including, as the case may be, in order to meet the needs of economic operators other than the producer of those substances —, provided that such re-use is a certainty, does not require any further processing prior to re-use and forms an integral part of the process of production or use (see, to that effect, *Palin Granit*, paragraphs 34 to 36; Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, paragraphs 33 to 38; *Niselli*, paragraph 47; and also Case C-416/02 *Commission* v *Spain* [2005] ECR I-7487, paragraphs 87 and 90, and Case C-121/03 *Commission* v *Spain* [2005] ECR I-7569, paragraphs 58 and 61).

39 Accordingly, in addition to the criterion of whether a substance constitutes a production residue, a relevant criterion for determining whether or not that substance is waste within the meaning of the directive is the degree of likelihood that that substance will be re-used without any prior processing. If, beyond the mere possibility of re-using the substance, there is also a financial advantage for the holder in so doing, the likelihood of such re-use is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to 'discard', but as a genuine product (see *Palin Granit*, paragraph 37, and *Niselli*, paragraph 46).

40 However, if such re-use requires long-term storage operations which constitute a burden to the holder and are also potentially the cause of precisely the environmental pollution which the directive seeks to reduce, that re-use cannot be described as a certainty and is foreseeable only in the longer term, and accordingly the substance in question must, as a general rule, be regarded as waste

(see, to that effect, *Palin Granit*, paragraph 38, and *AvestaPolarit Chrome*, paragraph 39).

41 Whether a substance is in fact 'waste' within the meaning of the directive must be determined in the light of all the circumstances, account being taken of the aim of the directive and the need to ensure that its effectiveness is not undermined (see *ARCO Chemie Nederland and Others*, paragraph 88; *KVZ retec*, paragraph 63; and the order in Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005, paragraph 40).

42 In the present case, it is common ground that the provisions at issue exclude excavated earth and rocks from the scope of the national legislation transposing the directive provided that those materials, first, are not contaminated within the meaning of those provisions and, second, are intended for actual re-use for filling, backfilling, embanking or as aggregates, which includes 'the filling of worked quarries and the tipping on another site, authorised for any reason whatsoever'.

43 In that regard, as is clear from paragraphs 5 and 31 of this judgment, 'soil and stones' in the European Waste Catalogue must be regarded as being 'waste' within the meaning of the directive if their holder discards them or intends or is required to discard them.

44 Since the directive does not provide any single decisive criterion for discerning whether the holder intends to discard a given substance or object, Member States are free, in the absence of Community provisions, to choose the modes of proof of the various matters defined in the directives which they are transposing, provided that the effectiveness of Community law is not thereby undermined (see *ARCO Chemie Nederland and Others*, paragraph 41, and *Niselli*, paragraph 34). Thus Member States may, for example, define different categories of waste, in particular

to facilitate the organisation and control of waste management, provided that the obligations arising under the directive or other provisions of Community law relating to such waste are complied with and that the exclusion of any categories from the scope of legislation enacted in order to transpose obligations under the directive is in compliance with Article 2(1) of the directive (see, to that effect, the judgment of 16 December 2004 in Case C-62/03 *Commission* v *United Kingdom*, not published in the ECR, paragraph 12).

45 In essence, the Italian Republic contends that the materials covered by the provisions at issue may be regarded, in accordance with the case-law of the Court, not as excavation residue, but as a by-product which the holder, because of his clear intention that it be re-used, is not seeking to 'discard', within the meaning of Article 1(a) of the directive; and that, accordingly, those provisions do not limit the obligations laid down in the directive in respect of the management of waste.

46 However, in view of the obligation, recalled in paragraph 33 of this judgment, to give the concept of waste a broad meaning and in the light of the requirements of the case-law set out in paragraphs 34 to 40 of this judgment, reasoning along the lines of the arguments put forward by the Italian Government, relating to by-products which the holder does not wish to discard, must be confined to situations where re-use of goods, materials or raw materials (including, as the case may be, in order to meet the needs of economic traders other than the producer) is not merely a possibility, but a certainty, and where such re-use does not require any prior processing and forms an integral part of the process of production or use.

47 In this case, the provisions at issue, particularly Article 1(19) of Law No 443/2001, evidently envisage a wide range of situations, including cases where excavated earth or rocks are tipped on another site.

48 In addition, it is possible, contrary to what is suggested, in essence, by the Italian Republic, that the 'actual re-use' referred to in the provisions at issue will take place only after a significant, or even open-ended, delay, thereby requiring long-term storage of the materials in question. As is clear from paragraph 40 of the present judgment, such operations are likely to constitute a burden to the holder and are also potentially the cause of precisely the environmental pollution which the directive seeks to reduce.

49 Moreover, as is clear in particular from paragraphs 36 and 37 of this judgment, the use to which a substance is put does not determine conclusively whether or not that substance is to be classified as waste. Consequently, the mere fact that the materials in question will be re-used does not support the inference that they do not constitute 'waste' within the meaning of the directive.

50 What subsequently happens to an object or a substance is not in itself determinative of its nature as waste, which, in accordance with Article 1(a) of the directive, is defined in terms of the holder of that object or substance discarding it or intending or being required to discard it (see, to that effect, *ARCO Chemie Nederland and Others*, paragraph 64, and *KVZ retec*, paragraph 52).

51 It is accordingly clear that the provisions at issue raise a presumption, in the situations to which they apply, that the excavated earth and rocks in question are by-products which represent for their holder — by dint of his intention that they be re-used — a benefit or an economic value, rather than a burden which he would seek to be rid of.

52 However, although in some cases that may actually reflect the true position, there cannot be a general presumption that a holder of excavated earth and rocks should derive from the fact that they are intended for re-use an advantage over and above that of simply being able to discard them.

53 Consequently, even assuming that it could be ensured that materials covered by the provisions at issue really are re-used for filling, backfilling, embanking or as aggregates — the Italian Republic not having pointed to any specific rule to that effect —, it must be held that those provisions result in the exclusion of residue which nevertheless meets the definition in Article 1(a) of the directive from being treated as waste in Italian law.

54 Article 1(a) of the directive not only sets out the definition of the concept of 'waste' for the purposes of the directive, but also — in conjunction with Article 2(1) — defines the scope of the directive. Article 2(1) lists the forms of waste that are excluded from the scope of the directive, as well as those that may be excluded, and the circumstances in which that is possible, whereas in principle the directive covers all waste which corresponds to the definition set out in Article 1(a) thereof. Any provision of national law which limits in general terms the scope of the obligations arising under the directive, to a greater degree than is permitted under Article 2(1), is necessarily disregarding the scope of the directive (see, to that effect, *Commission* v *United Kingdom*, paragraph 11), thus undermining the effectiveness of Article 174 EC (see, to that effect, *ARCO Chemie Nederland and Others*, paragraph 42).

55 In the present case, even assuming, as the Italian Republic argued at the hearing, that the operations referred to in the provisions at issue are also governed by the

national legislation on the carrying out of public works, such as the construction of embankments and tunnels, it is sufficient to observe in that regard that that type of works and the materials used in them do not, as a rule, come within the exception from the directive's scope under Article 2(1) thereof.

56 Finally, as regards the argument put forward by that Member State that application of the waste regime would mean that waste-disposal undertakings or undertakings licensed to transport or collect waste would have to be involved in the works in question and that that might increase their costs considerably, the Commission rightly pointed out that this situation stems from the Italian legislation rather than from the directive. Subject to the requirements as to registration, or, as the case may be, of a permit, the holder of the waste may simply recover it or dispose of it himself in accordance with the provisions of the directive. In that regard, it should be added that the directive applies not only to disposal and recovery of waste by specialist undertakings, but also to disposal and recovery of waste by the undertaking which produced it, at the place of production (*Inter-Environnement Wallonie*, paragraph 29).

57 In those circumstances, the Commission's action must be upheld.

58 It must therefore be held that, in so far as the provisions at issue excluded from the scope of the national legislation relating to waste excavated earth and rocks intended for actual re-use for filling, backfilling, embanking or as aggregates, with the

exception of those from contaminated and decontaminated sites with a concentration of pollutants above the acceptable limits laid down by the regulations in force, the Italian Republic has failed to fulfil its obligations under the directive.

Costs

59 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Declares that, in so far as Article 10 of Law No 93 of 23 March 2001 concerning provisions on the environment and Article 1(17) and (19) of Law No 443 of 21 December 2001 delegating to the Government matters of infrastructure and strategic installations of production and of other action to boost production excluded from the scope of the national legislation relating to waste excavated earth and rocks intended for actual re-use for filling, backfilling, embanking or as aggregates, with the exception of those from contaminated and decontaminated sites with a concentration of pollutants above the acceptable limits laid down by the regulations in force, the Italian Republic has failed to fulfil its obligations under Council**

Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991;

2. Orders the Italian Republic to pay the costs.

[Signatures]