OPINION OF ADVOCATE GENERAL JACOBS
delivered on 24 April 1997 *

1. In the main proceedings Inter-Environnement Wallonie ASBL (hereinafter 'Inter-Environnement') is asking the Belgian Conseil d'État to annul, in whole or in part, the Regulation of the Walloon Regional Executive of 9 April 1992 on toxic or hazardous waste ('the Regulation'). In its judgment of 29 March 1996 seeking a preliminary ruling the Conseil d'État has already adjudicated on five of Inter-Environnement's six pleas and annulled certain provisions of the Regulation. Inter-Environnement's remaining plea has prompted the Conseil d'État to seek a ruling on two points of Community law concerning, first, its power to review the legality of a national measure adopted before the final date for the implementation of a directive and, secondly, the scope of the notion of waste in the Community legislation on waste, with particular reference to materials produced or used in industrial processes.

2. Inter-Environnement's plea is concerned specifically with Article 5(1) of the national Regulation, which provides:

'Authorization is required for the setting up and running of an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste which is not an integral part of an industrial production process and which processes waste originating from third parties ...'

3. In Inter-Environnement's view that provision wrongly excludes from the authorization requirement toxic or dangerous waste forming an integral part of an industrial process. Its plea is in two parts.

4. Inter-Environnement contends first that Article 5(1) of the Regulation is contrary to Article 11 of Council Directive 75/442/EEC on waste, [1] as amended by Council Directive 91/156/EEC (all references hereinafter to Directive 75/442 are to the directive as amended), [2] and to Article 3 of Council Directive 91/689 on hazardous waste. [3]

* Original language: English.

1 — Council Directive of 15 July 1975 on waste, OJ 1975 L 194, p. 39.

2 — Council Directive of 18 March 1991 amending Directive 75/442/EEC on waste, OJ 1991 L 78, p. 32.

3 — Council Directive of 12 December 1991 on hazardous waste, OJ 1991 L 377, p. 20.

5. In its judgment the Conseil d'État concludes that Article 5(1) of the Regulation does not comply with those provisions. Articles 9 and 10 of Directive 75/442 lay down permit requirements for establishments or undertakings which carry out the waste disposal or recovery operations covered by the directive. Article 11 of the directive allows Member States to exempt from the permit requirement establishments or undertakings carrying out their own waste disposal at the place of production (Article 11(1)(a)) and establishments or undertakings that carry out waste recovery (Article 11(1)(b)). However, that exemption may apply only if certain conditions are met: the competent authorities must have adopted general rules for each type of activity laying down certain matters; moreover, the types or quantities of waste and the methods of disposal or recovery must be such that the basic aims of the directive of preventing danger to human health and harm to the environment as laid down in Article 4 of the directive are met. The Conseil d'État notes that those conditions have not been implemented in Belgian law. Moreover, Article 3(1) of Directive 91/689 provides that the power, provided for in Article 11(1)(a), to exempt establishments or undertakings carrying out waste disposal does not apply to hazardous waste covered by that directive.

6. The Conseil d'État notes however that the contested Regulation was adopted before the final date for implementing Directive 91/156, namely 1 April 1993; the applicant's plea therefore appears to fall foul of the rule of Belgian administrative law according to which the validity of a measure is to be assessed at the moment of its adoption.

7. In the second part of its plea Inter-Environnement argues that Article 5(1) of the Regulation infringes certain provisions of the Decree of the Walloon Regional Council of 5 July 1985 on waste, in particular Article 3(1). That provision, as amended by the Decree of 25 July 1991, defines waste as:

'all substances or objects in the categories set out in Annex I which the holder discards or intends or is required to discard'.

8. That provision is intended to give effect to the similarly worded Article 1 of Directive 75/442, as amended. The Conseil d'État considers that Inter-Environnement's plea raises the issue whether a substance or object which, directly or indirectly, forms part of an industrial production process is waste within the meaning of the Community and national provisions.

9. The Conseil d'État therefore seeks a preliminary ruling from the Court on the following questions:

'(1) Do Articles 5 and 189 of the EEC Treaty preclude Member States from adopting a provision contrary to Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, before the period for transposing the latter has expired?

Do those same Treaty articles preclude Member States from adopting and bringing into force legislation which purports to transpose the abovementioned directive but whose provisions appear to be contrary to the requirements of that directive?

(2) Is a substance referred to in Annex I to Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste and which directly or indirectly forms an integral part of an industrial production process to be considered "waste" within the meaning of Article 1(a) of that directive?'

10. The Court has received written observations from Inter-Environnement, the Belgian, French, German, Netherlands and United Kingdom Governments and the Commission. With the exception of the Belgian and German Governments, the foregoing were also represented at the hearing.

Question 1

11. Before I examine the national court's first question it may be helpful to set out certain basic principles concerning directives which flow from the Treaty and from the existing case-law.

12. Under Article 189 of the Treaty a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. By virtue of Article 191, as amended by the Treaty on European Union with effect from 1 November 1993, directives addressed to all Member States enter into force on the date specified therein or, if no date is specified, on the 20th day following their publication. Other directives take effect from the date of their notification to the addressees. Prior to its amendment Article 191 of the EEC Treaty provided that all directives were to take effect from the date of their notification to their addressees.

13. Although entering into force or taking effect on the above dates directives, which unlike regulations are not directly applicable, invariably allow Member States a period of time in which to adopt the laws, regulations and administrative provisions necessary to ensure implementation of the directive in national law.

14. In its judgment in *Ratti* [4] the Court held that:

'... a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.

...

... after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law ... which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.'

15. In the same case the Court was also asked whether a directive was immediately and directly applicable with regard to the obligations imposed on Member States as from the date of notification of the directive in a case where a person had complied with the provisions of the directive before the expiry of the period laid down for implementation. The Court replied that it was only at the end of that period and in the event of the Member State's default that the directive could have effects in relation to individuals and that until that date was reached Member States retained their freedom of action. [5]

16. Moreover, in its many judgments in proceedings under Article 169 of the Treaty concerning non-implementation of directives the Court, in declaring Member States to be in breach of their obligations under Community law, has consistently defined the breach as a failure to adopt the necessary implementing measures *within the prescribed period.*

17. In his Opinion in *Teuling* [6] Advocate General Mancini nevertheless suggested that the legislative freedom of Member States following the adoption of a directive was subject to certain limits:

'... such freedom does not include the power to aggravate the defect which the directive is intended to remedy. Indeed it may be that

4 — Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629, paragraphs 22 to 24 of the judgment.

5 — Paragraphs 43 and 44 and point 5 of the operative part of the judgment. See also Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 16.

6 — Case 30/85 *Teuling* v *Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497, paragraph 7 of the Opinion.

measures adopted during the prescribed period must of necessity be measures intended to transpose the Community provisions. Such measures must at least not conflict with the requirements laid down in those provisions.'

18. Advocate General Mancini's remarks were made against the background of national rules, adopted during the period for the implementation of Directive 79/7, [7] which were alleged to increase discrimination on grounds of sex in the award of benefits in respect of incapacity for work. In its judgment the Court did not however find it necessary to rule on the issue.

19. In the present proceedings Inter-Environnement and the Commission propose an affirmative answer to both parts of the national court's first question.

20. Inter-Environnement emphasizes that it does not seek to challenge the principle that an individual can rely upon the provisions of a directive before a national court only from the expiry of the implementation period. In its action before the Conseil d'État it is not seeking to assert individual rights. Its action seeks the annulment of the national Regulation on the basis that it conflicts with a superior rule, namely the Community directive which it is intended to implement. Under Belgian law such an action must be brought within 60 days of the publication of the measure concerned. In the absence of an obligation on the Walloon executive of the kind canvassed in the first question, an implementing measure adopted more than 60 days before the expiry of the implementation period would be unassailable. Challenges based on Community law would therefore be treated less favourably than challenges based on national law.

21. Inter-Environnement considers that the legality of national implementing measures can be reviewed even before the expiry of the implementation period. In the course of such review, account must be taken of the duty of cooperation under Article 5 of the Treaty, which imposes an obligation on Member States to implement the directive properly. The position is particularly clear in the present case since the contested Regulation expressly purports to be an implementing measure.

22. The Commission argues that the adoption of a directive entails a standstill obligation based on Articles 5 and 189 of the Treaty. A Member State is not permitted to

7 — Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6, p. 24.

adopt any new measure which would increase the disparity between the national and Community rules. Such a measure would be liable to jeopardize the attainment of one or more of the objectives of the directive and lead to legal uncertainty for individuals. It is therefore immaterial whether a measure is specifically intended to implement a directive.

23. In its written observations the Commission stated that the failure by a State to fulfil its obligations under the directive may be established only after the implementation period. At the hearing it suggested that an action could nevertheless be brought against a Member State under Article 169 of the Treaty to establish an infringement of the standstill obligation itself. The Commission accepts however that such obligation would not give rise to rights for individuals before the end of the implementation period.

24. The Belgian, French, Netherlands and United Kingdom Governments all propose a negative reply to the first question. The German Government did not submit observations on that question.

25. The Netherlands Government accepts that the adoption of a directive entails a form of standstill obligation. However, it considers that a Member State cannot be in breach of Articles 5 and 189 where, as here, it is unclear whether the provisions in question are in breach of the directive. Moreover, it considers that no action may be brought under Article 169 of the Treaty before the end of the implementation period.

26. The Belgian, French and United Kingdom Governments all take the view that pending the final date for implementation of a directive Member States remain free to enact rules which are contrary to it. The United Kingdom adds the qualification that a Member State is precluded by Articles 5 and 189 of the Treaty from adopting national measures which would have the effect of making it impossible or excessively difficult for the State to give proper effect to the directive when it subsequently introduces measures to transpose the directive into national law.

27. It seems to me that, in considering the Conseil d'État's first question, it is important to bear in mind the reasons which have led it to put the question to the Court. Although the question is phrased in terms of the power of Member States to adopt rules contrary to a directive during the period for its implementation, Inter-Environnement's action is not specifically concerned with that period. The question arises because of the principle in Belgian administrative law that the validity of a measure must be assessed by reference to the circumstances obtaining at the

moment of its adoption. The Conseil d'État's question is therefore designed to discover whether at the moment of the adoption of the contested Regulation Community law precluded Belgium from enacting a measure which was contrary to the directive. The Conseil d'État assumes that, unless at the moment of the adoption of the contested Regulation the directive imposed such an obligation on Belgium, the Regulation cannot be challenged by way of an action for annulment before the Conseil d'État.

28. Inter-Environnement also points out in its written observations that an action for annulment must be brought before the Conseil d'État within 60 days of the publication of the contested measure. Thus in order to be admissible its action had to be brought before the final date for implementation of Directive 91/156. However, it is not clear whether, even if an applicant were able to bring an action after the final date for implementation of a directive because the contested measure was adopted less than 60 days before that date, its action could succeed unless an obligation existed under Community law at the moment of the adoption of the measure.

29. Against that background it seems to me that the real issue in the present case is not whether Directive 91/156 precludes the application of the contested Regulation during the period for the implementation of the directive but whether, despite the fact that that period had not yet expired at the moment when the contested Regulation was adopted, the Conseil d'État is obliged to take account of the directive in assessing the validity of the Regulation. In my view that question must plainly be given an affirmative reply even on the basis of existing principles.

30. The Treaty, in particular the third paragraph of Article 189, imposes on Member States an obligation to achieve the result required by a directive no later than the final date fixed for its implementation. However, that obligation actually arises not from the final date for implementation but *on the day on which the directive enters into force or takes effect* as laid down in Article 191. Directive 91/156 took effect, by virtue of the second paragraph of Article 191 of the EEC Treaty, on the date on which it was notified to Belgium. From that date onwards and throughout the period for the implementation of the directive Belgium was under an obligation to bring its national provisions into line with the directive by 1 April 1993. In other words, it was under an obligation to ensure that there were no national rules contrary to the directive after that date. That obligation flowed from a legal instrument which had already taken effect at the moment of the adoption of the contested national Regulation and must clearly be taken into account by the Conseil d'État in assessing the validity of the Regulation. That is so notwithstanding the fact that performance of the obligation to implement the directive was not required until a later date; as I shall explain below (see paragraph 34), that may however be relevant in determining the scope of the remedy to be granted by the Conseil d'État.

31. Such a conclusion is therefore consistent with the rule, applicable also under Community law, [8] that the validity of a measure must be assessed on the basis of the situation at the moment of its adoption. The rationale for that rule is that the legislature can reasonably be expected to take account only of legal and factual circumstances obtaining at that moment. In the present case however the Community directive had already been adopted and had taken effect at the moment of the adoption of the contested national Regulation. Its existence was therefore a legal circumstance of which the Walloon executive must be taken to have been aware.

32. In that connection reference may also be made to the recent judgment of the Court of First Instance in *Opel Austria*. [9] The Court of First Instance, while acknowledging that the legality of a measure contested under Article 173 of the Treaty had to be assessed in the light of the elements of fact and law existing at the time when the measure was adopted, held that, in reviewing the legality of a Council Regulation, it was entitled to take account of the EEA agreement which had been concluded by the Communities seven days before the adoption of the Regulation but entered into force shortly afterwards. The Court of First Instance based that conclusion *inter alia* on the principle of good faith as embodied in Article 18 of the Vienna Convention on the Law of Treaties.

8 — See, for example, the judgment in Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321.

9 — Case T-115/94 *Opel Austria* v *Council*, judgment of 22 January 1997, paragraph 87 et seq.

33. It seems to me to be even clearer that, by virtue of the duty of cooperation imposed on Member States by Article 5 of the Treaty and their specific obligation to implement under Article 189, account must be taken of a directive which has already taken effect in assessing the legality of national measures.

34. In such a case it is for a national court, if it concludes that a national measure is incompatible with the obligations flowing from a directive, to determine the appropriate remedy in accordance with the relevant national rules. It may be that in certain cases, for example where a national measure was adopted under delegated powers and the enactment of a measure contrary to the directive would be *ultra vires*, the measure would fall to be annulled *ab initio*. More generally, in the case of a measure specifically intended as an implementing measure that result may be thought to be consistent with the purpose of an action, such as the action for annulment in the present case, which is designed to allow rapid review of new regulations in the interests of legal certainty.

35. However, that is a matter for national law. As a matter of Community law it would in my view be sufficient in the present case for the Conseil d'État to annul the contested national Regulation, if it were found to contravene the directive, solely with effect from the final date for implementation of the directive, namely 1 April 1993. It is from that date that the Regulation would begin to

produce unlawful effects. I should emphasize that the foregoing is of course without prejudice to the rules applicable under national law with respect to *locus standi*, time-limits and other procedural conditions.

36. The above solution may at first sight seem somewhat curious in so far as the moment by reference to which the legality of a national measure must be appraised does not coincide with the moment from which it produces unlawful effects. However, that anomaly is the consequence of the special features of directives. If, owing to the particular method by which directives are transposed into national law, national implementing measures adopted before the final date for implementation of a directive were immune from challenge by way of an action for annulment before the Conseil d'État, the result would be that actions based on Community law would be placed at a disadvantage by comparison with actions based on national law. For example, an action based on a superior rule of national law, such as a Decree of the Walloon Regional Council, would not encounter the same obstacle. Implementing measures would then at most be susceptible to indirect challenge by way of a plea of illegality raised in proceedings brought against individual decisions or other provisions adopted pursuant thereto.

37. The above conclusion based on existing principles should be sufficient to resolve the anomaly which prevents the Conseil d'État from reviewing the legality of implementing measures adopted before the final date for implementation of directives. I do not therefore think it is necessary in the present case for the Court to rule on the views put forward by Inter-Environnement and the Commission, namely that the entry into force of a directive has a 'blocking' effect in the sense that it confines the power of Member States to the adoption of implementing measures in conformity with the directive, at least where such measures expressly purport to implement the directive, or precludes the adoption of measures which increase the disparity between national and Community rules (a standstill obligation). Those arguments raise more difficult issues which would be better resolved in a case in which they genuinely arose. I shall nevertheless consider them briefly.

38. It is clear that Directive 91/156 does not expressly impose limitations of the kind suggested on the powers of Member States. It would have been open to the Community legislature to do so, yet it did not. Like other directives, it merely imposes an obligation to bring into force the laws, regulations and administrative provisions necessary to comply with the directive not later than a certain date.

39. The question arises whether such limitations may nevertheless be inferred from Articles 5 and 189 of the Treaty. I certainly

accept that a Member State would be in breach of its duty of cooperation under Article 5 of the Treaty if it were to adopt measures during the period for implementation of a directive which were liable to jeopardize the attainment of the aims of a directive by the appointed date. It would also be in breach of its more specific duty to implement under Article 189 of the Treaty.

40. As the United Kingdom suggests, that would be so if a Member State adopted measures which rendered the attainment of the objectives of the directive impossible or unduly difficult. For example, suppose that the Community adopted a directive imposing limits on the quantity of nuclear waste produced by Member States. It seems to me that a Member State would plainly be in breach of its obligations under Articles 5 and 189 of the Treaty if, after the adoption of the directive, it were to invest in a nuclear programme which would of necessity make compliance with the directive impossible or unduly difficult.

41. In such a case, in which measures adopted by a Member State were liable to create a situation which would make implementation of a directive impossible or unduly difficult, there would be sound reasons for recognizing that the Member State was in breach of its obligations under Community law even before the implementation period had expired. The Commission would then be able to bring the matter before the Court as a matter of urgency, with a view to forestalling the application of the measures.

42. I do not rule out the possibility that a Member State might in some circumstances also be considered to be in breach of its duty of faithful cooperation under Article 5 of the Treaty (although possibly not its duty to implement under Article 189) if it were to enact without justification, after the adoption of a directive, measures which were wholly contrary to the spirit and tenor of a directive, especially one which conferred rights on individuals. That might particularly be so where the measures, although repealed before the final date for implementation, continued to produce practical effects after that date. For example, as Advocate General Mancini suggested in *Teuling*, a Member State might be in breach of its duty of cooperation if, following the adoption of a directive prohibiting discrimination on grounds of sex in certain areas, it adopted measures introducing discrimination in those areas.

43. However, such cases would be exceptional. Contrary to the views expressed by Inter-Environnement and the Commission, I do not think it would be appropriate to interpret Articles 5 and 189 as entailing a general blocking effect in any of the senses mentioned in paragraph 37 above.

44. First, the somewhat extreme view that the power of a Member State is limited, following the adoption of a directive, solely to the adoption of implementing measures ignores the fact that, during the implementa-

tion period, Member States are permitted to continue applying their existing arrangements and may well need to make adjustments to those arrangements during that period. It seems clear that Member States must in principle retain the power freely to amend individual aspects of such arrangements, which may be based on methods and even objectives which differ materially from those underlying the directive, in order to preserve their coherence and effectiveness pending their replacement by the Community system.

45. Even the imposition of a standstill obligation, precluding a Member State from exacerbating any disparities between the national and Community rules, would in my view be inappropriate other than in special circumstances such as those described above. Such a restriction would, as the French Government suggests, unduly curtail the freedom of choice of Member States in implementing a directive; in some cases it may even make Member States reluctant to agree to the adoption of a directive in the first place.

46. Suppose, for example, that during 1997 the Council adopts a directive introducing a maximum rate of VAT with effect from 31 December 2000. A Member State, in agreeing to the adoption of the directive, calculates that for the years 1999 and 2000 it will require additional revenue in order to meet its public expenditure which can be met by increasing the rate of VAT which it levies above the maximum rate for those years. At the same time, however, it plans to use those years to draft and adopt new legislation introducing a wealth tax from the beginning of the year 2001 in order to meet the shortfall in tax revenue, allowing it to comply with the maximum rate of VAT from that year onwards. It seems to me that in that example the Member State, far from being in breach of its duty of cooperation, has been cooperative both in the adoption and implementation of the directive.

47. An implied standstill obligation would also be inappropriate in areas such as the environment, where a Member State by the adoption of measures seeks to ensure the attainment of certain physical parameters or values required by a directive. A Member State may be reluctant to guarantee that some worsening of the situation will not occur, and need to be reflected in its national rules, before the measures it puts in place for the attainment of the aims of the directive are effective.

48. Moreover, numerous directives designed to ensure the free movement of goods, services or persons provide for the replacement of regulation or supervision in the importing or host State by regulation or supervision in the State of origin. Pending the introduction of uniform rules permitting the transfer of competence to the State of origin it may be necessary, in the light of commercial or other developments, for an importing or host State to introduce additional arrangements or

procedures which, once the directive is implemented, will become the exclusive responsibility of the State of origin. Yet the introduction by the importing or host State of any new arrangements would by definition be contrary to the directive and in breach of a standstill obligation.

49. Contrary to the Commission's view, I do not think any support for the view that a standstill obligation arises from Articles 5 and 189 of the Treaty can be derived from the Court's judgment in *Peskeloglou* [10] or *Commission* v *United Kingdom*. [11] The Court's finding in *Peskeloglou* that, during the transitional period provided for in the second subparagraph of Article 45(1) of the Act of Accession of the Hellenic Republic, national provisions concerning the first grant of a work permit to a Greek national could not be made more restrictive after the entry into force of the Act was based on a restrictive interpretation of a provision of the Act itself; there is no equivalent provision in the directive in issue here. [12]

50. The Commission refers to the passage in *Commission* v *United Kingdom* where the Court stated that Article 5 of the Treaty 'imposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action'. However, those remarks concerning the duties of Member States were made in the context of Article 102 of the Act of Accession of 22 January 1972, under which the exclusive power to adopt measures relating to the conservation of the resources of the sea had been expressly transferred to the Community as from 1 January 1979.

51. Inter-Environnement's narrower view that, where a Member State adopts measures purporting to implement a directive, its power is limited to the adoption of measures which are in conformity with the directive is less objectionable at first sight. As I have already noted, it is certainly possible that as a matter of national law the power of the legislator is so limited.

52. However, other than in special circumstances I see no compelling reason why as a matter of Community law an implementing measure should be considered unlawful before the obligation to implement has crystallized. In proceedings brought by individuals based on the direct effect of directives

10 — Case 77/82 *Peskeloglou* v *Bundesanstalt für Arbeit* [1983] ECR 1085.

11 — Case 804/79 [1981] ECR 1045.

12 — See to the same effect S. Prechal, *Directives in European Community Law*, Clarendon Press, Oxford 1995, p. 26.

national courts are obliged to set aside conflicting national rules only after expiry of the implementation period. It is more consistent with that principle that in the present case the Conseil d'État should, as a matter of Community law, be obliged to annul the Regulation (if found to be contrary to the directive) only with effect from the final date for implementation.

53. Finally, I see no inconsistency between the above result and the view which I took in my Opinion in *Hansa Fleisch* [13] to the effect that, even before the expiry of the period for implementation, a national court was obliged under Community law to interpret national legislation intended to implement a directive in accordance with the directive. As I noted in that Opinion, the duty to interpret implementing provisions consistently with the directive arises, not from the expiry of that period, but from the duty of the national court under Article 5 of the Treaty to cooperate with other national authorities in their endeavour to implement the directive. It would plainly be absurd if a national court were permitted to frustrate the intention of the national legislature by refusing to interpret implementing provisions in conformity with the directive where they were capable of being so interpreted.

13 — Case C-156/91 *Hansa Fleisch* v *Landrat des Kreises Schleswig-Holstein* [1992] ECR I-5567.

Question 2

54. The purpose of the national court's second question is to ascertain whether the fact that the collection, pre-treatment, disposal or recovery of a substance forms part of an industrial process removes it from the scope of Directive 75/442.

55. In what follows I shall refer only to those provisions of the Community legislation which are directly relevant to the present case. For a fuller account of that legislation I would refer to my Opinions in *Commission* v *Germany* [14] and *Tombesi*. [15]

56. Inter-Environnement, the Commission and the Belgian, German, Netherlands and United Kingdom Governments all consider that it is immaterial whether the operation in question forms part of an industrial process. I share that view.

14 — Case C-422/92 [1995] ECR I-1097, in particular paragraphs 2 to 11.

15 — Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 [1997] ECR I-3561, Opinion of 24 October 1996, in particular paragraphs 2 to 18.

57. 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'.

58. Annex I to Directive 75/442, to which Article 1(a) of the directive refers and which is entitled 'Categories of waste', lists different categories of waste, including 'production or consumption residues not otherwise specified below' (Q1), 'off-specification products' (Q2), 'substances which no longer perform satisfactorily (e. g. contaminated acids, contaminated solvents, exhausted tempering salts)' (Q7), 'residues of industrial processes' (Q8), 'residues from raw material extraction and processing (e. g. mining residues, oil field slops, etc.)' (Q11) and 'adulterated materials' (Q12). The broad definition of waste is reinforced by the final category: 'any materials, substances or products which are not contained in the above categories' (Q16).

59. A detailed list of waste known as the European Waste Catalogue (EWC) was adopted by the Commission pursuant to Article 1(a) of the directive by Decision 94/3/EC. [16] Introductory Note 3 of the EWC states that:

'the EWC is an harmonized, 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.'

60. Thus a substance, in particular those listed in Annex I or in the EWC, constitutes waste within the meaning of Directive 75/442 where the holder discards or intends to discard or is required to discard it. The scope of the term 'waste' therefore turns on the meaning of the term 'discard'. As I noted in my Opinion in *Tombesi*, [17] it is clear from the provisions of the directive, in particular Article 4, Articles 8 to 12 and Annexes IIA and B, that the term 'discard' employed in

16 — Commission Decision of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste, OJ 1994 L 5, p. 15.

17 — Cited in note 15, paragraph 50.

the definition of waste in Article 1(a) has a special meaning encompassing not only the disposal of waste but also its consignment to a recovery operation.

61. There is nothing in the directive to suggest that its scope is limited to disposal or recovery operations not forming an integral part of an industrial process. On the contrary, it is clear from the list of categories of waste in Annex I, in particular the items mentioned at paragraph 58 above, and from the disposal and recovery operations listed in Annexes IIA and IIB that the notion of waste is sufficiently broad to cover all kinds of industrial residues, by-products and other materials resulting from production processes.

62. Moreover, it is clear from Articles 9, 10 and 11 of the directive, summarized at paragraph 5 above, that the permit requirement laid down by those provisions applies not only to undertakings specializing in waste disposal and recovery for third parties but also to undertakings which carry out their own waste disposal and recovery. The broad scope of the directive is confirmed by the power of Member States to lay down certain exemptions. Article 11 allows Member States to exempt undertakings carrying out their own waste disposal or recovery from the permit requirement on certain closely defined conditions. That power is subject to further limits in the case of hazardous waste. Under Article 3(1) of Directive 91/689 Member States are not permitted to exempt undertakings carrying out their own disposal operations in so far as the substance is classified as hazardous waste within the meaning of that directive. Moreover, Article 3(2) of the directive lays down more specific conditions for the exemption of undertakings carrying out their own recovery of hazardous waste going beyond those applicable to general waste under Article 11 of Directive 75/442.

63. It is clear therefore that a substance which is disposed of or recovered within the meaning of the directive constitutes waste even where such disposal or recovery forms part of an industrial process. That conclusion is sufficient to provide the national court with the guidance it seeks.

64. The Member States which have submitted observations on the second question have however gone further and explained the criteria which they use for distinguishing between waste and non-waste materials with particular reference to materials produced or used in industrial processes.

65. The Belgian Government considers that a substance referred to in Annex I to the Directive integrated into an industrial production process constitutes waste only if it is

used in a manner which is not in conformity with the nature or function assigned to it under a natural process or assigned to it intentionally under a production or other process.

66. The German Government takes the view that it is necessary, in the absence of criteria laid down by the directive, to consider each case on its merits in the light of the view generally held in the trade. The German Government produces by way of an annex to its written observations a recent OECD discussion document [18] providing guidance on the factors which may be relevant in distinguishing between waste and non-waste materials in individual cases. I shall consider that document in some detail below.

67. The Netherlands and United Kingdom Governments put forward similar views to those which they expressed in *Tombesi*. [19] The Netherlands Government distinguishes between waste and secondary raw materials. The environmental objectives underlying the waste directives mean that very stringent conditions must be fulfilled before a substance can be categorized as a secondary raw material. In the Netherlands the following criteria have been laid down for that purpose: the substance must be transported directly from the producer to the person who will make further use of it; it must be used 100% in a production process, for example as a substitute for a primary raw material; and it must not be subject to any process comparable to a current means of waste disposal or recovery.

68. The United Kingdom considers that a substance constitutes waste if it is consigned to a disposal operation within the meaning of Annex IIA or to an operation which falls within Annex IIB by virtue of the fact that it is unequivocally associated with the recovery of waste. Production residues, secondary raw materials and useful by-products used in industrial production processes in the same way as any other raw materials of non-waste origin do not constitute waste provided that they are not subjected to an operation unequivocally associated with the recovery of waste. Production residues which, by virtue of adulteration or other like reasons associated with their character as secondary raw materials, require processing in order to protect human health or the environment under conditions different from those necessary in the case of other raw materials of non-waste origin, are to be regarded as destined for recovery processes within the meaning of Annex IIB and constitute waste.

18 — Discussion Paper on guidance for distinguishing waste from non-waste, issued by the OECD Waste Management Policy Group, ENV/EPOC/WMP(96)1.

19 — Cited in note 15; see paragraphs 47 and 48 of the Opinion.

69. It seems to me that it would be possible — and may be desirable in the interests of legal certainty — for the Court, in the light of the observations presented to it in the present case, to offer some general guidance on the distinction between the discarding of waste within the meaning of the directive and normal industrial processing of non-waste products. As I suggested in my Opinion in *Tombesi*, [20] however, as the directive stands at present it must to some extent be left to Member States to develop more detailed criteria to apply the rules of the directive, as interpreted by the Court, to the various situations which may occur in practice.

70. Such an approach is moreover consistent with the division of responsibilities between the Court and the national courts under the Treaty. It is for the national courts to verify that national authorities have properly applied the directive in individual cases.

71. Although the Governments represented in these proceedings have put forward different criteria for applying the directive, it seems to me that there is nevertheless considerable common ground. Moreover, the OECD document produced by the German Government suggests that the same is true among OECD countries. Although prepared for a different purpose (namely the application of the notion of waste in the context of an OECD decision), the document contains a useful comparative survey of the relevant law and practice of OECD countries.

72. The document notes that OECD countries commonly distinguish between primary raw materials, residues and secondary raw materials. Primary raw materials are defined as materials obtained from natural sources for use in manufacturing or production processes (e. g. mined or quarried minerals, crude oil, harvested crops). Such materials are not regarded as waste because they have been intentionally obtained (although I presume that even primary raw materials could become waste if the holder formed an intention to dispose of them).

73. Residual materials or residues are defined as materials which unavoidably arise during the manufacture or use of a product. Such a material may be used directly as an effective substitute for a product or as an ingredient in another manufacturing process to create a different product or may have no direct use without being subjected to further processing. Some countries define the term 'by-product' in the same way. Such materials are generally regarded as waste unless they are capable of being used as an effective

20 — See paragraph 56.

substitute for another product or as an ingredient in another process other than a recovery operation. In both cases any direct use should be environmentally sound, i. e. comply with the same standards, regulations and specifications as the product or ingredient that the material is replacing.

74. According to the OECD document its member countries use the term 'secondary raw material' in three different ways: (a) a material which may no longer be used for its originally intended purpose but is in a form which allows it to be used directly in a production process as a substitute for a primary raw material (in which case it is unlikely to constitute waste); (b) a material which can be so used only after being consigned to a recovery operation (and hence is likely to constitute waste); (c) a material which has undergone a recovery operation and is now ready for use in a production process (and is therefore likely to have ceased being waste).

75. Although that appears to be the limit of the international consensus on the subject, the OECD document notes that its member countries employ a range of other criteria for determining whether a material constitutes waste in a given case. I think it is helpful to set out those criteria in full:

'1. Is the material produced intentionally?

2. Is the production of the material subject to quality control?

3. Does the material meet well developed nationally and internationally recognized specifications/standards?

4. Do these standards include environmental considerations, in addition to technical or economic considerations?

5. Is the material made in response to market demand?

6. Is the overall economic value of the material negative?

7. Is further processing required before the material can be directly used in a manufacturing/commercial application?

8. Is this processing limited to minor repair?

9. Is the material still suitable for its originally intended purpose?

10. Can the material be used for another purpose as a substitute material?

11. Is the use of the material as environmentally sound as that of a primary product?

12. Will the material actually be used in a production process?

13. Does the material have an identified use?

14. Does use of the material in a production process cause any increased risks to human health or the environment greater than the use of the corresponding raw material?

15. Is the material no longer part of the normal commercial cycle or chain of utility?

16. Can the material be used in its present form or in the same way as a raw material without being subjected to a recovery operation?

17. Can the material be used only after it has been subjected to a recovery operation?' [21]

76. The document then continues: [22]

'In presenting these questions, it should be noted that no particular weighting can be

21 — Paragraph 17 of the document.
22 — Paragraph 18.

assigned to individual questions nor any judgment made on their application given the variations in the way that they are used in different countries. Some of these questions overlap nor is the list exhaustive. In order to fully evaluate the status of the material, all of these questions may be considered when making a determination.'

77. In my Opinion in *Tombesi* [23] I suggested that underlying the Community directive was an implicit distinction between non-waste materials which are put to continued use in their existing form and waste materials which are subject to a recovery operation. Thus a by-product or residual product would not constitute waste if it was destined for direct use in a further process in its existing form, in other words if it was not destined for disposal or consignment to a recovery operation prior to its continued use. I pointed out however that a particular problem arose in distinguishing between direct use and recovery.

78. It seems to me that the foregoing comparative survey provides further guidance on how that difficulty may be resolved, as well as being consistent with the basic conclusions which I reached in *Tombesi*. The OECD document suggests that there is general consensus that, where a secondary raw material or residue can be used directly in a further process, possibly as a substitute for a primary raw material, it is unlikely to constitute waste. It will on the other hand constitute waste if it must first undergo a recovery process. Similar considerations appear to underlie a number of the detailed criteria applied by individual countries (see in particular points 7, 8, 9, 10, 12, 13, 15, 16 and 17 at paragraph 75 above).

79. As regards the sometimes difficult distinction between recovery of waste and direct use of non-waste materials, as noted at paragraph 73 above, it appears that there is general consensus among OECD countries that it is relevant to consider whether the use of a residual product or by-product as a substitute for another material or ingredient is as environmentally sound as that of the material or ingredient which it is replacing; in other words whether it complies with the same standards, regulations and specifications as those applicable to that product. Once again similar considerations appear to underlie a number of the more detailed criteria (see in particular points 3, 4, 11 and 14 at paragraph 75 above).

23 — Cited in note 15, paragraphs 53 and 54.

80. It seems to me that a similar approach would be appropriate in interpreting the term 'waste' in the Community legislation. The directive seeks to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. [24] The notion of waste must therefore be interpreted sufficiently broadly to ensure that any processing of a substance that is undertaken by reason of its nature as waste falls within the regulatory system of the directive. Thus where, owing to the fact that it is a residue, by-product, secondary raw material or other material resulting from an industrial process, a material — or the process which it undergoes — does not meet normal health or environmental requirements or standards, it must be regarded as waste and subject to special regulation under the directive. In so far as a material is wholly interchangeable with another product and requires no additional regulation or supervision beyond that applicable to the product it is replacing, it is unnecessary for it to be classified as waste.

81. I conclude therefore that the mere fact that a disposal or recovery operation within the meaning of the directive is carried out as part of an industrial process does not remove it from the scope of the directive. For the purpose of distinguishing between waste recovery and processing of non-waste materials it is relevant to consider whether a substance is destined to be put directly to continued use in its existing form. In the case of residues, by-products, secondary raw materials or other materials resulting from industrial processes, that condition is fulfilled where the material, or the process to which it is destined to be put, meets normal health and environmental requirements applicable to non-waste products or processes.

82. As the Community legislation stands at present, it is for the Member States to lay down further detailed criteria for the application of the rules of the directive to individual cases. For example, there is the problem that the mere possibility of a material being put to direct use in another process without undergoing recovery does not of itself guarantee that it will be so used; a number of the additional criteria mentioned in the OECD document may well be relevant in determining the intention of the holder to put the material to such use (for example, points 3, 5, 6 and 12 at paragraph 75 above).

83. It would therefore not be appropriate to attempt to go further at this stage in defining the notion of waste for the purposes of Community legislation.

24 — Article 4.

Conclusion

84. Accordingly, the questions referred by the Belgian Conseil d'État should in my opinion be answered as follows:

(1) In reviewing the legality of a national measure enacted after the adoption of a directive but before the final date for its implementation, a national court must take account of the obligations imposed by the directive on the Member State concerned. It may therefore be called upon to annul the national measure with effect from that final date.

(2) A substance which would otherwise constitute waste within the meaning of Article 1(a) of Council Directive 75/442/EEC, as amended by Council Directive 91/156/EEC, does not cease to be waste merely because the disposal or recovery operation to which it is subject forms part of an industrial production process. For the purpose of distinguishing between waste recovery and processing of non-waste materials it is relevant to consider whether a substance is destined to be put directly to continued use in its existing form. In the case of residues, by-products, secondary raw materials or other materials resulting from industrial processes, that condition is fulfilled where the material, or the process to which it is destined to be put, meets normal health and environmental requirements applicable to non-waste products or processes.