2. Article 3(2) of Directive 75/442 requires the Member States to inform the Commission in good time, that is to say before their final adoption, of any draft rules restricting the use and sale of non-biodegradable wrappings. It is directed not only at draft rules concerning *inter alia* the use of products which might be a source of technical difficulties as regards disposal or lead to excessive disposal costs but also, by virtue of paragraph 1, at all draft rules designed to encourage *inter alia* the prevention, recycling and processing of waste.

   Since the directive does not provide for any derogation or limitation regarding that obligation to inform the Commission, it extends to draft rules drawn up by all authorities in the Member States, including decentralized authorities such as municipalities.

   The abovementioned provision of the directive concerns only relations between the Member States and the Commission and thus does not give individuals any right which they may enforce before national courts in order to obtain the annulment or suspension of national rules falling within its scope on the ground that the rules were adopted without having previously been communicated to the Commission.

REPORT FOR THE HEARING
delivered in Case 380/87 *

I — Relevant legal provisions

Directives 75/442, 76/403 and 78/319 are intended to harmonize the laws of the Member States on waste in general, on polychlorinated biphenyls and terphenyls and on toxic and dangerous waste, with the dual aim of protecting human health and the environment and avoiding unequal conditions of competition capable of directly affecting the functioning of the common market.

To that end the directives provide that Member States are to take the necessary measures, in particular measures for supervision and verification, to ensure that all waste is disposed of without endangering human health and without harming the environment.

The directives also provide that the Member States are to take appropriate steps to encourage the prevention, recycling and processing of waste, including toxic and dangerous waste, and the regeneration of

* Language of the case: Italian.

waste polychlorinated biphenyls and terphenyls.

Finally, as regards waste in general, Article 3(2) of Directive 75/442 provides that the Member States are to:

'inform the Commission in good time of any draft rules to such effect and, in particular, of any draft rule concerning:

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

(b) the encouragement of:

— the reduction in the quantities of certain waste,

— the treatment of waste for its recycling and re-use,

— the recovery of raw materials and/or the production of energy from certain waste;

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

II — The dispute in the main proceedings

By a decision of 16 February 1987 the Mayor of Cinisello Balsamo prohibited, as from 1 September 1987, the supply to customers of non-biodegradable bags, wrappers or other containers in which to carry away their purchases and the sale or other distribution in any manner whatsoever of plastic bags, with the exception of those intended for the disposal of rubbish.

Enichem Base, Montedipe, Solvay, SIPA Industriale, Altene, Neophane and Polyflex Italiana, which are companies concerned with the production of raw materials and with the processing, marketing and distribution of plastic containers, packing and bags, brought an action against that decision before the Tribunale amministrativo regionale per la Lombardia in which they asked for suspension of the decision's operation and its annulment. They argued in particular that the decision was incompatible with Community law.

III — The questions referred to the Court for a preliminary ruling

Since it considered that an interpretation of Community law was necessary in order to give a decision both on the substance of the case and on the application to suspend the operation of the contested decision, the Tribunale amministrativo regionale stayed the proceedings and referred the following four questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1. Do Council Directives 75/442/EEC of 15 July 1975 on waste, 78/319/EEC of 20 March 1978 on toxic and dangerous waste and 76/403/EEC of 6 April 1976 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls give individual EEC nationals the right under Community law, a right which national courts must uphold even as against Member States (and which Member States cannot therefore restrict), to sell or use the products concerned by those directives, since the directives provide for the observance of certain rules regarding the disposal of the products in question, not the prohibition of their sale or use?

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

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

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

   (a) do that recital and the three directives in general give rise to a right (diritto soggettivo comunitario) on the part of EEC nationals, and a corresponding obligation on the part of all the Member States, under which any draft regulation regarding the use of the products in question which may result in technical difficulties in their disposal or excessive costs of disposal must be brought to the attention of the Commission before its adoption (Article 3(2) of Directive 75/442)?

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

4. Is the administration required under Community law to pay compensation where an unlawful administrative measure taken by it infringes a right under Community law (diritto soggettivo

comunitario) which upon its incorporation in the Italian legal system, while retaining its Community character, takes the form of a protected interest (interesse legittimo)?

In its statement of reasons for the fourth question the Tribunale amministrativo regionale states that in view of the fact that a right under Community law may in the Italian legal system take the form of a right under Community and Italian law the infringement of which by an unlawful administrative measure, established by the ordinary courts, may give rise to the payment of compensation, or the form of a protected interest under Community and Italian law the infringement of which by an unlawful administrative measure, established by the administrative courts, does not give rise to the payment of compensation, the reply to the question must be such as to enable the Tribunale amministrativo regionale to decide whether to suspend the operation of the decision of the Mayor of the Municipality of Cinisello Balsamo. Its operation may be suspended only if such operation would cause serious and irreparable harm and such harm is irreparable only if it is not possible to provide compensation *a posteriori*. In the Italian legal system only an infringement of a right gives rise to liability for compensation and not infringement of a protected interest.

IV — Procedure before the Court of Justice

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted:

on 24 March 1988 by the Commission of the European Communities, represented by its Legal Advisers Giuliano Marenco and Thomas Van Rijn;

on 30 March 1988 by the plaintiffs in the main proceedings, represented by Mr Leone, Mr Siragusa, Mr Simont and Mr Scassellati Sforzolini, avvocati;

on 7 April 1988 by the Italian Government, represented by Pier Giorgio Ferri, avvocato dello Stato;

on 7 April 1988 by the United Kingdom, represented by H. R. L. Purse, Treasury Solicitor;

on 8 April 1988 by the Portuguese Government, represented by Luís Fernandes, Rui Falcão De Campos and Ana Cristina Branco.

V — Summary of the written observations

1. *The first question*

The plaintiffs in the main proceedings state that the reply to the first question should be in the affirmative not only in view of the secondary law applicable but also in view of the EEC Treaty, in particular Article 30.

As regards secondary law, the plaintiff's maintain that of the three directives referred to in the order for reference only Directive 75/442 is applicable. Directive 76/403 is not applicable because it relates to substances which are not used in the manufacture of plastic bags. Directive 78/319 is not applicable either because such bags do not contain any of the toxic and dangerous substances listed in the annex to the directive and, in any case, household waste is excluded from the scope of the directive; plastic bags must be classified as household waste once they have been used by the consumer.

On the other hand, Directive 75/442, which relates to the disposal of all types of waste, is applicable in this case. The plaintiffs state that Directive 75/442 seeks to reconcile steps for protecting human health and the environment with the fundamental objectives of the Community, namely the abolition of restrictions on the free movement of goods and the creation of a system of undistorted competition.

Measures such as an absolute prohibition on marketing certain products on the sole ground that once they have been used they are inevitably thrown away by consumers and therefore become waste are contrary to the objective of the directive and to Article 30 of the EEC Treaty. Such measures have a disproportionately harmful effect on intra-Community trade and competition. In that respect the plaintiffs refer to the Court's case-law concerning measures having an effect equivalent to quantitative restrictions as support for their allegation that the measure in question is contrary to the principle of proportionality. In its judgments of 26 June 1980 in Case 788/79 *Gilli* [1980] ECR 2071 and of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227 the Court held that an absolute prohibition on marketing cannot be justified since it is always possible to attain the objective sought by less restrictive means.

In conclusion, the plaintiffs in the main proceedings propose that the reply to the first question should be that, at the present stage of development of Community law, it follows from the principles contained in Directive 75/442 taken as a whole and especially from the rules contained in the EEC Treaty prohibiting measures having an effect equivalent to quantitative restrictions that Community nationals are entitled to market plastic bags and containers. In their view, that right is subject only to national measures on the disposal of waste which are proportionate to the objective of protecting the environment and human health and is, consequently, not subject to an absolute prohibition on marketing, given that there are less restrictive means of protecting those interests.

The Italian and Portuguese Governments, the United Kingdom and the Commission, on the other hand, maintain that the reply to the first question put by the Tribunale amministrativo regionale must be in the negative.

The Italian Government takes the view that the aforementioned directives impose mandatory obligations on the Member States with regard to the sale and use of products which may become waste only to the extent expressly provided for by those directives. Article 3 of Directive 75/442 empowers the Member States to adopt

measures to encourage the prevention of waste production by laying down rules concerning the use of products which are a source of technical difficulties as regards disposal or lead to excessive disposal costs.

The United Kingdom states in the first place that none of the directives referred to in the order made by the Tribunale amministrativo regionale is applicable in this instance. Directives 75/442 and 78/319 relate to waste, which is described as any substance which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force. In the United Kingdom's view plastic bags provided for the purpose of carrying goods home do not amount to waste within the meaning of those directives. As far as Directive 76/403 is concerned, plastic bags do not fall within its provisions since they do not contain any of the substances listed in the directive. Moreover, Directive 76/403 relates to the disposal of polychlorinated biphenyls and terphenyls and not to their distribution or sale.

In any event, the fact that the directives in question provide for the harmonization of national rules on waste disposal cannot be taken as impliedly precluding the Member States from taking measures to limit the distribution or sale of certain products which may in due course be thrown away after use. Consequently, in the United Kingdom's view, the directives in question cannot give rise to a right on the part of individuals to distribute or sell plastic bags.

The Portuguese Government emphasizes in the first place that the obligations imposed by the directives in question are addressed to the Member States and it is for them to adopt the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment. To that end the directives leave the Member States a large degree of discretion in the choice of appropriate measures.

The Portuguese Government states secondly that the first question concerns an activity, namely the sale and use of certain products, to which the directives in question do not relate directly. The directives merely provide for a minimum level of protection of health and the environment. Consequently, measures such as those referred to in the order for reference which, whilst they are more stringent than those provided for in the directives, fall within the framework of the objectives set by the directives may be adopted by the Member States.

That follows from the wording of Article 8 of Directive 78/319, which enables the Member States at any time to adopt more stringent measures with regard to toxic and dangerous waste than those provided for in the directive, and from the wording of Article 2(1) of Directive 75/442, which provides that the Member States may adopt specific rules for particular categories of waste.

In that regard the Portuguese Government also refers to the Court's case-law according to which the Member States may decide what degree of protection of health and life of humans they intend to ensure in their national legal systems in the absence of harmonization (judgment of 30 November 1983 in Case 227/82 *Van Bennekom* [1983] ECR 3883).

The Commission maintains that whilst it is true that the directives in question are primarily concerned with the disposal of waste and not with its prevention, it is not possible to conclude that the Member States are precluded from adopting measures with regard to prevention, in particular since two of the three directives also expressly lay down the obligation to encourage the prevention of waste.

Consequently, the directives do not prohibit the Member States from adopting measures limiting the sale or use of products which involve the production of waste. Such measures are not therefore contrary to Community law provided they comply with the general rules laid down in the EEC Treaty, in particular in Article 30.

It follows that the three directives in question do not confer on individuals the right to sell or use the products to which they relate.

2. *The second question*

The plaintiffs in the main proceedings propose that the reply to the second question put by the Tribunale amministrativo regionale should be that the Member States are under an obligation to inform the Commission in good time of any draft legislative measures which might give rise to technical difficulties in waste disposal or to excessive costs of disposal and that they cannot implement such legislative measures unless the Commission has first established that they are compatible with the common market; otherwise those measures will be unlawful.

The purpose of Directive 75/442 is to coordinate the activities of the Member States in achieving the objectives laid down by it without providing for the adoption of legislation at the Community level. The most effective means provided by the directive for preventing the creation of disparities prejudicial to the proper functioning of the common market is the obligation to inform the Commission beforehand imposed by Article 3(2) of Directive 75/442. That directive is the only one to impose such an obligation, and the obligation extends to all draft national rules concerning the subject-matter of the directive regardless of the national body responsible for drafting the rules.

That obligation is comparable to the obligation laid down in Article 93(3) of the EEC Treaty concerning State aids or the obligation laid down in Directive 83/189 concerning technical standards for industrial products.

According to the plaintiffs in the main proceedings, since the obligation to inform the Commission beforehand is a precise and specific obligation and is imposed on the Member States with the essential aim of preventing the creation of obstacles to intra-Community trade, it must be concluded that the provision imposing the obligation is a mandatory provision which necessarily entails the immediate invalidity of any national measure of which the Commission is not informed.

In that regard the plaintiffs reject the argument that it is not possible to draw an analogy between Directive 75/442 and Directive 83/189 in view of the fact that the former does not contain detailed provisions laying down a review procedure, which are to be found, by contrast, in Directive 83/189. Article 93 of the EEC Treaty, in

providing for the Commission to be informed in sufficient time, does not contain precise rules as regards procedure either. Nevertheless, in its judgment of 11 December 1973 in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, the Court laid down a period within which the Commission may submit its observations to the Member States and prior to the expiry of which the national measures may not be implemented.

The Commission and the Italian Government are in agreement that the reply to the second question should be that Article 3(2) of Directive 75/442 imposes an obligation on the Member States to inform the Commission in good time of any draft rules containing the measures referred to in Article 3(1) but that in the absence of a Community procedure for checking the drafts which are notified it is not possible to deduce from that provision any obligation on the part of the Member States to maintain the status quo.

In the Italian Government's view, the provisions of Article 3(2) form part of a general relationship of cooperation between the Member States and the Commission and have no effect on the legality of the measures adopted as regards relations between national authorities and individuals.

The United Kingdom and the Portuguese Government, on the other hand, maintain that since the national measure in question relates to the sale and use of certain non-biodegradable products it does not fall within the scope of Directive 75/442 and is therefore not covered by the obligation to inform the Commission beforehand laid down in Article 3(2) because it does not concern the use of products which might be a source of technical difficulties as regards disposal or lead to excessive disposal costs.

3. *The third question*

The plaintiffs in the main proceedings maintain that Article 3(2) of Directive 75/442 would be deprived of any real effect if the obligation to inform the Commission imposed by that provision could not be relied upon by individuals before national courts to contest a national measure of which the Commission has not been informed, whether that measure is adopted by a central authority and applies to the whole of the national territory or is adopted by a local authority and has limited territorial effect.

Whilst the plaintiffs in the main proceedings acknowledge that the Court's case-law relates solely to cases where national provisions are inconsistent with the substantive provisions of a Community directive, they rely on the view taken by the Commission with regard to Directive 83/189, in particular in its communication of 1 October 1986, in concluding that even a provision of a directive which imposes procedural obligations on the Member States of a sufficiently clear and precise nature, such as Article 3(2) of Directive 75/442, must be regarded as being capable of conferring rights on individuals as against the Member States.

Consequently, a Member State may not impose on individuals measures falling within the scope of the directive of which

the Commission has not been informed beforehand, and individuals may rely on infringement of that obligation before the national courts in order for those measures to be annulled or declared inapplicable.

The United Kingdom and the Italian Government both state that the sole purpose of the obligation laid down in Article 3(2) of the directive is to facilitate cooperation between the national authorities and the Commission in order to give effect to the directive and that it cannot therefore be relied upon by individuals before a national court or tribunal.

The Commission also takes the view that since the obligation laid down in Article 3(2) of the directive in question has no suspensory effect, that provision does not confer any rights on individuals capable of being relied upon before a national court or tribunal.

The Portuguese Government did not submit any observations on the third question.

4. *The fourth question*

The plaintiffs in the main proceedings propose that the reply to the fourth question should be in the affirmative. In that regard they emphasize that although, in the absence of Community rules concerning the obligation to pay compensation in respect of the loss suffered by individuals as a result of an infringement of Community law by administrative authorities, the right to compensation and the manner in which that right is exercised are governed, in principle, by the rules of national law, those rules must comply with the limits set by Community law and in particular by the general principles common to the laws of the Member States.

In the plaintiffs' view the Court has recognized the existence in the 12 Member States of a general principle common to the laws of those States and applicable both to individuals and to public authorities to the effect that any person infringing the rights of another is liable for the consequences (see the Court's judgment of 22 January 1976 in Case 60/75 *Russo* v *Azienda di Stato per gli Interventi sul Mercato Agricolo* [1976] ECR 45). That principle of liability cannot be rendered ineffective by the manner in which a Member State classifies in national law the individual interest which has been damaged, because such a transformation would give rise to inequality of treatment between nationals of the various Member States.

That is why the Court imposed significant limits on the freedom of the Member States in that regard. In particular, it stated in its judgment of 9 November 1983 in Case 199/82 *Amministrazione delle finanze dello Stato* v *San Giorgio* [1983] ECR 3595 that the conditions for the payment of compensation laid down by the various national laws may not be so framed as to render virtually impossible the exercise of rights conferred by Community law.

That is precisely the case under Italian law, where certain Community rights are classified as protected interests, which enjoy indirect protection under national law, characterized by the fact that the administrative courts and tribunals have jurisdiction over disputes concerning such interests and it is impossible to obtain compensation for their infringement, and not as rights, which enjoy direct and immediate protection under

national law, characterized by the possibility of seeking compensation before the ordinary courts where such rights have been infringed by the administration.

The effect of such a classification, which is purely formal in the plaintiffs' view, is to remove any effective sanction in a case where the national administration infringes Community rules having direct effect, by denying any obligation to pay compensation in respect of loss arising from an infringement of that right on the part of the administration where the right is classified in the national legal system as a protected interest.

Consequently, the plaintiffs in the main proceedings propose that the reply to the fourth question should be that the administration is required to pay compensation for the damage caused where an unlawful administrative measure taken by it infringes a right under Community law which upon its incorporation in national law takes the form of a protected interest.

The United Kingdom begins by referring to the Court's case-law according to which it is for national law to specify the appropriate court in which an individual alleging violation of his rights under Community law may present his claim. According to that case-law, whilst it is incumbent upon national courts to deploy all available national remedies to secure the implementation of rules of Community law which have direct effect, the courts cannot be expected to create new remedies for that purpose (see the Court's judgment of 7 July 1981 in Case 158/80 *REWE* v *Hauptzollamt Kiel* [1981] ECR 1805). It follows that the applicants in the present case have no right to the payment of compensation if such compensation is not provided for in an equivalent situation arising purely under national law.

In that regard the United Kingdom emphasizes that the Court of Justice has never suggested that the payment of compensation is to be regarded as a *sine qua non* of making it possible in practice to exercise directly effective Community rights. No such general principle can be deduced either from the national law of the Member States nor from Community law itself.

As regards national law, the United Kingdom points out that Italian law is not the only system of law to deny the existence of a general right to compensation in respect of an unlawful act on the part of the administration itself. Such a general right does not exist in the United Kingdom, where the administration is not liable to pay compensation to persons who have suffered damage caused by a legislative or quasi-legislative measure unless it was made in bad faith or with knowledge that it was *ultra vires*. The administration incurs liability only if the person concerned can establish misfeasance in public office.

The United Kingdom states that that principle is consistent with the relevant Community law. The non-contractual liability of the Community does not flow automatically from the promulgation of an invalid legislative or administrative measure.

The Court has consistently stated that the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a

sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred (see its judgment of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL* v *Council and Commission* [1978] ECR 1209). The obligation to take into account the nature of the measure adopted by the public authorities underlies the general principles common to the laws of the Member States which have been synthesized by the Court of Justice and, by its very nature and origin, is relevant to the liability of the public authorities of the Member States when they promulgate general acts, whether they exercise national or regional jurisdiction.

Consequently, the United Kingdom submits that the reply to the fourth question should be that it is the responsibility of the national legal order to make available appropriate national remedies to ensure that the exercise of directly effective Community rights is possible in practice and that it does not follow that the administration is required in every case to pay compensation where an unlawful administrative act taken by it infringes a directly effective right under Community law.

The Commission and the Italian Government both state that in view of the replies they propose should be given to the first three questions the fourth question has no purpose. Nevertheless, the Italian Government states that it is solely for national law to regulate the manner and conditions under which national courts protect the persons concerned against infringements of the rules of Community law which affect them.

The Portuguese Government did not submit any observations on the fourth question.

G. C. Rodríguez Iglesias
Judge-Rapporteur