OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 30 November 2004 [1]

1. The Verwaltungsgericht Koblenz (Administrative Court, Koblenz) (Germany), has referred to the Court of Justice for a preliminary ruling two questions on Article 5 (1) and (2) of Directive 1999/31/EC [2] and Article 176 EC, with a view to establishing whether national provisions containing more stringent protective measures are compatible with the Community legislation governing the landfill of waste.

I — Community legal framework

2. Title XIX of the EC Treaty, concerning the environment, comprises three provisions: Article 174, which sets out the Community policy objectives in that sphere; Article 175, in which the legal basis for action by the Community is explained; and Article 176, which provides:

'The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.'

3. Directive 75/442/EEC [3] concerns the management of waste, Article 3(1)(a) thereof imposing on Member States the obligation to take appropriate measures to reduce waste production, while Article 4 sets out their obligation to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment.

4. Landfill constitutes one of the stages in the treatment of waste. In that particular connection, 'with a view to meeting the

1 — Original language: Spanish.

2 — Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1). Article 17 was amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

3 — Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32), by Council Directive 91/692/EEC of 23 December 1991 (OJ 1991 L 377, p. 48), by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p 32), and by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

requirements of Directive 75/442/EEC, and in particular Articles 3 and 4 thereof', the overall objective of Directive 1999/31 (hereinafter 'the Directive') is to provide for '... measures, procedures and guidance to prevent or reduce ... negative effects on the environment ... during the whole life-cycle of the landfill' (Article 1).

5. Article 5 of the Directive stipulates:

'1. Member States shall set up a national strategy for the implementation of the reduction of biodegradable waste going to landfills, not later than two years after the date laid down in Article 18(1) and notify the Commission of this strategy. This strategy should include measures to achieve the targets set out in paragraph 2 by means of, in particular, recycling, composting, biogas production or materials/energy recovery. ...

2. This strategy shall ensure that:

(a) not later than five years after the date laid down in Article 18(1), biodegradable municipal waste going to landfills must be reduced to 75% of the total amount (by weight) of biodegradable municipal waste produced in 1995 or the latest year before 1995 for which standardised Eurostat data is available;

(b) not later than eight years after the date laid down in Article 18(1), biodegradable municipal waste going to landfills must be reduced to 50% of the total amount (by weight) of biodegradable municipal waste produced in 1995 or the latest year before 1995 for which standardised Eurostat data is available;

(c) not later than 15 years after the date laid down in Article 18(1), biodegradable municipal waste going to landfills must be reduced to 35% of the total amount (by weight) of biodegradable municipal waste produced in 1995 or the latest year before 1995 for which standardised Eurostat data is available.

...'

6. The date referred to in Article 18(1) of the Directive is 16 July 2001.[4]

4 — Two years after the Directive's entry into force which, in accordance with Article 19, was the date of its publication in the Official Journal, namely 16 July 1999.

II — National legislation

7. To meet the requirements of the Directive, Germany adopted the Verordnung über die umweltverträgliche Ablagerung von Siedlungsabfällen (Regulation on the Environmentally Sound Deposit of Municipal Waste) of 20 February 2001, which entered into force on 1 March 2001. [5]

8. In the view of the referring court, regard must be had to the following provisions:

'Paragraph 3. General requirements for landfill

1. Municipal waste and waste within the meaning of Paragraph 2(2) may be deposited only on landfill sites or in landfill cells which meet the requirements for either category I or category II landfill sites. The requirements are laid down in point 10 of the Technical Instructions on Municipal Waste.

...

3. Municipal waste and waste within the meaning of Paragraph 2(2), save for waste treated by mechanical and biological processes, may be landfilled only if it meets the relevant waste acceptance criteria for category I or II landfill sites laid down in Annex 1.

Paragraph 4. Requirements governing the landfilling of waste treated by mechanical and biological processes

1. Waste treated by mechanical and biological processes may be landfilled only if:

(1) the landfill sites or landfill cells concerned meet the requirements for category II landfill sites;

5 — BGBl. I, p. 305.

(2) the waste in question meets the acceptance criteria for category II landfill sites set out in Annex 2;

(3) the waste in question has not been mixed in order to meet the acceptance criteria in Annex 2, and the overlaying of waste which has already been deposited and has a high biodegradable content (untreated household waste, for example) does not impair capture of the gas coming from that waste, the infiltration of water to maintain the process of biodegradation in the waste is either technically feasible or unnecessary and there is no uncontrolled gas release as a result; and

(4) during mechanical and biological treatment, waste with a high thermal value, together with other recyclable waste matter and waste containing pollutants, is removed for recovery or thermal treatment.

With regard to the cases in the first sentence of point 1, the requirements are defined in point 10 of the Technical Instructions on Municipal Waste.

2. In order to guarantee the proper disposal of waste in the landfill site concerned treated by mechanical and biological processes the landfill operator shall be required:

(1) to meet the requirements in Annex 3 governing the emplacement of waste treated by mechanical and biological processes, and

(2) to ensure that any traces of residual landfill gas emissions apparent after a landfill cell has been filled in are oxidised prior to their discharge into the atmosphere; observation reports pertaining to residual gas emissions, drawn up by independent monitors in accordance with the third sentence in point 6 of Annex C to the Technical Instructions on Municipal Waste, shall be submitted to the competent authority on request.

Paragraph 6. Transitional arrangements

...

2. Upon application from the landfill operator, the competent authority may grant

authorisation, subject to the conditions laid down in subparagraph (3), for the following:

(1) Household waste, industrial waste similar to household waste, sewage sludges and other waste with a high organic content can be landfilled even if the requirements for waste under Annex 1 or Annex 2 hereto are not met. The waste may be deposited at old landfill sites (municipal waste landfill sites) even if those sites fail to meet the requirements of Paragraph 3(1), on condition that they at least meet the requirements in point 11 of the Technical Instructions on Municipal Waste, or it may be deposited in separate cells at category II landfill sites. Such authorisation shall be granted until no later than 31 May 2005.

(2) Municipal waste and waste within the meaning of Paragraph 2(2), which meets the waste acceptance criteria for category I landfill under Annex 1, may continue to be deposited at old landfill sites which do not meet the requirements of Paragraph 3(1), on condition that they at least meet the requirements of point 11 of the Technical Instructions on Municipal Waste. Such authorisation shall be granted until no later than 15 July 2009.

(3) Municipal waste and waste within the meaning of Paragraph 2(2) which meets the criteria for category II landfill under Annex 1, and waste treated by mechanical and biological processes which meets the landfill acceptance criteria in Annex 2, may also be deposited at old landfill sites (household waste landfill sites) — where appropriate, in separate landfill cells — provided that it satisfies the requirements of Paragraph 3(1) for category II landfill, to the exclusion of points 10.3.1 and 10.3.2 of the Technical Instructions on Municipal Waste, and the requirements in point 11 of the said Technical Instructions. Such authorisation shall be granted until no later than 15 July 2009. The expiry date may be disregarded if evidence is furnished in an individual case to indicate that the safeguards listed in points 10.3.1 and 10.3.2 of the aforementioned Technical Instructions have been achieved by other, equivalent, technical safeguards and that public welfare (measured against the requirements laid down in this Regulation) is not affected. For the period up to 31 May 2005, point 1 shall apply mutatis mutandis as regards the relevant technical requirements governing landfill sites.

3. The derogations referred to in subparagraph (2) may be authorised only on condition that they do not affect public welfare and that:

(1) in the circumstances of subparagraph (2), point 1, it is not possible to use existing treatment capacity, and

(2) in the circumstances of subparagraph (2), points 2 and 3, it is not possible to use landfill sites which meet the requirements laid down in Paragraph 3 (1).

4. Any derogation from the rules governing the acceptance of waste at landfill issued by the competent authority prior to the entry into force of this Regulation, in accordance with the first and second sentences, under (a), of point 12.1 of the Technical Instructions on Municipal Waste, shall, in the case of household waste, industrial waste similar to household waste, sewage sludges and other waste with a high organic content, continue to apply as an authorisation within the meaning of Paragraph 2(1) of this Regulation until 1 June 2005 at the latest.

Annex 1. Landfill acceptance criteria

In order to be accepted at landfill, waste must meet the following criteria:

Number	Criterion	Acceptance values	
		Category I Landfill	Category II Landfill
2	Organic content of dry residue of the original substance		
2.01	Expressed as combustion loss	<= or 3% by mass	<= or 5% by mass
2.02	Expressed as TOC	<= or 1% by mass	<= or 3% by mass
4	Eluate criteria		
4.03	TOC	<= or 20 mg/l	<= or 100 mg/l

Annex 2. Landfill acceptance criteria for waste treated by mechanical and biological processes

In order to be accepted at landfill, waste treated by mechanical and biological processes must meet the following criteria:

Number	Criterion	Acceptance values
2	Organic content of dry residue of the original substance expressed as TOC	<= or 18% by mass
4	Eluate criteria	
4.03	TOC	<= or 250 mg/l
5	Biodegradability of dry residue of the original substance, expressed as aerobic activity (AT_4) or as gas formation rate in the fermentation test (GB_{21})	<= or 5 mg/g <= or 20 l/kg

...'

III — The facts of the main proceedings

9. The Deponiezweckverband Eiterköpfe is an association of the Landkreise (administrative districts) of Mayen-Koblenz and Cochem-Zell and of the city of Koblenz, which operates the Eiterköpfe central landfill site.

10. On 28 February 2000, the plaintiff applied to the Land Rheinland-Pfalz (the Land of Rhineland-Palatinate) for authorisation to fill cells 5 and 6 with waste treated by mechanical processes alone, during the period from 31 May 2005 to 31 December 2013. [6]

6 — Previously, in a binding decision of 26 September 1995, the defendant in the main proceedings had determined that only waste which could not be recovered and which satisfied the acceptance criteria in Annex B, Section 2, to the Technical Instructions on Municipal Waste, relating to combustion loss and TOC (total organic carbon) in the eluate, could be deposited in the landfill site.

11. That application was rejected, whereupon the plaintiff brought an action before the national judicial authorities, claiming that the German waste deposit regulation infringed Community law.

IV — The questions referred for a preliminary ruling

12. Following a hearing on 4 December 2002, the national court took the view that the authorisation sought could be granted only if the national provisions are contrary to Community law, in so far as they preclude the landfill of waste which has undergone mechanical pretreatment alone. Accordingly, the Seventh Chamber of the Verwaltungsgericht Koblenz stayed the proceedings and referred the following questions to the Court of Justice:

'1. Must Article 5(1) of the Directive and the Community rules for a strategy for the reduction of biodegradable waste going to landfills be interpreted as meaning that, in accordance with Article 176 EC and notwithstanding the measures referred to in Article 5(2) of the Directive, namely, the reduction of the quantity of biodegradable waste going to landfills to a certain percentage of the total amount by weight of biodegradable municipal waste in relation to a given calendar year, those measures may be made more stringent by a provision of domestic law, intended to implement the Community rules, which provides that municipal waste and waste that may be disposed of as municipal waste may not be landfilled unless the reference criterion "organic content of the dry residue of the original substance" — expressed as either combustion loss or as total organic carbon (TOC) — is satisfied?

2 (a) If so, must the rules of Community law fixed by Article 5(2) of the Directive be construed as meaning that the reduction requirements set out therein, namely:

— 75% by weight as from 16 July 2006,

— 50% by weight as from 16 July 2009, and

— 35% by weight as from 16 July 2016,

are met, having regard to the Community law principle of proportion-

ality, by a national provision under which:

the organic content of dry residue of the original substance, in the case of municipal waste and waste that can be deposited in the same way as municipal waste, must, after 1 June 2005, be no more than either 5% by mass, expressed as combustion loss, or no more than 3% by mass, expressed as TOC;

and under which from 1 March 2001, waste treated by mechanical and biological processes may be landfilled at old sites until 15 July 2009 at the latest, or even beyond that date in certain cases, only if the organic content of dry residue of the original substance is no more than 18% by mass, expressed as TOC, and the biodegradability of the dry residue of the original substance is no more than 5 mg/g, expressed as aerobic activity (AT_4), or no more than 20 l/kg, expressed as the gas formation rate in the fermentation test (GB_{21})?

(b) Does the Community law principle of proportionality grant extensive or restricted discretion when assessing the effects of overlaying untreated waste with waste treated by thermal or mechanical and biological processes? Is it appropriate to infer from the principle of proportionality that hazards caused by waste treated by mechanical processes alone may be offset by other safety measures?'

V — The procedure before the Court of Justice

13. Written observations were submitted by the Deponiezweckverband Eiterköpfe, the Land Rheinland-Pfalz, the Netherlands, Austrian and German Governments, and the Commission.

14. At the hearing on 15 September 2004, oral argument was presented by the representatives of the plaintiff association and the defendant Land in the main proceedings, by the agents of the German, Netherlands and Austrian Governments, and by the agent of the Commission.

VI — Community law and the environment

A — *The development of legislation*

15. The environment was not a concern for the drafters of the Treaties, which initially provided no legal basis for the Community to

take action in that area.[7] However, the meeting of Heads of State or Government which took place in Paris in 1972 decided to implement a specific policy, proposing that the absence of any legislation on the subject could be addressed by invoking Articles 100 and 235 of the EC Treaty (now Articles 94 EC and 308 EC respectively).[8] That explains why the purpose of the first rulings of the Court in the sphere was to clarify the legislative basis of the aforementioned Community initiative.[9]

16. The Single European Act[10] inserted into the EC Treaty a specific title on the environment — Title VII (now Title XIX) —[11] comprising Articles 130r and 130s (now, after amendment, Articles 174 EC and 175 EC respectively), and Article 130t (now Article 176 EC),[12] in addition to Article 100a(3) (now Article 95(3) EC), which requires the Commission to take as a base for the proposals envisaged in paragraph 1 'a high level of protection'.[13]

17. Concern about the environment has increased in Community law to the extent that attaining 'a high level of protection and improvement of the quality of the environment' has become an aim of the Community (Article 2 EC),[14] thereby making 'a policy in

7 — Establishing the legal basis of Community environmental law became one of the most complex and controversial problems. Bravo-Ferrer Delgado, M., 'La determinación de la base jurídica en el derecho comunitario del medio ambiente', *Gaceta Jurídica*, March 1994, p. 13.

8 — Article 100 was the basis for harmonising provisions which directly affected the establishment or functioning of the common market, while the broader Article 235 provided for the adoption of appropriate measures for the purposes of attaining Community objectives which are not specifically referred to in the Treaty. Point 15 of the declaration arising from the 1972 meeting of Heads of State or Government states that 'in order to implement the measures defined in the action plans, it is necessary to rely on all the provisions of the Treaties, including Article 235'. Directive 75/442/EEC, cited in footnote 3, has as its legal basis 'the Treaty establishing the European Economic Community, and in particular Articles 100 and 235 thereof'.

9 — In Case 91/79 *Commission* v *Italy* [1980] ECR 1099, the Court agreed that the environmental provisions concerned were founded on Article 100 of the EC Treaty. Furthermore, in Case 240/83 *ADBHU* [1985] ECR 531, it held that protection of the environment must be regarded as 'one of the Community's essential objectives', although the protective measures adopted must not 'go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest'. The Court delivered a similar ruling in Case 302/86 *Commission* v *Denmark* [1988] ECR 4607.

10 — OJ 1987 L 169.

11 — Title VII was inserted into Part Three of the Treaty by Article 25 of the Single European Act, while Article 100a was inserted by Article 18. When the Treaty on European Union was adopted (Article G, point 28) it became Title XVI.

12 — See point 2 of this Opinion.

13 — The Court has interpreted those provisions on a number of occasions. In Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, the Court held that a Community environmental protection measure was not required to be based on Article 130s of the EC Treaty, since the objective concerned could also be effectively contained using the harmonising provisions laid down in Article 100a of the EC Treaty. However, in Case C-155/91 *Commission* v *Council* [1993] ECR I-939, the Court took the view that, in the light of the aim and content of the contested directive (Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste (OJ 1991 L 78, p. 32)), it was correct to base it on Article 130s of the EC Treaty. Likewise, in Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857, the Court held that Article 130s was the correct basis for a regulation which was general in nature and the content of which fell within the framework of Community environmental policy (Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1)), notwithstanding that, by harmonising the conditions in which movements of waste take place, it affected the attainment of the internal market. By contrast, in his Opinion in Case C-155/91 *Commission* v *Council*, Advocate General Tesauro differentiated between two types of directives: those which are general in nature and are based on Article 130s of the Treaty and those which relate to a specific sector and are based on Article 100a of the Treaty. The former are usually aimed at achieving a high level of environmental protection, whereas the latter aim to prevent distortions of the principle of free competition. The academic writers Krämer and Kromarek asserted that that distinction could not work in practice (Krämer, L. and Kromarek, P., 'Droit communautaire de l'environnement. 1 octobre 1991-31 décembre 1993', *Revue juridique de l' environnement*, Vol. 2-3, 1994, p. 231.

14 — When the Treaty on European Union was signed in Maastricht, environmental protection was elevated into a fundamental principle of the Community.

the sphere of the environment' absolutely essential (Article 3(1)(l) EC). Furthermore, '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development' (Article 6 EC). That concern is also apparent in other provisions of the Treaty, such as Article 95 EC, which I have already mentioned, and Article 161 EC, which provides for the setting-up of a Cohesion Fund to provide 'a financial contribution to projects in the fields of environment'.

18. The draft Treaty establishing a Constitution for Europe carries on that approach, [15] stipulating that competence in the field is shared between the European Union and the Member States (Article I-14(2)(e)), [16] which is already apparent from the current legislation.

15 — Article II-97, which is based on Article 2 EC, provides that '[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. By declaring that '[e]nvironmental protection requirements must be integrated into the definition and implementation of the policies and activities referred to in this Part, in particular with a view to promoting sustainable development', Article III-119 reflects the content of Article 6 EC. Article III-172 is similar to Article 95 EC, while Article III-223 is similar to Article 161 EC. Finally, Articles III-233 and III-234 essentially reproduce Articles 174 EC to 176 EC.

16 — In accordance with Article I-12(2) of that draft Treaty, '[w]hen the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence'.

B — *Shared competence in the field of the environment: limits*

19. Areas of shared competence make up a specific category in the conferral provisions of the Treaty. Those provisions envisage a number of permutations, notable among which is the possibility for national legislation to be more stringent than Community legislation.

20. With regard to the environment, Article 176 EC empowers the Member States to maintain or introduce more stringent protective measures, provided that such measures are compatible with the Treaty and are notified to the Commission. In addition, notwithstanding the existence of harmonisation measures, Article 95 EC permits Member States to maintain (paragraph 4) or introduce (paragraph 5) their own provisions, where that is justified by the need to protect the environment and on condition that the provisions concerned are communicated to the Commission. Finally, the second subparagraph of Article 174(2) EC provides for the harmonisation measures in question to include 'a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons', subject to an inspection procedure. [17]

17 — A number of academic writers have challenged the view that Article 174(2) EC opens the way sufficiently to enable increased protection of the environment; for example, Verhoeve, B., Bennet, G. and Wilkinson, D., *Maastricht and the Environment*, Institute for European Environmental Policy, London, 1992, p. 24.

21. That explains the Court's willingness to declare that the system of rules provided for in the Treaty in this area does not seek to effect complete harmonisation, [18] meaning that the Member States are required to fulfil an important role, with the result that Community provisions exist side by side with domestic provisions, as in this case.

22. The need to define the Community law restrictions on such action taken at national level appears to underlie the questions referred for a preliminary ruling by the Verwaltungsgericht Koblenz.

23. The prevailing conditions in each Member State vary significantly: some are more environmentally aware; some come under greater social pressure in this area; while others develop more advanced waste treatment techniques. Unlike other Community provisions in the sphere, [19] the Landfill Directive is a provision which lays down minimum requirements.

24. The aim of the Landfill Directive is to prevent or reduce 'negative effects on the environment ... from landfilling of waste, during the whole life-cycle of the landfill', by way of 'requirements ... measures, procedures and guidance' (Article 1). To that end, the Directive classifies landfills, according to the risk posed by the waste, as hazardous, non-hazardous and inert (Article 4); sets out the criteria and the procedures governing the acceptance of waste at each class of landfill (Article 6 and Annex II); lists the control and monitoring procedures in operation and aftercare (Annex III); and, lastly, calls on the Member States to set up a national strategy to reduce biodegradable waste (Article 5(1)), which, in the case of municipal waste, must ensure a three-phase reduction (Article 5(2)).

25. It follows from an interpretation of the Directive in conjunction with Article 176 EC that Member States cannot be precluded from introducing more stringent measures in relation to other types of waste, laying down more selective acceptance conditions, requiring more thorough pretreatment, or shortening the time-limits set, provided that they satisfy the two requirements laid down in the provision, namely that the measures concerned must be compatible with the Treaty and that they must be notified to the Commission.

26. The first of those requirements implies that there must be compliance with the Community legal system as a whole, and in particular with the Directive.

18 — Case C-318/98 *Fornasar and Others* [2000] ECR I-4785.

19 — Such as Regulation No 259/93, cited in footnote 13, which, according to the judgment in Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, harmonises the shipment of waste (paragraph 42), from which it follows that any national measure relating to that area 'must be assessed in the light of the provisions of the Regulation' (paragraph 43), since, 'where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure' (paragraph 32). The Court has held a directive to be a harmonised measure on a number of occasions (Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947), but, contrary to the opinion of the referring court, I do not believe that it is appropriate to regard the Landfill Directive as such for the reasons to be explained.

27. However, contrary to the approach taken in a number of the written observations submitted in these proceedings, that need for compliance does not mean that the Directive endorses more stringent national provisions. As is clear from Article 3(3), (4) and (5), when it has sought to allow some exception, it has done so expressly. Accordingly, the basis for such provisions is the Treaty, which authorises the Member States to adopt measures more stringent than the Community ones concerned, provided that the former are compatible with the latter. [20]

28. Moreover, as I have explained, it is important to recall that the attainment of a high level of protection and improvement of the quality of the environment has become one of the objectives of European integration, the achievement of which requires the development of a suitable policy (Articles 2 and 3(1)(l) EC), [21] from which it follows that the adoption of more stringent national measures must conform to Community guidelines, since it is not only specific provisions which can be incompatible but also programmes drawn up in this supranational sphere. [22]

C — *The Landfill Directive*

29. That directive, to which I have already referred, states that 'the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects' caused by the collection, transport, treatment, storage and tipping of waste. [23] In the interests of coordination in that sphere, the directive also seeks 'effective and consistent regulations ... which neither obstruct intra-Community trade nor affect conditions of competition'. [24]

20 — It will be noted that I have taken a different approach to the one put forward by the Netherlands Government at the hearing, since, in my opinion, there are three methods of establishing whether national law is compatible with Community law: (a) if the national measure falls within the scope of the directive, the analysis must be carried out in accordance with the content of its provisions; (b) if the national measure does not fall within the scope of the directive, it must be analysed by reference to the Treaty; (c) if the national measure exceeds the scope of the directive but is covered by primary legislation, regard must be had to the criteria set out therein. In this case the German legislation concerned implements the Community legislation, although it provides for greater protection of the environment, which means that regard must be had both to the Directive and to the Treaty.

21 — See point 17 of this Opinion.

22 — It is necessary to qualify the response to the debate which has arisen in German academic legal circles (underlying the questions referred (Section 4, point 2, of the order) and also raised by the Netherlands Government in its written observations (point 20 et seq.)) as to whether the measures introduced by the Member States pursuant to Article 176 EC are the same in nature as Community measures, since Article 176 EC makes the validity of national measures conditional on their being compatible with the Treaty, which refers specifically to the need for environmental protection, thereby excluding any conflicting measures. Any other approach would impede future harmonisation by placing conditions on action taken by the Community, and, consequently, by its Member States. In other words, the authorisation to introduce more stringent protective measures cannot be used as an excuse and its exercise is subject to limitations. Indeed, the fact that they are made subject to the Treaty does not imply that national measures are the same in nature as Community ones. It will suffice if they pursue the same aims, by fulfilling the objectives and, in short, the policies of the Community in the field of the environment, and that is a matter which must generally — including in these proceedings — be determined on a case-by-case basis.

23 — Third recital in the preamble to Directive 75/442, cited in footnote 3.

24 — Sixth recital in the preamble to Directive 75/442.

30. In the Resolution of 7 May 1990, [25] the Council drew attention to the need to provide the Community with a global policy for all forms of waste, including the recycling of waste and the reuse and disposal of waste, urging that the 'harmonisation of measures at Community level should be encouraged and rendered consistent with the development of the internal market' (point 1). The Council also underlined that it was a priority to 'ensure an adequate infrastructure for waste disposal ... making use of the most appropriate methods and technologies', while warning that 'the building-up of such a network is primarily a matter for Member States' (point 7). Lastly, the Council proposed that pretreatment processes should be encouraged (point 8).

31. Notwithstanding other initiatives, [26] the Council Resolution of 24 February 1997 on a Community strategy for waste management [27] proposed that, in future, only safe landfill activities should be carried out, while allowing Member States the flexibility to apply the best waste disposal option to meet their particular conditions (point 32).

32. The Directive has a bearing on that proposal, which is reflected in its preamble. For example, the sixth recital states that 'landfill should be adequately monitored and managed to prevent or reduce potential adverse effects on the environment and risks to human health'.

33. By way of conclusion, it is important to bear in mind Council Decision 2003/33/EC of 19 December 2002 establishing criteria and procedures for the acceptance of waste at landfills pursuant to Article 16 of and Annex II to Directive 1999/31/EC. [28] Although the decision took effect on 16 July 2004 (Article 7), it is capable of providing a number of guidelines on interpretation.

VII — Analysis of the questions referred for a preliminary ruling

34. The Verwaltungsgericht Koblenz seeks to establish whether a number of the

25 — Council Resolution of 7 May 1990 on waste policy (OJ 1990 C 122, p. 2).

26 — Inter alia other measures, the European Parliament Resolutions of 19 February 1991 (OJ 1991 C 72, p. 34) and 22 April 1994 (OJ 1994 C 128, p. 471); Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20); Regulation No 259/93, cited above; Council Decision 93/98/EEC of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (OJ 1993 L 39, p. 1); and Council Directive 94/67/EC of 16 December 1994 on the incineration of hazardous waste (OJ 1994 L 365, p. 34).

27 — OJ 1997 C 76, p. 1.

28 — OJ 2003 L 11, p. 27

provisions of the German waste deposit regulation are compatible with Community law. In the light of the wording of the questions, I agree with the Commission that they should be restructured, so that first I shall analyse Question 1 and the first part of Question 2(a), which concern the interpretation of Article 5(1) and (2) of the Directive and of Article 176 EC; I shall then analyse the second part of Question 2(a) and Question 2(b), which refer to the Community principle of proportionality. [29]

35. However, the requirements of Article 5 (1) and (2) must not be considered in isolation from the rest of the Directive or from the general framework described above. The objective pursued, and the minimum requirements laid down, are set out in the preamble to and in the enacting terms of the Directive, and it is for the national court to establish whether the national measure complies with those provisions, in the light of the compatibility requirement in Article 176 EC. The Court must not encroach on that sphere and must instead concentrate its efforts on interpreting Community law so as to furnish the criteria which will direct its uniform application. The Court's role is to explain the scope of the Community law provisions and of the concept of compatibility, but not to embark on a detailed analysis of each and every way in which the national measure may be incompatible. In other words, the Court does not have jurisdiction to rule on a provision of national law governing matters as technical as the ones at issue in these proceedings. The landfill acceptance criterion of the organic content of dry residue of the original substance (expressed as combustion loss or as TOC), used in the German regulation, is unquestionably more stringent than the criterion of the total amount (by weight) of biodegradable municipal waste produced in a year, used in the Directive, but it is more difficult to determine how that affects the attainment of the Community objectives. [30]

Nevertheless, it is appropriate to analyse the questions referred in the restructured form described.

29 — The plaintiff in the main proceedings also seeks to raise the issue of whether the German regulation is compatible with other Community provisions, such as Article 28 EC and Article 30 EC. However, in the order for reference, the Verwaltungsgericht Koblenz clearly excludes their analysis — and, consequently, any discussion of those provisions (Section IV, point 4) — from which it follows that it is not appropriate to carry out such an analysis. It is settled case-law that 'it is for the national courts alone, within the system of cooperation between them and the Court established by Article 234 EC, to assess the relevance of the questions they refer to the Court, in the light of the facts of the cases before them' (Case 298/87 *Smanor* [1988] ECR 4489; Case C-448/98 *Guimont* [2000] ECR I-10663; and Case C-510/99 *Tridon* [2001] ECR I-7777).

30 — The Court has consistently held that the assessment of the facts of the proceedings is a matter for the national court (inter alia Case 36/79 *Denkavit* [1979] ECR 3439), thereby excluding its jurisdiction to apply the rules of Community law which it is required to interpret to national measures or situations (see, for example, Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, paragraphs 37 and 38). See also footnote 35.

A — *Question 1 and the first part of Question 2(a)*

36. The referring court is of the view that the German legislation contains more stringent protective measures than the ones laid down in the Directive, questioning whether they are compatible. The differences are as follows:

— The use of the waste acceptance criterion of 'organic content of dry residue of the original substance' (expressed as combustion loss or TOC).

— The setting of shorter time-limits for the reduction of waste.

— The inclusion of both biodegradable and non-biodegradable waste in the scope of the German regulation.

— The fact that the same treatment is afforded to municipal waste and waste that can be disposed of in the same way as municipal waste, particularly industrial waste.

37. In the light of those findings, the referring court concludes that there is a body of protection mechanisms which, in its opinion, amounts to a strategy which differs from the Community one.

38. The effect of those differences must therefore be analysed.

(a) The waste acceptance criterion

39. Under the German regulation, municipal waste and waste which can be disposed of in the same way as municipal waste may be disposed of in landfill sites only if they satisfy the requirements laid down in Annex 1, including the organic content of dry residue of the original substance expressed as combustion loss or as TOC. [31] For its part, Article 5(2) of the Directive refers to the total amount (by weight) of biodegradable municipal waste produced in the calendar year specified.

40. By its very nature, such a measure is binding as to the result to be achieved, while leaving to the national authorities the choice of form and methods (Article 249 EC). Accordingly, because the Directive stipulates minimum requirements, [32] Community law

31 — Paragraph 3(3) of the regulation in conjunction with points 2.01 and 2.02 of Annex 1. See point 8 of this Opinion.

32 — See points 23 and 24 of this Opinion.

is not infringed by the imposition of a landfill acceptance condition which does not refer to the total weight of the waste, provided that it adheres to the limit set by the Community.

41. Furthermore, as the Austrian and Netherlands Governments have pointed out, the landfill acceptance criterion is not an objective, but rather a means of reducing waste. In addition, the general principles set out in Annex II to the Directive include 'limitations on the amount of organic matter in the waste' as an example of a waste property-based criterion.

(b) The setting of shorter time-limits for the reduction of waste

42. Article 5(2) of the Directive stipulates that national strategies must ensure that biodegradable waste going to landfills is reduced by certain percentages in three phases which end 'not later than' 5, 8 and 15 years from 16 July 2001, and provides that in each of those phases there must be a reduction to 75%, 50% and 35% respectively.

43. Therefore, since the Directive sets maximum time-limits (and percentages), the Member States, having regard to their own environmental policies, are authorised to shorten those time-limits, provided that the intended result is achieved by the prescribed deadline and no later. It makes no difference if that result is achieved earlier.

(c) Application to biodegradable and non-biodegradable waste

44. The reference to waste in Article 5(1) and (2) is qualified by the term 'biodegradable', giving rise to the question whether it also covers 'non-biodegradable' waste.

45. In the light of the context and aim of the Directive, it appears that the minimum conditions laid down in the provisions in question refer only to biodegradable waste, although Member States are entitled to extend the scope of the Directive because in fact it seeks to provide for measures, procedures and guidance to prevent or reduce negative effects from the landfilling of 'waste' (Article 1), without greater detail, a term that refers to Directive 75/442 (Article 1(a)) in which a broad definition is provided. [33]

33 — In accordance with Directive 75/442, waste means any substance or object in the categories set out in Annex I which the holder discards or intends to discard. The list contains 16 sections, covering, for example, 'unusable parts' (Q6), 'residues of industrial processes' (Q8) and 'residues from raw materials extraction and processing' (Q11).

46. Accordingly, the extension of the rules on waste to non-biodegradable waste does not infringe Community law either.

(d) Application to industrial waste

47. While Article 5(1) requires the setting-up of a strategy for the reduction of 'biodegradable waste', Article 5(2) refers to a strategy for the reduction of 'biodegradable municipal waste', giving rise to the question whether, in the light of the definition in Article 2(b) of the Directive, the use of the adjective 'municipal' precludes the inclusion of non-municipal waste, such as industrial waste.

48. It is clear that the reply must be the same as the one proposed above. The Directive sets out a number of final provisions which the Member States must take steps to implement. The Member States are authorised to introduce others of wider scope without overstepping the limits concerned or running counter to the objective referred to in Article 1, which uses the more general term 'landfilling of waste'. Thus, a strategy which ensures the reduction of both biodegradable municipal waste and other types of waste is compatible with the Community law.

49. In addition, as the Netherlands and German Governments point out, industrial waste can be biodegradable — if not totally then at least in part — and, therefore, such waste would have to be included in the national reduction strategy referred to in Article 5(1).

50. Accordingly, the Directive does not preclude the provisions on municipal waste from also applying to industrial waste.

(e) Joint analysis

51. It follows from the considerations above that the condition laid down in Article 176 EC, in order for more stringent national protective measures to comply with the Treaty, is satisfied in each of the cases analysed in relation to the Directive.

52. However, as the German court observes, it is necessary to determine whether an analysis of those measures as a whole is capable of leading to a different conclusion.

53. That approach can be rejected outright, since the German national legislation does not conflict with the policy set out in the relevant provisions of Community law. Specifically, the Directive provides for a three-phase reduction of biodegradable municipal waste going to landfills until such waste amounts to 35% of the total amount (by weight) of waste produced in 1995, but the Directive does not specify how that process should be implemented. In addition, the German regulation applies to waste which can be disposed of in the same way as municipal waste, requires that treatment must not be effected by mechanical processes alone (which presumably reduces such waste to a greater extent), [34] and sets earlier time-limits. It therefore goes further than the Directive, while respecting the minimum requirements laid down therein, from which it follows that it is for the national court, rather than the Court of Justice, to determine the aims of the domestic legislation and compare them with those laid down in the Community provision.

54. Moreover, it is stated in the case-law that, notwithstanding that Community policy in environmental matters aims at a high level of protection, such a level of protection does not necessarily have to be the highest that is technically possible, since the Member States are authorised to raise that level. [35]

55. In the light of the considerations set out above, I propose that, in reply to Question 1 and the first part of Question 2(a), the Court should declare that, pursuant to Article 176 EC, when Member States transpose Directive 1999/31 into national law they may introduce more stringent environmental protection measures, provided that those measures pursue the objectives and meet the requirements of the Community provisions, as is the case when the acceptance at landfills of municipal waste and of waste which can be disposed of in the same way as municipal waste is made conditional on a criterion of the organic content of dry residue in the original substance (expressed as combustion loss or TOC), when the reduction targets are required to be achieved by earlier dates than those set in the Directive, and when, in short, the acceptance of waste at landfill sites is made subject to pretreatment other than mechanical processes alone. [36]

34 — The case-file does not contain the technical reports needed to establish the effect of the application of each acceptance criterion on the waste treatment process. Furthermore, an expert's report on the subject was not submitted, nor an economic and financial study of the effect on the viability of the landfill site of compliance with the Community legislation and the German legislation. The latter would also have been helpful for the purposes of addressing other underlying issues, such as possible compensation for the operator.

35 — Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraph 49.

36 — With regard to the last condition, Article 6(a) of the Directive requires the Member States to take measures in order that 'only waste that has been subject to treatment is landfilled', treatment being defined in Article 2(h) as 'the physical, thermal, chemical or biological processes, including sorting, that change the characteristics of the waste in order to reduce its volume or hazardous nature, facilitate its handling or enhance recovery'. Accordingly, when Article 5(1) calls on the Member States to set up a national strategy which includes measures to achieve the targets set out in paragraph 2, 'by means of, in particular, recycling, composting, biogas production or materials/energy recovery', it can be inferred that this list is not exhaustive.

B — *The second part of Question 2(a) and Question 2(b): the Community principle of proportionality*

56. The principle of proportionality implies that the means used to attain an objective should be suited and appropriate to the aim pursued, the same holding good for two or more concepts, criteria or parameters. In the sphere of law, it is a general, multidimensional principle, since its influence extends at international, Community and national level.

57. Without prejudice to the determination of whether the German legislation complies with that principle, which the Verwaltungsgericht Koblenz must carry out pursuant to German law, the questions it has referred also concern the effect of the legislation at Community level.

58. Before examining those questions, it is necessary to address the assertion put forward by the Commission and the German Government in their written observations, to the effect that the Community principle of proportionality has no bearing on the national legislation, inter alia because, under Article 5 EC, that principle relates only to action by the Community, and because such action is not at issue in these proceedings.

59. Although, initially, the arguments put forward – in particular by the Commission — appear convincing, the principle of proportionality is a general rule of law which is not restricted in scope to action taken by the Community. The principle is enshrined in Article 5 EC which, according to the settled case-law of the Court, restricts it to that sphere but has not limited its impact on Community law as a whole. Furthermore, in making the validity of more stringent national protective provisions conditional on their being compatible with the Treaty, Article 176 EC refers not only to written law but also, as I have already pointed out, to the objectives, fundamental freedoms, policies and principles which underpin it. [37] Therefore, it is not appropriate to restrict the expression 'this Treaty' to the specific provisions contained therein. [38]

60. That being the case, the effect of the principle of proportionality extends to all action taken by the Community, irrespective of whether such action is carried out by the Community itself or by the Member States in the fulfilment of their responsibilities at Community level.

37 — In point 28 of this Opinion.

38 — Including Article 10 EC, pursuant to which the Member States must take 'all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'. The adjective appropriate must also be construed in accordance with general Community law principles. In its judgment in *DaimlerChrysler*, cited in footnote 19, the Court interpreted the expression 'in accordance with the Treaty' contained in Regulation No 259/93 'as meaning that, in addition to being compatible with the Regulation, such national measures must also comply with the general rules or principles of the Treaty to which no direct reference is made in the legislation adopted in the field of waste shipments' (paragraph 45).

61. The difficulty lies, therefore, in determining whether the national provision or the conduct of the concerned amounts to action at Community level. Only if the reply is in the affirmative will the principle of proportionality come into play. Application of the principle is not dependent on the effect of the national provision on the legal system of the Union but rather on its incorporation into that legal structure. In other words, if the principle of proportionality requires that there must be an appropriate balance between the objective pursued and the means of achieving that objective, [39] it stands to reason that, in order to determine whether that balance exists at Community level, there must be a Community objective and Community means, which is not the case where, for example, the objective used as a basis for the action concerned is a Community one but the mechanism employed is not.

62. In those circumstances, it is for the national court to make such a determination, while bearing in mind that measures introduced by the Member States relate to the supranational sphere in various ways, ranging from mere implementation to complete separation. Moreover, the effect of the principle of proportionality may not be as extensive as under Community law. [40] In any event, the Court does not have jurisdiction to rule on whether a rule of national law conforms to the Community principle of proportionality, in particular where, as in these proceedings, very precise technical issues are involved and the information necessary in order for a judicious appraisal to be carried out has not been supplied. [41]

63. For the reasons set out, I propose that the answer to the second part of Question 2 (a) and Question 2(b) should be that it is for the national court to assess whether the national provision or the conduct of the Member State concerned complies with the Community principle of proportionality, having first of all established that the action in question is taken at Community level.

39 — As the Austrian Government states in its written observations, citing Case 265/87 *Schrader* [1989] ECR 2237, the proportionality of a measure must be assessed on the basis of whether it is appropriate and necessary, and on the basis of the prohibition on the imposition of disproportionate obligations.

40 — As Guy Isaac states, 'la proporcionalidad significa que, en la aplicación de una competencia, si la Comunidad puede elegir entre varios modos de acción, debe optar, a eficacia igual, por aquel que deje más libertad a los Estados, a los particulares, a las empresas' ['proportionality means that where, in the exercise of one of its powers, it is possible for the Community to choose between a number of courses of action, it must opt, for equal effectiveness, for the one which accords greater freedom to the Member States, to individuals and to undertakings'], *Manual de Derecho Comunitario General*, translated by G.-L. Ramos Ruano, Ariel, Barcelona, Fifth edition, 2000, p. 76.

41 — In that connection, the Court, in its judgment in Case 304/84 *Ministère public* v *Muller and Others* [1986] ECR 1511, took the view that, as it stood at the time, Community law did not prevent a Member State from prohibiting the marketing of foodstuffs from other Member States, to which certain substances had been added, but went on to state that 'the principle of proportionality which underlies the last sentence of Article 36 of the Treaty [now, after amendment, Article 30 EC] requires that any such prohibition be restricted to what is necessary to attain the legitimate aim of protecting health' (paragraph 23). The Court held that 'it is for the competent national authorities to show in each case, in the light of national eating habits and with due regard to the results of international scientific research, that the rules are necessary to give effective protection to the interests referred to in Article 36 of the Treaty'. Similarly, in the judgment in *Tridon*, cited above, the Court observed that 'the assessment to be made of the proportionality of the prohibition of trade at issue in the main proceedings, in particular whether the objective sought could be achieved by measures having less effect on intra-Community trade, cannot be performed in the present case without additional information, and that such an assessment requires a specific analysis on the basis of scientific studies and of the factual circumstances of the main proceedings, it being for the national court to make that analysis' (paragraph 58).

VIII — Conclusion

64. In the light of the foregoing considerations, I propose that, in reply to the questions referred for a preliminary ruling by the Verwaltungsgericht Koblenz, the Court of Justice should declare:

(1) With regard to Question 1 and the first part of Question 2(a), pursuant to Article 176 EC, when Member States transpose Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste into national law they may introduce more stringent environmental protection measures, provided that those measures pursue the objectives and meet the requirements of the Community provisions, as is the case when the acceptance at landfills of municipal waste and of waste which can be disposed of in the same way as municipal waste is made conditional on a criterion of the organic content of dry residue in the original substance (expressed as combustion loss or TOC), when the reduction targets are required to be achieved by earlier dates than those set in the Directive, and when, in short, the acceptance of waste at landfill sites is made subject to pretreatment other than mechanical processes alone.

(2) With regard to the second part of Question 2(a) and Question 2(b), it is for the national court to assess whether the national provision or the conduct of the Member State concerned complies with the Community principle of proportionality, having first of all established that the action in question is taken at Community level.