JUDGMENT OF THE COURT (Second Chamber)

10 April 2008 *

In Case C-442/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 26 October 2006,

Commission of the European Communities, represented by D. Recchia and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk and C. Toader (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by adopting and maintaining in force Legislative Decree No 36 of 13 January 2003 (Ordinary Supplement to GURI No 40 of 12 March 2003), as amended by Decree-Law No 203 of 30 September 2005 (GURI No 230 of 30 October 2005, p. 4) ('Legislative Decree No 36/2003'), which transposes Council

Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1) into national law, the Italian Republic has failed to fulfil its obligations under Articles 2 to 14 of that directive.

Relevant provisions

Community legislation

2 According to Article 1 of Directive 1999/31, the aim of the directive is to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment from landfilling of waste.

3 Article 2 contains a list of the definitions referred to in the directive. It defines, inter alia, waste and landfills, the latter meaning waste disposal sites for the deposit of the waste onto or into land. Article 3 defines the directive's scope, stating that it relates, in principle, to all landfills, as defined in Article 2.

4 Articles 4 and 6 of Directive 1999/31 classify landfills in three classes, namely, landfills for hazardous waste, landfills for non-hazardous waste and landfills for inert waste, and state what waste may be accepted in those three classes of landfill.

5 As regards waste and treatment not acceptable in landfills, Article 5(1) of the directive provides that '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 [for transposition of the directive] and notify the Commission of this strategy', and Article 5(2) sets time-limits for implementing that reduction of waste.

6 Article 10 of Directive 1999/31 lays down rules concerning the costs of the landfill of waste. Article 11 and Annex II set out rules on waste acceptance procedures at landfills, Article 12 and Annex III lay down those on control and monitoring procedures in respect of operations carried out at landfills and Article 13 relates to closure and after-care procedures.

7 Articles 7 to 9 of Directive 1999/31 lay down the permit procedure for new landfills. The directive also makes existing landfill sites subject to special measures. In that respect, Article 14 of the directive provides:

'Member States shall take measures in order that landfills which have been granted a permit, or which are already in operation at the time of transposition of this Directive, may not continue to operate unless the steps outlined below are accomplished as soon as possible and within eight years after the date laid down in Article 18(1) at the latest:

(a) [within] a period of one year after the date laid down in Article 18(1), the operator of a landfill shall prepare and present to the competent authorities, for

their approval, a conditioning plan for the site including the particulars listed in Article 8 and any corrective measures which the operator considers will be needed in order to comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1;

(b) following the presentation of the conditioning plan, the competent authorities shall take a definite decision on whether operations may continue on the basis of the said conditioning plan and this Directive. Member States shall take the necessary measures to close down as soon as possible, in accordance with Articles 7(g) and 13, sites which have not been granted, in accordance with Article 8, a permit to continue to operate;

(c) on the basis of the approved site-conditioning plan, the competent authority shall authorise the necessary work and shall lay down a transitional period for the completion of the plan. Any existing landfill shall comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1 within eight years after the date laid down in Article 18(1);

(d) (i) within one year after the date laid down in Article 18(1), Articles 4, 5, and 11 and Annex II shall apply to landfills for hazardous waste;

(ii) within three years after the date laid down in Article 18(1), Article 6 shall apply to landfills for hazardous waste.'

8 Article 18 of Directive 1999/31 sets the period for transposition of the directive as follows:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than two years after its entry into force. They shall forthwith inform the Commission thereof.

…’

9 The directive came into force on 16 July 1999. The period for transposition laid down in Article 18 thereof expired on 16 July 2001.

10 On 19 December 2002, the Council of the European Union adopted Decision 2003/33/EC establishing criteria and procedures for the acceptance of waste at landfills pursuant to Article 16 of and Annex II to Directive 1999/31 (OJ 2003 L 11, p. 27).

National legislation

11 Legislative Decree No 36/2003 transposes all of the provisions of Directive 1999/31 into national law.

12 Article 5 provides that the regions must draw up and approve a programme of reduction of biodegradable waste present in landfills within a period of one year from entry into force of the legislative decree. The legislative decree also sets the time-limits which must be complied with in order gradually to reduce such waste in landfills. Article 6 of the legislative decree implements the provision of Directive 1999/31 concerning waste not accepted at landfills, while Article 11 lays down the rules of procedure relating to the acceptance of waste at landfills.

13 Article 17 of the legislative decree, headed 'Transitional and final provisions', which lays down the rules concerning the treatment of existing landfill sites, provides:

'1. Landfills for which a permit has already been granted on the date of entry into force of this decree may continue to accept, until 31 December 2006, the waste for which they have been authorised.

2. In compliance with the conditions and limits of acceptability provided for by the decision of the interdepartmental committee of 27 July 1984, published in the Ordinary Supplement to [GURI] No 253 of 13 September 1984 … disposal in new landfills is authorised until 31 December 2006 so far as concerns:

(a) in landfills for inert waste, the waste previously sent to class two, type A landfills;

(b) in landfills for non-hazardous waste, the waste previously sent to class one and class two, type B landfills;

(c) in landfills for hazardous waste, the waste previously sent to class two, type C and class three landfills.

3. Within a period of six months from the date of entry into force of this decree, the holder of the permit referred to in paragraph 1 or the operator of the landfill instructed by him shall present to the competent authority a site-conditioning plan on the basis of the criteria referred to in this decree, including the financial guarantees referred to in Article 14.

4. By a reasoned measure, the competent authority shall approve the plan referred to in paragraph 3, authorise the continuation of the activity of the landfill and lay down the works for compliance, the method of execution and the final time-limit for completion of the works, which may not under any circumstances be later than 16 July 2009. …

5. Should the plan referred to in paragraph 3 be rejected, the competent authority shall state the detailed rules and time-limits for closure of the landfill, in accordance with Article 12(1)(c).

…'

14 The decision of the interdepartmental committee of 27 July 1984, referred to in Article 17(2) of Legislative Decree No 36/2003, provides for the classification of landfills into three classes. Class two, type C landfills and class three landfills, referred to in Article 17(2)(c), are those which are intended to accept toxic and hazardous waste (points 4.2.3.3 and 4.2.4 of that decision).

Pre-litigation procedure

15 After receiving a complaint referring to incorrect implementation of Directive 1999/31 by Legislative Decree No 36/2003, on 17 October 2003 the Commission sent the Italian Republic a letter of formal notice in which it claimed that the legislative decree did not comply with Articles 2, 5, 6, 10, 13 and 14 of the directive. In the introduction to that letter the Commission stated that the observations contained in it '[were without prejudice to] the fact that further questions might be brought to the attention of the Italian authorities'.

16 The Italian Republic replied to that letter by two separate notes, dated 12 December 2003 and 28 January 2004 respectively.

17 On 9 July 2004, the Commission sent the Italian Republic a supplementary letter of formal notice in which it expressed doubts as to whether not only the articles of Directive 1999/31 referred to in the original letter of formal notice, but also Articles 3, 4, 7 to 9, 11 and 12 of that directive, had been correctly transposed. Moreover,

it called on the Italian Republic to supply information on the exact number of landfills to which the provisions of that directive relating to new landfills were not applicable and to submit its observations within a period of two months from the receipt of the supplementary letter of formal notice.

18 Since the Commission was not satisfied with the explanations given by the Italian Republic, it sent it a reasoned opinion on 19 December 2005. In the latter, it withdrew some of the complaints set out in the original letter of formal notice and confirmed those alleging that the national provisions concerning existing landfill sites did not comply with Directive 1999/31. It also called on the Italian Republic to adopt the necessary provisions to comply with the reasoned opinion within a period of two months from its receipt.

19 Since it was not persuaded by the arguments put forward by the Italian Republic in its note of 28 February 2006 in response to the reasoned opinion, the Commission brought the present action.

The action

The plea of inadmissibility, alleging irregularity of the pre-litigation procedure

20 The Italian Republic pleads a defect in the pre-litigation procedure rendering the Commission's action inadmissible. It observes that that institution changed the complaints relied on. Whereas in the original letter of formal notice, so far as concerns the treatment of existing landfill sites, the Commission had referred

to non-compliance of Legislative Decree No 36/2003 with Article 14 of Directive 1999/31, in the supplementary letter of formal notice it relied on infringement of Articles 2 to 14 of that directive. The Italian Republic also submits that in the original letter of formal notice the Commission had already inserted a reference to the effect that 'new doubts' could arise subsequently as to the compatibility of the national legislation transposing Directive 1999/31 with that directive. The insertion of such a reference makes it possible for the Commission to change the complaints relied on against a Member State, in accordance with its needs and without being required to open a new infringement procedure. Moreover, the addition of new complaints in the supplementary letter of formal notice constitutes an infringement of the duty of sincere cooperation referred to in Article 10 EC.

21 The Commission disputes the existence of such an infringement, given that the supplementary letter of formal notice sent to the Italian Republic was intended to add new complaints or to amend those which had already been put forward. In order to state more specifically what has been set out in a letter of formal notice and to complete the analysis of the response of the national authorities, the Commission sends the Member State concerned a reasoned opinion. On the other hand, in accordance with Article 226 EC, in order to extend the complaints relied on the Commission sends that State a supplementary letter of formal notice on which it has the opportunity to submit it arguments.

22 In that regard, it must be recalled that it is settled case-law that the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the EC Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter. It follows from that function that the purpose of the letter of formal notice is, first, to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence and, secondly, to enable the Member State to comply before proceedings are brought before the Court (Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraph 54, and Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855, paragraphs 46 and 47).

23 The Commission sent the Italian Republic a supplementary letter of formal notice, laying down a new time-limit for that Member State to submit its observations, before sending it a reasoned opinion based on the same complaints as those in the supplementary letter of formal notice. Accordingly, the Commission did not prejudice the rights of the defence since the Italian Republic was given the opportunity to prepare its defence before receiving the reasoned opinion.

24 This plea of inadmissibility raised by the Italian Republic must therefore be rejected.

The first complaint, alleging infringement of Articles 2 to 14 of Directive 1999/31 arising from the delay in transposing that directive

Arguments of the parties

25 The Commission claims that, on account of the belated transposition of Directive 1999/31, which did not take place until 27 March 2003 upon the entry into force of Legislative Decree No 36/2003, whereas the directive should have been transposed by 16 July 2001, the treatment applied, in Italian law, to landfills authorised between 16 July 2001 and 27 March 2003 was that reserved to existing landfill sites and not the stricter treatment laid down for new landfills. The Italian Republic therefore infringed, so far as concerns those landfills, Articles 2 to 14 of that directive, since they were not applied to all those landfills, which ought, on the contrary, to have

been regarded as new. The Italian authorities thus intentionally chose to infringe the Community provisions concerned because, even when transposing the directive out of time, they could have, and should have, made those landfills subject to the treatment reserved by the directive to new landfills.

26 The Commission adds that the fact, relied on during the administrative procedure, that the Italian Republic preferred unilaterally to await the adoption of Decision 2003/33/EC does not justify the delay in the implementation of Directive 1999/31. That implementation did not depend in any way on the existence of such a measure since, in accordance with the directive, the Member States were to use national criteria in compliance with the requirements in Annex II to the directive.

27 The Italian Republic pleads, first of all, that this complaint is inadmissible, stating that the Commission cannot start proceedings before the Court on the basis of a delay in the transposition of Directive 1999/31 when the implementing legislative decree was adopted before the pre-litigation procedure was initiated and that delay is a fact which is impossible to remedy.

28 The Italian Republic claims, secondly, that that delay led to the need, for exclusively technical and administrative reasons, to make landfills authorised between the date of expiry of the period for transposition of Directive 1999/31 and that of the entry into force of Legislative Decree No 36/2003 subject to the obligations set out in the directive for existing landfill sites. It was necessary to lay down in respect of those landfills, which already contained a certain amount of waste, a transitional period during

which the holders of operating permits had to adapt those sites. Those transitional arrangements reflected, moreover, the need not to create a situation of inequality for economic operators already holding such permits on the date of entry into force of the legislative decree. The arrangements were, in any event, extremely restrictive and laid down a mandatory time-limit for the presentation of a conditioning plan for the sites which was shorter than that set by Directive 1999/31.

Findings of the Court

29 As regards the plea of inadmissibility raised by the Italian Republic alleging that there is a lack of legal interest in a finding of delay in the transposition of Directive 1999/31, it should be noted that the form of order sought in the present action, in particular in so far as it is based on the action's first complaint, does not relate to a declaration of such delay but to a declaration that the transitional provisions of Legislative Decree No 36/2003 do not comply with the directive so far as concerns the treatment of landfills opened during the period from the date of expiry of the period for transposition of the directive to the date of entry into force of the legislative decree.

30 As is apparent from the case-law of the Court, a Member State which has not transposed, within the period prescribed, a Community directive and against which infringement proceedings have been brought in respect not of the failure to transpose but of the failure to fulfil an obligation flowing from that directive cannot plead the fact that it has not taken the necessary measures to implement the directive in order to object to the admissibility of the action and hence to prevent the Court from examining the application for a declaration that it has failed to fulfil its obligations (Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 23).

31 The plea that the first complaint in the action is inadmissible because the Commission lacks a legal interest in bringing proceedings must consequently be rejected.

32 As regards the substance of this complaint, as the Commission has correctly noted and is not disputed by the Italian Republic, Legislative Decree No 36/2003 does not provide for the application of the provisions concerning new landfills, that is to say, in particular, Articles 2 to 13 of Directive 1999/31, to landfills authorised between the date of expiry of the period for transposition of the directive and that of the entry into force of the legislative decree. On the other hand, it provides for the application to those landfills of the treatment reserved to existing landfill sites, by making them subject to the adaptation procedure laid down in Article 17 of the legislative decree.

33 According to settled case-law, a Member State may not plead its late implementation of a directive as justification for failure to fulfil, or late fulfilment of, other obligations imposed by that directive (see Case C-274/98 *Commission* v *Spain* [2000] ECR I-2823, paragraph 22, and Case C-127/99 *Commission* v *Italy* [2001] ECR I-8305, paragraph 45). When a directive, such as that in question in the present case, lays down unequivocal obligations on the competent national authorities, Member States which have not transposed the directive cannot consider themselves relieved from compliance with those obligations after the period for transposition has expired and cannot exclude, by a transitional provision, the application of the provisions of the directive. To allow the State such a right would have the effect of allowing it to defer the time-limit for transposition by it (see, to that effect, Case C-396/92 *Bund Naturschutz in Bayern and Others* [1994] ECR I-3717, paragraph 19).

34 It follows that the Italian Republic should have applied to landfills authorised between 16 July 2001 and 27 March 2003 the provisions of Directive 1999/31 concerning new

landfills contained in Articles 2 to 13 of the directive. Therefore, by adopting and maintaining in force Legislative Decree No 36/2003 which excludes such application, it has failed to fulfil its obligations under those articles.

35 In addition, by applying the set of rules laid down in Article 14 of Directive 1999/31 concerning existing landfill sites to new landfills, it has also failed to fulfil its obligations under that article.

36 Moreover, the grounds relied on by the Italian Republic to justify its delay in transposing and applying Directive 1999/31, which relate to the need to await the adoption of Decision 2003/33, are not well founded. That decision is designed to specify the rules concerning the criteria and procedures for the acceptance of waste at landfills. However, those rules are set out in the directive and their application is not conditional on the adoption of such a decision pursuant to Article 16 of the directive.

37 Accordingly, the first complaint relied on by the Commission in support of its action must be considered to be well founded.

The second complaint, alleging infringement of Article 14(d)(i) of Directive 1999/31

Arguments of the parties

38 In its second complaint, the Commission notes that Article 14(d)(i) of Directive 1999/31, which lays down transitional rules concerning landfills for hazardous

waste, provides that Articles 4, 5 and 11 of, and Annex II to, that directive are to apply, from 16 July 2002, to existing landfill sites, whereas Legislative Decree No 36/2003 does not provide for any application of those provisions to such landfills, merely laying down, on the contrary, in Article 17(2)(c), transitional rules exclusively for new landfills. The latter provision therefore conflicts not only with Article 14(d)(i) of the directive but also with the provisions which must be applied to existing landfill sites, namely, in particular, Articles 4, 5 and 11 and Annex II. Moreover, the Italian legislation applicable to those landfills before the entry into force of the directive did not comply with those provisions either.

39 The Italian Republic observes that any finding that it has failed to fulfil its obligations resulting from this complaint will not enable it to take the measures necessary to comply with Directive 1999/31 since the Court will deliver its judgment after the expiry of the time-limit set, as regards the transitional arrangements specific to landfills for hazardous waste, at 31 December 2006.

40 That Member State submits, as regards the substance of the second complaint, that Article 17 of Legislative Decree No 36/2003 correctly transposes Article 14(d)(i) of Directive 1999/31 since it provides for the application of Articles 4, 5 and 11 thereof to existing landfill sites. Pursuant to Article 17(3) to (5) of the legislative decree, operators of those landfills should have submitted conditioning plans for the sites to the competent authority by 27 September 2003 at the latest. The latter was to approve the plan in the light of the conditions set by the provisions transposing the directive, relating to the classification of landfills and the conditions under which their operations may continue, by 16 July 2009, the time-limit set by the directive for completing the adaptation of existing landfill sites.

41 Further, Article 17(2)(c) of Legislative Decree No 36/2003, relied on by the Commission, lays down a transitional provision according to which hazardous

waste intended, in accordance with the legislation prior to the legislative decree, for landfills for hazardous and toxic waste may be accepted in such landfills up to 31 December 2006. In the view of the Italian Republic, even though that legislation, including Ministerial Decree No 141 of 11 March 1998 (GURI No 108 of 12 May 1998, p. 22), did not transpose the provisions of Directive 1999/31, it provided for prohibitions and specific procedures for the acceptance of that waste at those landfills, in accordance with the rules laid down in that directive.

Findings of the Court

42 Regarding the plea of inadmissibility put forward by the Italian Republic, it should be recalled that it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion. Accordingly, even where the infringement has been remedied after that period has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its infringement, to, amongst others, persons who derive rights from the infringement (see, to that effect, Case C-29/90 *Commission* v *Greece* [1992] ECR I-1971, paragraph 12, and Case C-519/03 *Commission* v *Luxembourg* [2005] ECR I-3067, paragraphs 18 and 19).

43 In the present case, Article 17(2)(c) of Legislative Decree No 36/2003 contains a transitional provision regarding landfills for hazardous waste which, as confirmed by the Italian Republic, was applicable also on the expiry of the period prescribed for that Member State to comply with the reasoned opinion sent to it by the Commission.

44 Furthermore, contrary to what the Italian Republic asserts, the basis of the failure to fulfil obligations complained of by the Commission is that several provisions of Italian law applicable to those landfills do not comply with Community law. These provisions include not only the provision which refers to the waste which may be accepted at those landfills, for which Legislative Decree No 36/2003 lays down transitional treatment rules, but also provisions relating to the treatment of waste and the procedure for acceptance of that waste at landfills.

45 It follows that the second complaint, relating to the infringement of Article 14 (d)(i) of Directive 1999/31, is admissible.

46 As regards the substance of the second complaint, it should be recalled that Article 14(d)(i) of the directive provides that Articles 4, 5 and 11 and Annex II are to apply to existing landfill sites for hazardous waste within a period of one year after the date of expiry of the period for transposition of the directive, namely from 16 July 2002. That provision thus lays down, irrespective of the duration of the procedure for adapting existing landfill sites which must be completed on 16 July 2009, a short period for the application of the said provisions to those landfills.

47 By contrast, as the Commission has correctly stated, Article 17(2)(c) of Legislative Decree No 36/2003, which lays down, in particular, transitional provisions concerning the treatment of hazardous waste, applies only to new landfills and does not lay down any transitional rule for the treatment of that waste in existing landfill sites.

48 Contrary to the statements of the Italian Republic, Article 17(3) to (5) of Legislative Decree No 36/2003 also does not provide for the application to those landfills, from 16 July 2002, of Articles 4, 5 and 11 of, and Annex II to, Directive 1999/31. That national provision lays down only an adaptation procedure which applies to all landfills, irrespective of the class to which they belong. According to that provision, the holder of the permit to operate a landfill must present a site-conditioning plan to the competent authority within six months from the date of entry into force of the legislative decree. The competent authority authorises the continuation of the activity of the landfill and lays down the works for compliance, the method of execution and the time-limit for completion of the procedure. The adaptation of the landfill must be completed by 16 July 2009.

49 In addition, during that transitional period for the adaptation of existing landfill sites, even though the rules of national law prior to Legislative Decree No 36/2003 which related to the procedure for the disposal of hazardous waste laid down specific provisions for the acceptance of that waste at landfills, they did not secure the full application of Articles 4, 5, 11 of, and Annex II to, Directive 1999/31 to the landfills receiving that waste. The Italian Republic has in fact admitted, in its defence, that that domestic legislation did not have the same content as that of the relevant provisions of the directive.

50 It follows from those considerations that the second complaint relied on by the Commission must also be held to be well founded.

51 Consequently, by adopting and maintaining in force Legislative Decree No 36/2003 which transposes Directive 1999/31 into national law,

— in so far as that legislative decree does not provide for the application of Articles 2 to 13 of Directive 1999/31 to landfills authorised subsequent to the date of expiry of the period for transposition of that directive and prior to the date of the entry into force of the legislative decree, and

— in so far as it does not secure the transposition of Article 14(d)(i) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 2 to 14 of Directive 1999/31.

Costs

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

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

1. **Declares that, by adopting and maintaining in force Legislative Decree No 36 of 13 January 2003, as amended, which transposes Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste into national law,**

   — in so far as that legislative decree does not provide for the application of Articles 2 to 13 of Directive 1999/31 to landfills authorised subsequent to the date of expiry of the period for transposition of that directive and prior to the date of the entry into force of the legislative decree, and

   — in so far as it does not secure the transposition of Article 14(d)(i) of that directive,

   the Italian Republic has failed to fulfil its obligations under Articles 2 to 14 of Directive 1999/31;

2. **Orders the Italian Republic to pay the costs.**

[Signatures]