OPINION OF ADVOCATE GENERAL STIX-HACKL
delivered on 1 April 2004 [1]

I — Introduction

1. In this action for failure to fulfil obligations, the Commission seeks a declaration that, by failing to adopt the measures necessary to comply with Article 3(1) of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, [2] as amended by Council Directive 87/101/EEC of 22 December 1986 [3] ('Directive 75/439, as amended'), by which Member States were required to give priority to the processing of waste oils by regeneration over their disposal by burning or other means, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive.

2. The case primarily concerns the question of the scope of this obligation in light of the fact that Article 3(1) refers to technical, economic and organisational constraints as limiting factors.

II — Legal framework

3. Articles 1 to 6 of the original version of Directive 75/439 were replaced by the new provisions introduced by Article 1 of Directive 87/101. The second recital in the preamble to Directive 87/101 reads as follows:

'... regeneration is generally the most rational way of re-using waste oils in view of the energy savings which can be achieved; ... therefore, priority should be given to the processing of waste oils by regeneration, where technical, economic and organisational constraints allow it'.

1 — Original language: German.
2 — OJ 1975 L 194, p. 23 ('Directive 75/439').
3 — OJ 1987 L 42, p. 43 ('Directive 87/101').

4. Under Article 1 of Directive 75/439, as amended, 'regeneration' within the meaning of the Directive means 'any process whereby base oils can be produced by refining waste oils, in particular by removing the contaminants, oxidation products and additives contained in such oils'.

5. Article 3 of Directive 75/439, as amended, provides:

'1. Where technical, economic and organisational constraints so allow, Member States shall take the measures necessary to give priority to the processing of waste oils by regeneration.

2. Where waste oils are not regenerated, on account of the constraints mentioned in paragraph 1 above, Member States shall take the measures necessary to ensure that any combustion of waste oils is carried out under environmentally acceptable conditions, in accordance with the provisions of this Directive, provided that such combustion is technically, economically and organisationally feasible.

3. Where waste oils are neither regenerated nor burned, on account of the constraints mentioned in paragraphs 1 and 2, Member States shall take the measures necessary to ensure their safe destruction or their controlled storage or tipping.'

III — Pre-litigation procedure and proceedings before the Court

6. In its reply to a questionnaire from the Commission concerning implementation of Directive 75/439, as amended, the United Kingdom Government submitted that, because of technical, economic and organisational constraints, it had not been possible to give priority to the processing of waste oil by way of regeneration. The United Kingdom Government pointed out in this regard that high levels of investment would be required for that purpose. Market competitiveness, particularly from firms recovering energy from waste oils, was an obstacle to such investment, as was the low price of virgin oil, which made regeneration unprofitable.

7. In its letter of formal notice of 19 April 2001 and reasoned opinion of 21 December 2001, the Commission stated its view that there were no constraints such as could justify the lack of priority given to regener-

ation of waste oils and that the United Kingdom had thus failed to adopt the measures necessary to give effect to Article 3(1) of Directive 75/439, as amended.

8. While the United Kingdom Government stated in its respective replies that it was in principle prepared to give full effect to Article 3(1), it also pointed out that economic constraints in particular stood in the way of prioritising the processing of waste oils by regeneration. Analysis of the waste oil market in the United Kingdom highlighted clearly the economic limits facing regeneration of waste oils. The main obstacles in this regard were the strong demand for waste oils for use as fuel and the weakness inherent in the market for regenerated oils.

9. Referring to the complexity and expense of the measures that would be required for the prioritisation of waste oil regeneration, the United Kingdom Government did not provide a full list of relevant measures but made reference to discussions on the introduction of a one-off capital grant towards the construction and operation of a regeneration facility in conjunction with a programme to enhance the marketability of the regenerated product and the possibility of a change in the tax treatment of waste oils. The United Kingdom Government further undertook to draw up a detailed timetable for implementation of the Directive as soon as appropriate measures had been finalised and also stated that it would liaise with the Commission in regard to the proposed measures.

10. As the Commission did not consider the explanations proffered by the United Kingdom Government to be sufficient to bring an end to the alleged failure to fulfil obligations, it brought the present action under Article 226 EC by application of 21 November 2002, lodged at the Registry of the Court on 22 November 2002.

11. The Commission claims that the Court should:

1. declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Article 3(1) of Council Directive 75/439/EEC requiring Member States to take the measures necessary to give priority to the processing of waste oils by regeneration, as amended by Directive 87/101/EEC on the disposal of waste oils, or, in any event, by failing to notify such provisions to the Commission, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;

2. order the United Kingdom of Great Britain and Northern Ireland to pay the costs.

IV — The failure to fulfil obligations

A — *Main submissions of the parties*

12. First, so far as the substance and scope of the obligation under Article 3(1) of Directive 75/439, as amended, are concerned, the *United Kingdom Government* submits that this provision does not impose an absolute obligation on Member States to take measures designed to give priority to waste oil regeneration, but rather that such an obligation exists only in so far as there are no technical, economic or organisational constraints in that regard. If such constraints do exist, Article 3(2) and (3) sets out alternatives for the disposal of waste oil. The objective of regeneration calls for appropriate and proportionate measures.

13. The United Kingdom Government bases its arguments on the judgment in Case C-102/97.[4] It follows from that judgment — as from the Opinion of Advocate General Fennelly in that case —[5] that the duty in question will vary according to the circumstances in each Member State and that the Member States have a broad discretion when it comes to implementing Article 3 of Directive 75/439, as amended. It is not absolutely indispensable that legal or other provisions of a particular kind be adopted; what is needed is the introduction of appropriate prioritisation measures in the light of the limitations induced by the constraints. Depending on the nature of the constraints, these could be measures of an incremental nature or measures that change over time. The Court's task in this regard is to establish whether the Member State in question has acted in a proportionate and appropriate manner in light of the prevailing circumstances.

14. The United Kingdom Government takes the view that it has adopted appropriate and proportionate measures to prioritise regeneration and has thereby complied with its obligations under Article 3(1) of Directive 75/439, as amended. It submits in this regard that it has identified the obstacles to regeneration, which are principally economic in nature, namely the strong market for recovered waste oil for use as fuel — particularly in coal-fired power stations (for heat regulation) and asphalt plants — and the weak market for regenerated oil, which is perceived by users as an inferior product.

4 — Case C-102/97 *Commission* v *Germany* [1999] ECR I-5051, paragraph 40 et seq.

5 — Opinion of Advocate General Fennelly in Case C-102/97 (cited in footnote 4), point 20.

Further, the United Kingdom Government states that, in a detailed study carried out in March 2001, it attempted to identify solutions for the removal of these obstacles and, in the light of that study, worked on the development of measures to promote waste oil regeneration. These latter investigations were — as the United Kingdom Government has stated in the written procedure — concluded in mid-March 2003 and thus placed it in a position to implement a structured plan to promote regeneration of waste oil in accordance with Directive 75/439, as amended.

15. As it thus actively took measures to identify, evaluate and overcome existing constraints, that Government claims that the United Kingdom is in a situation distinguishable from that of the Federal Republic of Germany in Case C-102/97, which, according to the Court's judgment, did not take any specific measures and '[confined] itself ... to referring to its own definition of constraints and to the circumstances obtaining in its territory in an attempt to justify the complete failure to introduce measures implementing Article 3 (1) of Directive 75/439, as amended'.

16. The United Kingdom Government concludes by pointing out that the existing national tax reduction — in relation to combustion of waste oils — will not appreciably redress the imbalance between the market for regeneration and the market for combustion of waste oils. It is difficult to determine the market price for waste oil intended for regeneration in the United Kingdom because such waste oil is subsidised in other Member States and transport costs for waste oil earmarked for regeneration are significantly higher than those for waste oil intended for combustion.

17. In the view of the *Commission*, by contrast, the United Kingdom Government has, through the steps and investigations to which it has referred, not yet adopted the measures required to give priority to the processing of waste oils by way of regeneration. The situation in regard to transposition of the Directive in the United Kingdom is analogous to that in the Federal Republic of Germany, which the Court declared to be unsatisfactory in its judgment in Case C-102/97. The United Kingdom Government has not taken any concrete measures to promote the prioritisation of regeneration and has merely confined itself to establishing which measures might one day be introduced in order to achieve that goal. That Government has not brought about any actual change in the processing of waste oils.

18. The United Kingdom Government has also, notwithstanding the economic constraints, failed to utilise the possibility under Articles 14 and 15 of Directive 75/439, as

amended, to grant financial indemnities to offset the costs involved. Furthermore, in the Commission's view, the tax relief granted for waste oil intended for combustion promotes the burning of waste oil, contrary to the goal pursued by the Directive.

19. During the hearing the *United Kingdom Government* stated further inter alia that, in addition to the economic constraints, there were also constraints of an organisational nature (the highly decentralised collection system for waste oil to be used as fuel would have to be changed fundamentally in order to divert waste oil to regeneration plants) and of a technical nature (uncertainty as to whether particular technical methods would be capable of dealing with changes in the composition of waste oils over the next 10 years). It submitted that it in no way takes the view that nothing can be done given the constraints. In light of the circumstances, however, the studies which it has carried out are (for the moment) the appropriate implementing measures. In addition, the United Kingdom Government referred for the first time during the hearing to the 'Waste strategy 2000', adopted within the framework of the waste directive (Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39)) and on the basis of the Environmental Protection Act, in which it is also recognised that priority has to be given to regeneration under Directive 75/439, as amended. In response to a query, the United Kingdom Government explained that the report scheduled for March 2003, which was designed to permit the application of appropriate measures, was not ready until autumn 2003.

20. During the hearing, the *Commission* once again stressed that the studies and reports adduced constituted merely the basis for measures to prioritise waste oil regeneration. Action, it submitted, was what was in fact also required.

B — *Appraisal*

21. It is first of all necessary to examine the import of the duty which Article 3(1) of Directive 75/439, as amended, imposes on Member States to give priority to the processing of waste oils by regeneration, it being noted that, as the United Kingdom Government has also stated, there is in this regard no fundamental divergence between its views and those of the Commission.

22. Article 3 of Directive 75/439, as amended, contains several obligations devolving on Member States with regard to the treatment and disposal of waste oils.

First, all measures must be taken that are necessary to give priority to the processing of waste oils by regeneration (Article 3(1)), this constituting a principal objective of Directive 87/101. Member States must then ensure that any combustion of waste oils is carried out under environmentally acceptable conditions (Article 3(2)). Finally, safe destruction of the oils or their controlled storage or tipping must be guaranteed (Article 3(3)).

23. The aforementioned obligations and treatment procedures are 'graded' by means of the criterion of technical, economic and organisational feasibility, that is to say, waste oils may be burned only if and in so far as such constraints do not permit regeneration. Destruction and storage, in turn, should occur only if and in so far as those constraints permit neither regeneration nor combustion of the waste oils.

24. The reference to 'technical, economic and organisational constraints' establishes the scope and substance of the obligation in question — in this case, the obligation to give priority to the processing of waste oils by regeneration. [6]

25. It must first be stated that not every technical, economic or organisational obstacle which might stand in the way of a potential measure for the prioritisation of regeneration will release a Member State from its obligation to adopt such a measure under Article 3(1) of Directive 75/439, as amended.

26. The Directive calls for guiding intervention on the part of the Member State in order to comply with the 'graded' obligations laid down in Article 3 with regard to treatment and disposal of waste oils, that is to say, for measures designed to overcome the abovementioned obstacles or constraints. This is also made evident by the fact that the Directive itself mentions such measures, such as the possibility cited in Articles 14 and 15 of the Directive for undertakings which collect and/or dispose of waste oils to receive indemnities. Moreover, the provision in Article 3 of the Directive would otherwise be deprived of much of its practical efficacy. [7]

27. On the other hand, sufficient outlay — in particular, financial — can as a rule overcome practically any economic obstacle, and,

6 — Judgment in Case C-102/97 (cited in footnote 4), paragraph 39.

7 — See the judgment in Case C-102/97 (cited in footnote 4), paragraph 43.

within certain limits, any organisational and technical obstacle as well.

28. Article 3(1) of Directive 75/439, as amended, does not, however, require Member States to take any measure, no matter how costly, in order to prioritise waste oil regeneration over the other treatment procedures referred to in Article 3. That again would render meaningless the reference to 'technical, economic and organisational constraints' introduced by Directive 87/101.

29. The Court, rather, held in its judgment in Case C-102/97 that the provision relating to constraints must be understood 'as an expression of the principle of proportionality'. [8]

30. Member States cannot therefore simply leave the matter of waste oil disposal as it stands as soon as the prioritisation of waste oil regeneration encounters economic, organisational or technical obstacles. On the other hand, they need not adopt disproportionately costly measures in order to comply with that obligation.

31. To that extent the United Kingdom Government is correct in its assertion that it is at least conceivable *in extremis* to imagine a situation in a Member State in which no measures for the prioritisation of waste oil regeneration would have to be taken, that is to say, in the case where this is achievable only by way of measures that are disproportionately onerous in economic, organisational or technical terms.

32. A Member State does not therefore, as the Commission somewhat pointedly noted in regard to the United Kingdom, have to 'do something' in any event.

33. Nor can a Member State be obligated to take measures for prioritisation of regeneration which, although economically, technically and organisationally feasible, do not contribute to attainment of the objective pursued. Thus, while it will in practical terms always be possible to conduct a marketing campaign to promote regenerated waste oil, such a measure would be pointless and/or ineffective if the purchase of this waste oil was economically indefensible for consumers and the price of this waste oil could not

8 — Judgment in Case C-102/97 (cited in footnote 4), paragraph 42.

however — for instance, because of economic constraints — be adequately reduced by appropriate measures.

34. Article 3(1) of Directive 75/439, as amended, thus requires on the whole that Member States adopt measures which are at least appropriate for contributing to the objective of prioritising the treatment of waste oils by way of regeneration [9] and which are capable of being implemented in technical, economic and organisational terms without disproportionately great expense.

35. So far as concerns the question of the realisation of that obligation in the present case, the United Kingdom Government has put forward as implementing measures the establishment of reports and studies on the obstacles to waste oil regeneration and the means of overcoming those obstacles.

36. I share the Commission's view that such reports and studies do not yet as such constitute measures for the prioritisation of regeneration within the meaning of Article 3 (1) of Directive 75/439, as amended.

37. In numerous directives — as also in Article 18 of Directive 75/439, as amended — an obligation is imposed on Member States to draw up a report, plan or other form of document, most frequently in conjunction with the obligation to forward it to the Commission. In such cases the implementation measure called for does in fact already consist in the establishment of the report, plan or document as such.

38. The present case, however, concerns the obligation to adopt the measures required to achieve prioritisation of waste oil regeneration.

39. The investigations and suchlike conducted by the United Kingdom Government, however, cannot as such produce any effect in regard to the implementation of this treatment procedure or make any contribution to it. That could be the case only if appropriate specific measures were to be adopted on the basis of those investigations.

40. So far as concerns 'Waste strategy 2000', which was mentioned for the first time during the hearing, and which therefore

9 — See the judgment in Case C-102/97 (cited in footnote 4), paragraph 48.

had apparently not yet been forwarded to the Commission as an implementing measure by the date which is crucial for determining whether there has been a failure to fulfil obligations, that is to say, the expiry of the period laid down in the reasoned opinion, [10] this appears to be limited to a general recognition of the objective of prioritisation of regeneration pursued by Directive 75/439, as amended, but without specifically contributing to its realisation.

41. Further, however, it must be held that the United Kingdom Government does not, to judge from its statements, proceed on the basis that such extreme constraints exist as to render impossible any efforts to prioritise regeneration.

42. The line of argument pursued by the United Kingdom Government, to the effect that the investigations and studies which it has mentioned do indeed in view of the existing constraints — which are significant but not extreme — constitute appropriate implementation measures, also strikes me as not being entirely conclusive given that it ought to be possible in any situation to establish such problem analyses, even in a situation of extreme constraints in which, according to that Government, a Member State is not obliged to take any measures whatever.

43. It is necessary first and foremost to hold that it is apparent that in both the study of March 2001 and — according to the submission of the United Kingdom Government made during the hearing — in the report of autumn 2003 outline solutions are set out to overcome the predominantly economic constraints and various action options posited for prioritisation of regeneration.

44. Further, it is also evident from the views expressed by the United Kingdom authorities in the course of the pre-litigation procedure that the studies are merely a precursor to the specific measures still to be adopted, and which only now are to be elaborated, and are not themselves to be regarded at this point as being the measures required under Article 3 (1) of Directive 75/439.

45. It is not for the Court to determine which measures the United Kingdom ought to have adopted for the purpose of complying with the obligation in issue. [11] Suffice it to hold that the United Kingdom had available to it apparently feasible measures to overcome the existing technical, economic or organisational constraints and to effect prioritisation of waste oil regeneration.

10 — See inter alia the judgments in Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 18, and in Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 23.

11 — See the judgment in Case C-102/97 (cited in footnote 4), paragraph 48.

46. The United Kingdom did not, however, adopt any specific measures of such a kind.

47. The contention that the United Kingdom has failed to fulfil its obligations is for those reasons well founded.

V — Costs

48. 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. As the United Kingdom has been unsuccessful in its submissions, and the Commission has asked for costs to be awarded to it, the United Kingdom must be ordered to pay the costs.

VI — Conclusion

49. In light of the foregoing, I propose that the Court should:

1. declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Article 3(1) of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, as amended by Council Directive 87/101/EEC of 22 December 1986, by which Member States were required to take the measures necessary to give priority to the processing of waste oils by regeneration, or in any event by failing to notify the Commission of those measures, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;

2. order the United Kingdom of Great Britain and Northern Ireland to pay the costs of the proceedings.