Transfrontier movements of waste and free movement of goods

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permissible sound levels of motor vehicle exhaust systems has itself been amended, mainly by extension to include the noise created by the contact between tyres and the ground. Official Journal 16 July 1992 C179/10.

European Court of Justice Report

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Case C-2/90, Commission v Belgium (free movement of goods, transfrontier movements of waste) 9 July 1992 (not yet reported)

Introduction

Environmental law may generally be defined as a body of legal norms regulating the various conflicting uses to which the environment may be put. This definition serves to stress that environmental law, by its nature, is intrinsically "contentious", a characteristic applying without distinction to international, European Community or national environmental law. With the gradual emergence of an increasingly comprehensive body of Community environmental law, actual and potential conflicts between the Treaty's classical "economic" objectives and the more recent environmental imperatives as expressed mainly in Arts 130R-T, have consequently become more numerous and pronounced. The well publicised *Danish Bottle* case [1988] ECR 4607 and the *Leybucht Dykes* case 57/89 (not yet reported) are good examples of the kind of balancing act the court is sometimes asked to perform. It is not surprising that these cases have attracted more than average public and academic attention, since they provide indications as to the relative weight of the Community's environmental ambitions within the wider spectrum of Community policies. In this respect the present judgment, which concerns the relation between the Treaty's provisions on the free movement of goods and the freedom left to Member States to restrict the importation of waste, is even more explicit than the two cases referred to above and should be regarded as a landmark in the court's environmental jurisprudence. At the same time, the case has implications extending beyond the narrow field of EC environmental law.

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Factual and Procedural Background

In an attempt to prevent the Region of Wallonia in Belgium from becoming "the dustbin of Europe", Art 1(1) of the Decree of the Walloon Regional Executive of 19 March concerning the disposal of certain waste products in the Region of Wallonia prohibits the storage, tipping or dumping of waste from a foreign country in authorized depots, stores and tips in Wallonia, except in depots annexed to an installation for the destruction, neutralization and disposal of toxic waste (*Moniteur Belge* of 28 March 1987, p 4671 as amended by Art 130 of the Decree of 23 July 1987, *Moniteur Belge* of 29 September 1987, p 14078). Paragraph 2 of the same provision forbids waste disposal undertakings to permit the storage etc of foreign waste on their premises. Under Art 2, derogations from Art 1 may be granted by the Walloon Regional Executive for a limited period not exceeding two years and must be justified by reference to serious and exceptional circumstances. The prohibition on storing, tipping or dumping waste also applies to other Belgian regions (Flanders and Brussels) but here exceptions may be made in accordance with agreements to be made with those other regions (Art 3). Article 5(1) defines waste from a foreign country or another region as waste that is not produced in Wallonia. The cumulative effect of these provisions, it was agreed by all parties, is to impose a global ban on the importation of all waste products into Wallonia, subject only to the exceptions contained in the Decree and to the possibility of further derogations.

After an individual complaint, the Commission on 11 November 1986 sent a formal letter of compliance to the Belgian Government in accordance with Art 169(1) EEC, expressing the view that the provisions in question infringed Directives 75/442 (OJ 1975 L 194/39) and 84/671 (OJ 1984 L 326/31) as well as Arts 30 and 36 of the Treaty itself.

In the absence of any reply to its letter of 11 November, the Commission subsequently sent a reasoned opinion on 17 October 1988, inviting the Belgian Government to take the necessary measures to comply with the said provisions within two months. On 3 January 1990, the Commission instituted proceedings before the European Court of Justice, seeking a declaration that, by prohibiting the storage, tipping or dumping in Wallonia of waste from other Member States or from Belgian regions other than Wallonia, the Kingdom of Belgium had failed to fulfil its obligations under Directive 75/442, Directive 84/631 and Arts 30 and 36 of the EEC Treaty. Oral argument was presented at a hearing on 27 November 1990 and Advocate General F G Jacobs presented his Opinion on 10 January 1991. Pursuant to Art 61 of the Rules of Procedure, by an Order dated 29 May 1991 the court reopened the oral procedure in order to provide the parties, the other Member States and the other institutions with an opportunity to express their view on the following question:

> Is the movement of *unusable* and *non-recyclable* waste which is devoid of commercial value covered by the Treaty provisions concerning the free movement of goods, or are the commercial transactions relating to the disposal, tipping or destruction of such waste covered by the Treaty provisions concerning the free movement of services? (Emphasis added).

In addition, the Commission was invited to inform the court of any Community legislative measures currently in preparation on the cross-border transfer or the storage, dumping or tipping of non-dangerous, non-recyclable waste and was asked whether it intended to make any proposals for measures aimed at limiting cross-border movements of such waste.

The Belgian Government was asked to explain whether the provisions at issue in the proceedings covered recyclable or non-recyclable waste,

The Advocate General delivered his second Opinion on 19 September 1991.

Community Legislation at Issue

Directive 75/442 adopted on 15 July 1975 provides the framework of

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Community action in the field of waste management. It promotes the prevention, recycling and processing of "waste" (Art 3), which is broadly defined as encompassing "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force", (Art 1(a)). The core obligation is contained in Art 4, which obliges Member States to take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment, and in particular:

- without risk to water, air, soil and plants and animals,
- without causing a nuisance through noise or odours,
- without adversely affecting the countryside or places of special interest.

To this end, Member States must establish or designate the competent authority or authorities to be responsible, in a given zone, for the planning, organization, authorization and supervision of waste disposal operations (Art 5). Any installation or undertaking treating, storing or tipping waste on behalf of third parties must obtain a permit from the competent authority (Art 8) and is subject to periodical inspections by the latter so as to ensure that the conditions of the permit are being fulfilled (Art 9). The same applies to undertakings transporting, collecting, storing, tipping or treating their own waste and those which collect or transport waste on behalf of third parties (Art 10).

Implementing the Council Resolution of 7 May 1990 on waste policy (OJ 1990 C 122/2), Directive 91/156 of 18 March 1991 amends Directive 75/442. For the purpose of the present case, the most important provision of Directive 91/156 – which is to come into force on 1 April 1993 – is Art 5 which provides:

> 1. Member States shall take appropriate measures . . . to establish an integrated and adequate network of disposal installations . . . The network must enable the Community as a whole to become self-sufficient in waste disposal, and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialized installations for certain types of waste.
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> 2. The network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies . . ."

The second Directive which, in the eyes of the Commission, ruled out a global ban on the importation of waste is Directive 84/631 on the supervision and control of transfrontier shipment of hazardous wastes within the European Community (as subsequently amended by Directive 86/279 (OJ 1986 L 181/13) and Directive 87/112 (OJ 1987 L 48/31)). The Directive, which was the Community's response to the Seveso scandal, seeks to establish an uninterrupted chain of control and supervision of hazardous waste, from its production to its final disposal. To this end, when a holder of waste intends to ship it from one Member State to another, or have it routed through a particular Member State, he is required to notify the competent authorities of the Member States(s) concerned by means of a uniform consignment note (Art 3). A transfrontier shipment may not be executed before the competent authorities have acknowledged receipt of the notification. The authorities may, within one month of notification, raise objections against the shipment, which must be substantiated on the basis of laws and regulations relating to environmental protection, safety and public policy or health protection which are in accordance with the Directive and other Community interests (Art 4). The Directive applies to toxic and hazardous waste as defined in Directive 78/319 (OJ 1978 L 84/43) with the exception of some chlorinated and organic solvents and to PCB as defined in Art 1(a) of Directive 76/403 (OJ 1976 L 108/41).

Article 30 EEC prohibits quantitative restrictions and measures having equivalent effect on the importation of goods. Being at the heart of the Customs union, it is perhaps the most fundamental provision in the EEC Treaty. Article 36 EEC exhaustively enumerates the possible grounds for derogations to Art 30. It reads:

> "The provisions of Art 30 to 34 shall nor preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

Arguments of the Parties

It appears convenient to structure the arguments of the parties, the Advocate General's Opinion and the court's judgment around the main issues that arise in this case:

i. the compatibility of the disputed legislation with Directive 75/442,
ii. the compatibility of the disputed legislation with Directive 84/631,
iii. the preliminary question whether the movement of unusable and non-recyclable waste which is devoid of commercial value is covered by the Treaty provisions concerning the free movement of goods or, alternatively, by those concerning the free movement of services,
iv. if the answer to the previous question is in the affirmative, whether Art 36 EEC may be invoked to justify the disputed legislation,
v. to the extent that Art 36 EEC does not cover the disputed legislation, whether the "rule of reason" may be advanced to justify the 1987 Decree.

In respect of Directives 75/442 and 84/361 the Commission pointed out that, as evidenced by the fact that the Directives are based on both Art 100 as well as Art 235 EEC, they pursued the dual objectives of eliminating barriers to trade and unequal conditions of competition as well as the protection of the environment and human health. No provision in the Directives authorized a prohibition of the kind contained in the disputed Belgian legislation. It added that not only were the Decree's provisions incompatible with the objectives of the Directives' provisions, but also with their general scheme which sought to ensure the free movement of waste in a way which respected the environment and human health.

The Belgian Government submitted

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that the prime objective of all Community waste legislation was to protect the environment. This, according to the Belgian Government, was evidenced by Arts 36 and 130R EEC as well as by the third recital of Directive 75/442. It added that waste legislation did not, as such, pursue objectives of an economic nature and had only an indirect impact on intra-Community trade.

In respect of the Commission's assertion that the import ban violated the Directives, the Belgian Government observed that the Commission had merely referred to their general scheme and had not presented any precise provision in further support. As to the absence of any provision in the Directives authorizing the prohibition on the importation of the waste it submitted that, by enabling the competent authorities properly to control the disposal of waste by way of a system of derogations from a general ban on importation, the disputed provisions of the Decree were in perfect harmony with the system of authorizations and planning instituted by the Directives. Thus, even though the Directives did not explicitly foresee or authorise the system introduced by the Decree, at the same time they did not rule out such a system.

Regarding the applicability of Art 30 to the present case, this was disputed by the Belgian Government, it quoted the court's dictum in case 7/68, *Commission v Italy* [1968] ECR 423 at pp 428–9:

> "Under Art 9 of the Treaty the Community is based on a customs union 'which shall cover all trade in goods'. By goods within the meaning of that provision, there must be understood *products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.*" (Emphasis added).

This being the case, the Belgian Government argued, recyclable and re-usable waste fell under this definition but not wastes which cannot be recycled or re-used, which are destined to be disposed off and have no economic value. It was only to these kinds of waste that Belgian legislation applied. In any event, it added, waste constituted a particular type of goods, *sui generis*, difficult to compare with other types of goods.

The Belgian Government further submitted that even if waste were to be considered as goods, the disputed legislation still would not fall within the ambit of Art 30. The legislation did not regulate the importation of waste, but merely partially prohibited the storage of foreign waste as well as wastes originating from regions other than Wallonia.

The Commission, also citing the quoted passage of case 7/68, submitted that waste, irrespective of the question whether or not it may be recycled, must be regarded as goods within the meaning of Art 30 EEC. In support it referred to case 359/88, *Zanetti* ECR [1990] 1-1909, where the court used a single definition of waste and did not attach legal consequences to the recyclability of waste. It followed that import restrictions on waste constituted a measure having equivalent effect to a quantitative restriction.

The Belgian Government argued that, even if it were the case that the import restriction contravened Art 30, the provisions were justified by virtue of Art 36. The disputed legislation constituted a temporary safety measure in the face of a specific exceptional situation. It added that the legislation was not discriminatory as it did not aim to protect goods of Walloon origin, further pointing out that, in any event, Art 36 did not exclude a difference in treatment between national and foreign products (Case 34/79, *Henn* [1979] ECR 3795).

In response, the Commission argued that recourse to Art 36 was *prima facie* ruled out in view of the existence of a Community regime formed by Directives 75/442 and 84/631.

Although the rule of reason was not mentioned as such by either of the parties, both the Belgian Government and the Commission have in fact touched upon elements related to its applicability. Thus, the contention by the Belgian Government that the disputed legislation did not fall within the ambit of Art 30 in the first place, in conjunction with its inconsistency on the provisions not being discriminatory and necessary in the face of an exceptional environmental danger, amounts to reliance on the rule of reason. Conversely, the Commission was adamant that the Decree was discriminatory in that it allowed for agreements to be made between the Walloon Region and the Regions of Flanders and Brussels, a possibility not open to Member States. The Commission also drew attention to the fact that only by extending the import restriction to the Regions of Flanders and Brussels could the Walloon Region effectively prevent waste from other Member States from entering Wallonia. The effect of the Commission's arguments, therefore, is to rule out recourse to the rule of reason.

Advocate General Jacob's Opinions

It is not often that an Opinion by the Advocate General generates a public debate in the way the present Opinions have. Environmental organisations, in particular Greenpeace, have expressed their concern about the implications of Advocate General Jacob's interpretation of the issues, (Greenpeace, The Single European Dump, 1992). It is probably the unpretentious and clear wording in which he has chosen to phrase his Opinions that enabled such an open discussion to take place, an achievement which deserves the highest respect. At the same time, it is submitted, the Opinions are based on a generally accepted and uncontroversial interpretation of Community law. A comparison between the Opinions and the court's a judgment hence helps to expose the innovative elements of the court's ruling. Before turning to the judgment itself, it is therefore useful to examine Advocate General Jacob's Opinions.

In respect of the compatibility of the Decree's provisions with the two Community Directives in this field, Advocate General Jacobs distinguished between Directive 75/442 and Directive 84/631. Directive 75/442, although at the same time pursuing trade and environmental objectives, beyond formulating general principles did not contain any substantive provision which is specifically concerned with inter-State trade in waste products or which expressly or by necessary implication excludes the type of measure adopted by the Walloon Regional Executive.

The position was different as regards Directive 84/631. Unlike Directive 75/442, this Directive specifically concerned the transfrontier movement of dangerous waste. The fact that the Directive had

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opted for a system of prior notification, under which the onus is on the Member State of destination to raise objections, excluded the possibility of adopting an alternative system of control such as a general prohibition on imports, subject to the possibility of derogations. Although by enabling the Member State of destination to raise objections relating to *a specific* consignment of waste the Directive did foresee the possibility of restricting the importation of waste, this did not empower a Member State to introduce a global, prior ban on importation. The Advocate General therefore concluded that the Commission had succeeded in establishing breach of Directive 84/631.

The question whether unusable and non-recyclable waste should be considered "goods" for the purpose fo Arts 30–36 is addressed in both Opinions. Advocate General Jacobs argued that the Treaty provisions on the free movement of goods apply to all types of waste. Even if certain types of wastes did not possess an intrinsic value, they clearly formed the subject of commercial transactions in that waste disposal firms are paid to dispose of them. More generally, the notion that certain classes of products would not benefit from the regime on the free movement of goods, in the eyes of the Advocate General, contravened the purpose of the Treaty. In support, he referred to case 172/88, *Inter Huiles* [1983] ECR 555, where the court ruled that the provisions on the free movement of goods and Directive 75/439 on the disposal of waste oils do not allow a Member State to organise a system for the collection and disposal of waste oils in such a way as to prohibit exports to an authorised disposal or regeneration undertaking in another Member State.

In the second Opinion, additional arguments were advanced to establish the applicability of Arts 30–36 rather than, in particular, the provisions on the free movement of services. Above all, the residual character of Art 60 where the notion of "a service" is defined as "normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons" supported this interpretation.

As to the interpretation of the foremention dictum in case 7/68 the Advocate General noted that, even if the court had intended to be exhaustive, it was clear that objects which had a "negative value" (ie objects which the owner is willing to pay to have taken away) can be the subject of commercial transactions and thus should be considered goods. Nor did the fact that the goods were transported across national frontiers for the purpose of storage, tipping or disposal remove the transaction from the ambit of Arts 30–36. Citing varous court rulings, the Advocate General concluded that the free movement of goods includes the freedom to move wastes across a national frontier in order to dispose of them more cheaply or more safely in another Member State, just as much as it includes the freedom to move personal possessions across a frontier for the purpose of private consumption.

Having thus arrived at the conclusion that the disputed legislation infringed Art 30 of the Treaty, the Advocate General turned to the question of the applicability of derogations under Art 36 or the rule of reason. Article 36 could not be relied upon in the present case since, according to established case law, this provision must be interpreted restrictively (see eg case 46/76, *Bauhuis* [1977] ECR 5). Hence, the reference to "human health" in Art 36 could not be taken to encompass restrictions on substances which do not threaten health or life but at most "the quality of life".

Recalling that the court in case 302/86, *Commission v Denmark* [1988] ECR 4607, had recognized environmental protection as being one of the concerns not mentioned in Art 36 which may justify restrictions on imports, the Advocate General stressed that such restrictions were acceptable only if they applied equally to domestic and imported waste. In view of the fact that the disputed provisions allowed exceptions to be made in favour of the Flanders and Brussels Region which were not applicable to other Member States, Belgian legislation was discriminatory and thus could not be relied upon for the protection of "mandatory requirements".

From this analysis it appeared that Belgium might in principle rely on Art 36 only in relation to categories of dangerous waste excluded from the scope of Directive 84/631, such as radioactive waste excluded by Art 3 of Directive 78/319, or the chlorinated and organic solvents excluded by Art 2(1) (*a*) of Directive 84/631.

Finally, the Advocate General briefly examined recent and proposed Community legislation in the field of waste management which, according to the Belgian Government, in conjunction with the Basle Convention of 22 March 1989 on the control of transboundary movements of hazardous waste and their disposal, were compatible with the disputed legislation. In particular the Walloon Decree had to be seen in the light of the principles of self-sufficiency and proximity as contained in the Council Resolution of 7 May 1990 on waste policy, Directive 91/156 and the Basle Convention. Advocate General Jacobs dismissed these arguments, insisting the principles had to be implemented at regional and zonal level, rather then at national level, in such a way as to facilitate the disposal of waste in one of the nearest suitable facilities. Thus, there was no incompatibility between the Treaty provisions on the free movement of goods and the principles of self-sufficiency and proximity, provided that those principles were applied in a Community as opposed to a purely national framework.

Accordingly, the Advocate General concluded that the Belgian legislation infringed Directive 84/631 and Art 30 EEC, but dismissed the Commission's complaint relating to Directive 75/442.

The Judgment

After having briefly summarized the provisions of Belgian and Community law at stake, the court first examined the compatibility of the disputed provisions with Directive 75/442. This Directive, the court pointed out, pronounced certain principles in respect of waste management and contained provisions of a general nature. However, from an examination of the scheme of the Directive it appeared that neither the general scheme set up by the Directive nor any of its provisions specifically concerned inter-State movements of waste or contained a concrete prohibition to adopt measures of the kind laid down in the disputed Decree. The court therefore dismissed the Commission's complaint

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relating to Directive 75/442.

It observed that, although the Decree applied without distinction to both dangerous and non-dangerous waste, in view of the regime set up by Directive 84/631 specifically relating to dangerous waste, it was necessary to examine its provisions. Of these provisions, those regarding the transfrontier movement of waste had to be confronted with the disputed legislation. Quoting from Arts 3 and 4 of the Directive (cf supra, Community Legislation at Issue) the court concluded that Directive 84/631 had set up an exhaustive system which applied in particular to transfrontier movements of dangerous waste to be disposed of in designated plants, based upon the requirements of prior notification by the holder of the waste. National authorities were entitled to raise objections against a particular shipment (as opposed to a general ban on imports of waste) in order to respond to problems relating to, on the one hand, environmental protection and safety and, on the other hand, public policy of health protection. Hence, the system did not leave Member States any scope to provide for a global ban on such movements.

It followed that the disputed provisions, to the extent that they fell within the scope of the procedure covered by the Directive and introduced an absolute ban on the importation of dangerous wastes into Wallonia, even if they allowed for certain derogations to be granted by the competent authorities, were not in conformity with the Directive.

Having arrived at this conclusion, the court subsequently examined the Belgian legislation (as far as it applied to waste that does not already fall within the scope of application of Directive 84/631) in the light of Arts 30 and 36 EEC. First, the court resolved the preliminary question as to the extent to which non-recyclable, non-reusable wastes were subject to the provisions governing the free movement of goods. It discharged the arguments advanced by the Belgian Government in respect of the applicability of the provisions governing services by noting:

> "... it suffices to observe that objects which are transported across a frontier so as to give rise to commercial transactions are subject to Art 30, regardless of the nature of those transactions" (Para 26).

Furthermore, the court added, the distinction between recyclable and non-recyclable waste raised practical difficulties, especially in respect of border controls. In fact, such a distinction was based on uncertain factors which are susceptible to change with the progress of time and technical know-how. Amongst others, the recyclable character of waste depended on the cost and profitability of recycling, making a judgement as to the recyclability necessarily subjective.

It followed that all waste, recyclable or not, had to be considered goods whose movement, in accordance with Art 30 of the Treaty, must in principle not be hindered.

The court then turned to the justifications advanced by the Belgian Government, *ie* that the disputed legislation satisfied a mandatory requirement relating to the protection of the environment as well as the protection of human health.

In this respect, the court first of all noted that, bearing upon the environment, wastes are goods of a special nature. Taking into account the limited capacity of each region or town to receive wastes, their accumulation constituted a danger for the environment, even before they became a threat to human health. Without having been contradicted by the Commission, the Belgian Government had indicated that a massive and abnormal stream of waste originating from other regions entered Wallonia for disposal which, bearing in mind the limited capacity of the Region, constituted a real danger for the environment.

It followed that the argument to the effect that mandatory requirements relating to the protection of the environment justified the disputed measure had to be considered well founded.

The court then turned to the apparent discriminatory character of the disputed provisions which in the opinion of the Commission (and the Advocate General) ruled out reliance on the rule of reason. It was true that mandatory requirements only related to measures applying indiscriminately to national and imported products (see case C-1/90, *Aragonesa de Publicida* not yet reported). However, in order to judge the discriminatory character of the restriction in question, it was necessary to take into account the special character of wastes. In fact, the principle that environmental damage should be rectified at source, established for Community action in the field of the environment in Art 130(2) of the Treaty, implied that it was the duty of each region, parish or other local entity to take the appropriate measures in order to ensure the collection, treatment and disposal of its own waste. In order to limit its transportation to a minimum, waste had to be disposed as near as possible to its place of production.

In addition, this accorded with the principle of self-sufficiency and proximity as laid down in the Basle Convention of 22 March 1989 on the control of transboundary movements of harzardous wastes and their disposal, to which the Community was a signatory.

It followed that, taking into account the differences amongst wastes produced in different places and the connection with their place of production, the disputed provisions should not be considered discriminatory. Hence, the application was rejected in so far as it related to wastes not covered by Directive 84/651.

The court concluded that by introducing an absolute prohibition on storing, tipping or dumping dangerous waste originating from another Member State, thus overriding the procedure established by Directive 84/631 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, Belgium had failed to fulfil its obligation under this Directive.

It dismissed the remainder of the Commission's complaints and ordered each of the parties to pay their own costs.

Conclusion

Compared to the Advocate General's transparent and lucid Opinions, the court's reasoning is sometimes rather obscure and difficult to follow. It is therefore proposed first to recall briefly the "standard-procedure" that is traditionally followed by the court in order to assess the acceptability of national restrictions on imports of goods under Community law, which may then serve as a clarification of the various elements of the judgment.

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The key provision prohibiting quantitative restrictions and measures having equivalent effect on imports is Art 30 EEC. Derogations to this blanket prohibition are exhaustively listed in Art 36. Reliance upon Art 36 is further limited by the existence of any relevant secondary Community legislation (Directives or Regulations). However, in case 120/78. *Cassis de Dijon* [1979] ECR 662, the court accepted that obstacles to the free movement of goods resulting from disparities between national laws relating to products must be accepted (as not infringing Art 30 in the first place) in so far as those provisions satisfy "mandatory requirements" not mentioned in Art 36 and apply *without distinction* to imported and national products. In the *Danish Bottle* case the court ruled that environmental protection is such a mandatory requirement. Evidently, as with the derogation under Art 36, reliance on this so-called "rule of reason" is conditional upon the absence of conflicting provisions of Community Directives or Regulations.

It is for this reason that the court first examined the provisions of Directives 75/442 and 84/631 which the disputed legislation was alleged to infringe. It then proceeded to assess those provisions of the Decree which were not covered by the relevant Directives in the light of Art 30 EEC, which involved answering the preliminary question on the extent to which wastes are to be considered "goods" for the purpose of this provision. It then turned immediately to the applicability of "the rule of reason". For this purpose, it had to rule on the discriminatory character of the import restrictions embodied in the Decree. This analysis eventually led the court to the following conclusions:

(a) import restrictions on waste of the kind contained in the disputed Decree do not infringe the provisions of Directive 75/442, which merely provide a general framework and do not have a bearing upon transfrontier movements of waste,

(b) Directive 84/631 establishes a complete and exhaustive regime in respect of intra-Community transfrontier movements of the dangerous wastes covered by the Directive, removing the power for Member States to impose a global ban on such movements,

(c) all wastes, recyclable or not, are goods for the purposes of Arts 30–36 and hence their movement must not be hindered,

(d) wastes are goods of a nature sui generis, justifying reliance on mandatory requirements relating to the protection of the environment and human health,

(e) the sui generis nature of waste implies that regional restrictions on the importation of waste as contained in the disputed Decree (in so far as applying to waste not covered by Directive 84/631), also in view of the principle of proximity and self-sufficiency, are not discriminatory and do not infringe Art 30.

The court's finding that the disputed provisions do not infringe Directive 75/442 is not surprising. As the Advocate General pointed out, the Directive merely establishes a general framework and leaves the issue of transfrontier movements of waste largely untouched. Mere reference to Art 100 EEC in the Directive's preamble does not, as the Commission seemed to suggest, in itself make import restrictions incompatible with the Directive.

Neither is the fact that the court found that the system of notification set up by Directive 84/631 rules out any alternative system of control such as a prior global ban with provision for derogations unexpected. Indeed, the preamble of the Directive refers to the need for "an efficient and coherent system of supervision and control of the transfrontier shipment of hazardous waste [which] should neither create barriers to intra-Community trade nor affect competition". Unlike Directive 75/442, this general commitment is backed up by detailed provisions and annexes. Evvidently, the coherent and efficient system Directive 84/631 is seeking to bring about would become illusory if Member States were to be allowed to maintain or introduce differing systems of supervision.

The real importance of the case therefore resides in the passages dealing with the relation between the provisions on the free movement of goods, and the phenomenon waste. The court had little difficulty in answering the principle question whether waste should be considered "goods" for the purpose of Art 30, arguing in a sweeping dictum that the concept embraced "all objects which are transported across a frontier so as to give rise to commercial transactions".

Having arrived at this point, the conclusion that the disputed provisions infringe the rules on the free movement of goods seems inescapable. Whilst a global ban on importation clearly infringes Art 30, reliance on Art 36 or the rule of reason would prima facie seem to be ruled out. The former, as pointed out by Advocate General Jacobs, has always been interpreted restrictively and as being exhaustive. Since the import ban also applies to waste that does not necessarily threaten "health and life of humans, animals or plants", the Decree cannot be justified under Art 36. In any event, such a blanket-ban seems difficult to reconcile with the requirement that derogations under Art 36 must be proportionate to their aim.

This would leave the Belgian Government with the "rule of reason" as a last resort. Leaving aside the previous remark relating to the proportionality of the disputed provisions, convential wisdom dictates that the overt discriminatory character of the Decree, denying other Member States the kind of arrangement open to the Flanders and Brussels Regions under Art 3, is an insurmountable obstacle barring recourse to the rule of reason.

It is clear therefore that only by either departing from its previous case law or by introducing a novum could the court arrive at an opposite conclusion. The fact that at the end the court *did* find that the Decree was compatible with Art 30 while at the same time very much adhering to the traditional scheme set out above, indicates that a novel concept has been put forward.

Indeed, it is in para 30 that the court abandons the conventional path set out in its previous case law and introduces a notion of waste as goods sui generis (*"objects de nature particulière"*) which, as far as the writer is aware, had no precedent in Community law. For the court's finding that mandatory requirements relating to the environment could in principle justify measures of the kind contained in the Decree, it would not have needed to introduce the special nature of waste. As already indicated, it is well-accepted that environmental protection constitutes a mandatory requirement that may justify

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restrictions on imports. Where the notion of goods sui generis did have a crucial role to play, however, was in neutralizing the obvious discriminatory nature of the provisions in question. It was here that the court stressed that the question whether the disputed provisions were discriminatory should be assessed in the light of the special character of waste as goods. Drawing upon the principle that pollution should be rectified at source, which according to the court implied that each region was responsible for the management of its own waste, and the principles of proximity, the court concluded that the measures were not discriminatory and hence did not infringe Art 30.

Thus, by way of stressing the special character of waste, the court has been able to achieve that waste has been afforded a special status in the regime governing the free movement of goods, while leaving the regime itself intact. It is noteworthy that the court did not even raise the issue of Art 36, which must be taken to indicate that the court regarded it as prima facie impossible to rely on this provision for the purpose of justifying the disputed import ban.

Two final issues must be addressed, in the first place, one may question the soundness of the court's arguments. Whatever the special nature of waste may involve, it is difficult to apprehend why certain exceptions which are apparently acceptable in relation to waste produced in Flanders or Brussels should not be equally applicable to "other" foreign waste. The court has thus effectively by-passed the issue of the discriminatory character of the Decree. Furthermore, the principles of preventing pollution at source, proximity or self-sufficiency would not seem to have the meaning and effect afforded to them by the court. First, in view of their legal status, some of them could best be described as "soft law" principles while the Basle Convention is not yet in force. Secondly and most importantly – contrary to the court's interpretation – the principles of proximity and self-sufficiency are clearly intended to operate in a Community context and not in a purely national perspective, something to which we shall return below.

The second question relates to the likely impact of the judgment. Environmental interest groups will probably welcome this ruling. The picture of a "Single European Dump" that Greenpeace painted after the Advocate General's Opinions, for example, seems at least to have been miscionceived. It is evidently positive that the court has freed the Community's waste policy from the straight jacket formed by the provisions intended to regulate the free movement of goods. Yet, it is not obvious that the overall effect of the court's judgment will be to achieve better protection of the environment against the dangers posed by (dangerous) waste. The result of the present case is indeed that the Walloon Region will be partly protected from waste produced in countries where legislation is more stringent and thus from becoming the dustbin of Europe. Yet, the danger of the ruling is that, due to the "national" interpretation of the principles of proximity and self-sufficiency, Member States would seem to be empowered to ban the importation of certain dangerous wastes, even if in fact the only facility possessing the know-how necessary to treat the waste safely is situated in their territory.

It is not at all self-evident, therefore, that the judgement will not raise more problems than it has solved.