

Court, Mr Justice Kearns, was unimpressed and found that the failure to hold a by-election within a reasonable time offended “the terms and spirit of the Constitution and its framework for democratic representation.”

Although the Government has appealed the decision to the Supreme Court (to clarify issues pertaining to the separation of powers) the writ to hold the by-election was moved on the day after the judgment was delivered. Senator Doherty went on to win the by-election held three weeks later.

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### **Italy—Naples rubbish crisis leads to EU action and continuing alarm—force majeure plea based on contractual defaults, local opposition and criminal interferences no defence—breach of Directive 2006/12/EC on waste, *Commission v Italy*, March 4, 2010 (C-297/08)**

☞ EU law; Failure to fulfil obligations; Force majeure; Italy; Waste disposal

Since 1993, Campania has been suffering a serious “waste crisis”. Even after identifying 18 waste areas, and after preparing a waste plan in 1997, the region has not been able to manage the rubbish collected in its territory. Implementation of the plan suffered delays because of local inhabitants’ opposition, problems with the construction of the waste treatment installations and because of an investigation for fraud by the Naples Public Prosecutor (and the placing in receivership of some installations). The effect was that a vast amount of waste accumulated in the available landfills and storage areas.

In 2007 the crisis hit particularly Naples, whose public roads were covered with rubbish. Prime Minister Berlusconi took the chance to denounce the inactivity of the (left oriented) local authorities and ordered the Civil Protection Agency “to clean the city”, but because of the failure of installations the collected waste was simply moved to and stored in new areas.

After the necessary pre-litigation procedure (art.226 TEC), the EU Commission, on July 3, 2008 decided to bring an action for failure to fulfill obligations under arts 4 and 5 of Directive 2006/12 on waste [2006] OJ L114/9). The former imposes duties to manage waste without endangering human health and or using processes which could damage the environment. The latter requires the creation of an integrated network of disposal installations in each Member State in accordance with the principle of proximity, i.e. the rubbish has to be collected and processed in the nearest installations.

The Court, in its March 2010 decision, declared Italy in violation of its obligations under the Directive. It highlighted that art.4 is binding as to the objective to be achieved, so Member States benefit from a certain latitude as to how to dispose of waste, but if there is:

“a significant deterioration in the environment over a protracted period without any action being taken by the competent authorities, this may be an indication that the Member States have exceeded the discretion conferred on them by that provision.” (at [97])

Italy argued that it had done everything possible to contain the crisis and sought to raise in its defense a plea of force majeure, citing in particular, contractual problems, local opposition, and interference from criminal elements. But, the Court held:

“it is irrelevant whether the failure ... is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it.” (at [81]–[82])

Moreover, internal situations—e.g. criminality—may not be pleaded in order to justify the infringement of EU Law. Finally, the force majeure:

“requires the non-performance of the act in question to be attributable to circumstances, beyond the control of the party claiming [it], which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence.” (at [85])

A careful administration should have taken all the precautions to guard against contractual defaults and to guarantee the construction of the disposal installations in time.

At the time of writing Campania still has no adequate waste services. Naples remains mired in refuse, and Janez Potocnik, the EU Environment Commissioner, regards the stench with alarm.

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### **Mexico—Supreme Court upholds same-sex marriage and right to adopt for same-sex couples in Mexico City, *General Republic Prosecutor v Local Congress*, acción de inconstitucionalidad 2/2010, August 16, 2010**

☞ Adoption; Constitutionality; Marriage; Mexico; Same-sex partners

Mexico City was the first city in Latin America to approve same-sex marriage and the right for gay couples to adopt children by modifying the relevant provisions of the Civil Code in 2009. Marriage was redefined as “the free union between two people”. In response to a challenge launched by the national prosecutor, the Mexican Supreme Court, by an 8-2 vote, has upheld the reform.

The prosecutor had challenged the new articles of the Civil Code alleging breaches of arts 4 (concept of family) and 16 (motivation and principle of legality) of the federal Constitution. First, the prosecutor claimed that there was no rationale for the reform because same sex couples already had their rights protected by the