JUDGMENT OF THE COURT (Fifth Chamber)

3 April 2003 *

In Case C-116/01,

REFERENCE to the Court under Article 234 EC by the Raad van State (Netherlands) for a preliminary ruling in the proceedings pending before that court between

SITA EcoService Nederland BV, formerly Verol Recycling Limburg BV

and

Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer,

on the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) and Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, A. La Pergola (Rapporteur), P. Jann and A. Rosas, Judges,

Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— SITA EcoService Nederland BV, by R.G.J. Laan and B. Liefting-Voogd, advocaten,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the United Kingdom Government, by G. Amodeo, acting as Agent, and by D. Wyatt QC,

— the Commission of the European Communities, by G. zur Hausen and H. van Vliet, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by N.A.J. Bel, acting as Agent; the United Kingdom Government, represented by D. Wyatt; and the Commission, represented by H. van Vliet, at the hearing on 19 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2002,

gives the following

Judgment

1 By judgment of 13 March 2001, received at the Court on 15 March 2001, the Raad van State (Netherlands Council of State) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) and Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32), hereinafter 'the Directive'.

2 Those questions were raised in the context of a dispute between SITA EcoService Nederland BV ('SITA') and the Minister van Volkshuisvesting, Ruimtelijke

Ordening en Milieubeheer (Minister for Housing, Spatial Planning and the Environment, hereinafter 'the Minister') concerning the lawfulness of two decisions by which the latter subjected waste shipments which had been notified by SITA to certain conditions.

Legal framework

Community legislation

The Directive

3 The essential objective of the Directive is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. In particular, the fourth recital of the Directive states that the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources.

4 In Article 1(e) of the Directive, 'disposal' is defined as 'any of the operations provided for in Annex IIA', and in Article 1(f) 'recovery' is defined as 'any of the operations provided for in Annex IIB'.

5 Annex IIA of the Directive, headed 'Disposal operations', states:

'*NB:* This annex is intended to list disposal operations such as they occur in practice....

...

D10 Incineration on land

...'

6 Annex IIB, headed 'Recovery operations', states:

'*NB:* This annex is intended to list recovery operations as they occur in practice....

R1 Use principally as a fuel or other means to generate energy

...

R3 Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes)

...

R5 Recycling/reclamation of other inorganic materials

...

R11 Use of wastes obtained from any of the operations numbered R1 to R10

...'

7 Article 3(1) of the Directive states:

'Member States shall take appropriate measures to encourage:

(a) firstly, the prevention or reduction of waste production and its harmfulness...

(b) secondly:

(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or

(ii) the use of waste as a source of energy.'

8 Article 7 of the Directive provides:

'1. In order to attain the objectives referred to in Articles 3, 4 and 5, the competent authority or authorities referred to in Article 6 shall be required to draw up as soon as possible one or more waste management plans. Such plans shall relate in particular to:

— the type, quantity and origin of waste to be recovered or disposed of,

— general technical requirements,

— any special arrangements for particular wastes,

— suitable disposal sites or installations.

Such plans may, for example, cover:

— the natural or legal persons empowered to carry out the management of waste,

— the estimated costs of the recovery and disposal operations,

— appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste.

2. Member States shall collaborate as appropriate with the other Member States concerned and the Commission to draw up such plans. They shall notify the Commission thereof.

3. Member States may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans. They shall inform the Commission and the Member States of any such measures.'

Regulation (EEC) No 259/93

9 Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1), as amended by Council Regulation (EC) No 120/97 of 20 January 1997 (OJ 1997 L 22, p. 14, hereinafter 'the Regulation'), lays down rules governing *inter alia* the monitoring and control of shipments of waste between Member States.

10 According to Article 2(i) of the Regulation, 'disposal' is 'as defined in Article 1(e) of Directive 75/442/EEC' and, according to Article 2(k), 'recovery' is 'as defined in Article 1(f) of Directive 75/442/EEC'.

11 Title II of the Regulation, entitled 'Shipments of waste between Member States', contains two separate chapters, one of which (Articles 3 to 5) concerns the procedure applicable to shipments of waste for disposal and the other (Articles 6 to 11) the procedure applicable to shipments of waste for recovery.

12 Under Article 6(1) of the Regulation, when a waste producer or holder intends to ship waste for recovery listed in Annex III to the Regulation (amber list of waste) from one Member State to another Member State and/or pass it in transit through one or several other Member States, he is to notify the competent authority of destination and send copies of the notification to the competent authorities of dispatch and transit and to the consignee.

13 According to Article 6(3) of the Regulation, notification is to be effected by means of the consignment note which is issued by the competent authority of dispatch. Article 6(5) specifies the information which the notifier is to supply on the consignment note, which includes *inter alia* information relating to the recovery operations set out in Annex IIB to the Directive (fifth indent of Article 6(5)) and the planned method of disposal for the residual waste after recycling has taken place (sixth indent of Article 6(5)).

14 Article 7(2) of the Regulation lays down the time-limits, conditions and procedures which must be observed by the competent authorities of destination, dispatch and transit when raising an objection to a notified, planned shipment of waste for recovery. That provision provides in particular that objections are to be based on Article 7(4).

15 Article 7(4)(a) of the Regulation provides:

'The competent authorities of destination and dispatch may raise reasoned objections to the planned shipment:

— in accordance with Directive 75/442/EEC, in particular Article 7 thereof, or

— if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection, or

— if the notifier or the consignee has previously been guilty of illegal trafficking. In this case, the competent authority of dispatch may refuse all shipments involving the person in question in accordance with national legislation, or

— if the shipment conflicts with obligations resulting from international conventions concluded by the Member State or Member States concerned, or

— if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non recoverable fraction do not justify the recovery under economic and environmental considerations.'

National legislation

16 The Meerjarenplan Gevaarlijke Afvalstoffen II (second Multi-Year Plan for Hazardous Waste, hereinafter 'MJP GA II') is a hazardous waste management plan within the meaning of Article 7 of the Directive, which was adopted by the Netherlands authorities in June 1997 for the period 1997 to 2007.

17 Sectoral Plan 18 of the MJP GA II, entitled 'Incineration of hazardous waste', states that a distinction can be made between recovery by means of recycling, recovery by use principally as a fuel and final disposal by incineration.

18 Recovery by means of recycling may consist of the processing of waste or its use in a production process, such as the use of combustible waste with a high inorganic content in the production of cement clinker.

19 According to the MJP GA II, since it is not possible to develop reliable general criteria as regards the distinction between recovery by means of recycling and final disposal of hazardous waste by incineration, a case-by-case assessment must be carried out, on the basis of the characteristics of the batch and the planned means of processing.

20 As regards recovery with use principally as a fuel, the MJP GA II uses calorific value in conjunction with chlorine content as a criterion. In order for there to be recovery, the MJP GA II requires a minimum calorific value of 11 500 kJ/kg for hazardous waste with a chlorine content of 1% or less and a minimum calorific value of 15 000 kJ/kg for hazardous waste with a chlorine content of over 1%.

21 Section 18 of the MJP GA II also states that, when assessing a waste shipment notification, it will first be considered whether recovery of the waste is possible. When sufficient disposal capacity is available in the Netherlands, it is possible under the Plan to raise reasoned objections to a planned shipment of waste for disposal, in accordance with Article 4(3)(b) of the Regulation. The maintenance of national elimination capacity is considered extremely important in the light of the principle of self-sufficiency.

Main proceedings and the questions referred for a preliminary ruling

22 SITA is a company governed by Netherlands law established in Maastricht (Netherlands), which carries out the collection and processing of hazardous and non-hazardous waste.

23 On 23 December 1997 and on 6 January 1998, SITA notified the Minister, as the competent authority of dispatch within the meaning of the Regulation, of two planned shipments of waste.

24 The first notification (NL 90201) concerned a plan to ship 2 000 tonnes of a compact mixture of waste glue, sealant, resin and paint, as well as waste containing silicon mixed with sawdust, to the undertaking STPI, established in Engis (Belgium), between 1 February 1998 and 31 January 1999.

25 The second notification (NL 90204) concerned a plan to ship 1 000 tonnes of organic and inorganic sediments with a low halogen content, mixed with sawdust, to the same undertaking, during that same period.

26 Following shipment, the waste at issue was to be used by the Belgian cement industry as fuel in cement kilns and as raw material in the production of clinker by cement factories. In that treatment process, known as a 'combined process', the energy produced from the waste replaces energy produced by raw materials, and ash from incinerated waste in turn replaces raw materials.

27 By two decisions adopted on 28 January and 13 February 1998 ('the contested decisions'), the Minister, in accordance with Article 7(2) of the Regulation, gave written consent to the waste shipments planned by SITA. The Minister nevertheless made authorisation of those shipments subject to certain conditions.

28 The Minister considered that, in the light of the form of processing envisaged, that is, use for the purpose of producing cement clinker, the proportion of the

waste re-used as a material for the manufacture of cement — 25 to 40% and 30%, respectively — could not be considered recovery by recycling within the meaning of the MJP GA II.

29 The Minister acknowledged, however, that the purpose of the shipments could be considered to be a recovery operation with use principally as a fuel, subject to the condition that, for each planned movement of waste with a chlorine content of 1% or less the waste to be exported was to have a calorific value of over 11 500 kJ/kg and that for each planned movement of waste with a chlorine content of over 1% the calorific value was to be over 15 000 kJ/kg. The Minister based that condition on the MJP GA II.

30 SITA challenged the decisions in question in so far as they subjected the authorisation to ship the waste concerned to such conditions, by means of, first, an application for interim measures made to the President of the legal section of the Raad van State and, secondly, a complaint to the Minister.

31 By order of 18 June 1998, the President of the Administrative Appeal Section of the Raad van State rejected the application for interim measures.

32 By two decisions of 2 December 1998, the Minister rejected the complaints submitted by SITA against the decisions in question. On 11 January 1999, SITA brought an action against each of those decisions before the national court.

33 In the circumstances, the Raad van State, considering that the solution to the dispute before it depends on an interpretation of Community law, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the Directive... be interpreted as permitting a process for treating waste in which more than one operation is performed, as described above, to be assessed as a whole?

(2) If so, does the process concerned constitute recovery within the meaning of R1, R3 and R5 of Annex IIB to the Directive if it results in the complete use of the waste employed therein?

(3) (a) If the answer to question 1 is in the negative, is the extent (expressed as calorific value) to which the waste contributes to the incineration process or the extent (expressed as the level of material reused) to which the ash residues from that waste contribute to the production process relevant as regards the classification of each individual operation as recovery or disposal (R1, R3 and R5, and D10, respectively)?

(b) If so, on the basis of which criteria is it necessary to assess whether or not the contribution is sufficient for classification as recovery? In the absence of Community criteria in this respect, is it possible to apply national criteria?

(4) If one operation must be classified as recovery and another operation as disposal, how must the process as a whole be regarded?'

The first question

34 By its first question, the national court essentially asks whether, in the case where a waste treatment process includes several distinct stages, its classification as a disposal operation or recovery operation within the meaning of the Directive must, for the purpose of implementing the Regulation, be considered comprehensively, as constituting a single operation, or rather by examining each of the stages separately, as distinct operations.

Arguments of the parties

35 SITA claims that the Directive should be interpreted to mean that, for the purpose of classification, a waste treatment process involving more than one operation can be assessed as a whole. In that regard, it states that the treatment process at issue in the main proceedings constitutes a single technical process and must therefore be subject to a global assessment, which leads to the conclusion that it constitutes a single recovery operation.

36 The Netherlands Government considers that the answer to the first question must be that the Directive allows a waste treatment process such as that at issue in the main proceedings, which involves more than one material operation (that is, the incineration of waste and the use of the ash in the production of cement clinker) to be considered a single operation within the meaning of Annexes IIA and IIB to that directive.

37 The United Kingdom Government states that, where it is claimed that the waste at issue will be used in a cement kiln both as fuel and as a raw material for the production of cement clinker, each of those elements must be taken into account and a conclusion drawn on the basis of the overall contribution of the waste to the process as a whole.

38 According to the Commission, the Directive should be interpreted to mean that, in the case where waste undergoes a treatment process involving several successive operations, it must be established for each of those operations whether the treatment in question is a recovery operation or a disposal operation within the meaning of Annexes IIA and IIB of that directive.

39 The Commission points out that, in the case in the main proceedings, the national court observes that, in a first stage, the waste is to be used as fuel in cement kilns, where the energy generated by that waste will replace energy normally generated by raw materials. In a second stage, after the waste has served as an energy source, the ash from that waste will partially replace the raw materials needed to produce clinker in cement works. The fact that the use of waste ash is itself classified as disposal or recovery has no effect on the classification of the first treatment which the waste undergoes, which would be relevant only if it was

necessary to determine the purpose of a waste shipment with a view to implementing the Regulation.;

Findings of the Court

40 In that regard, it must first be recalled that, for the purpose of applying the Directive and the Regulation, it must be possible to classify any waste treatment operation as either disposal or recovery, and a single operation may not be classified simultaneously as both a disposal and a recovery operation (Case C-6/00 *ASA* [2002] ECR I-1961, paragraph 63).

41 Nevertheless, while a single operation must be given a single classification in the light of the distinction between a recovery operation and a disposal operation, a waste treatment process can in practice include several successive stages of recovery or disposal.

42 It follows from the Directive and the Regulation that, in such a case, the treatment process as a whole is not to be assessed as a single operation, but each phase must be classified separately for the purpose of implementing the Regulation when it constitutes a distinct operation in itself.

43 As is clear from the sixth indent of Article 6(5) and the fifth indent of Article 7(4)(a) of the Regulation, an operation classified as waste recovery may be followed by a disposal operation of the non-recoverable fraction of that waste. In such a case, the classification of the first operation as a recovery operation is not affected by the fact that it is followed by an operation to dispose of the residual waste.

44 Moreover, point R11 of Annex IIB to the Directive makes clear that the use of residual waste obtained from any of the operations listed in that annex, in points R1 to R10, itself constitutes a recovery operation distinct from the recovery operation which precedes it. In accordance with the distinction thus laid down in the Annex, it must therefore be determined whether an operation falls under operations R1 to R10 in that annex independently, without taking into account the possible subsequent use of the residual wastes obtained from any of those operations — a use which is itself covered by a separate operation.

45 As the Commission rightly points out, and as made clear by the Advocate General in paragraph 51 of his Opinion, when the question of the classification of a waste treatment operation arises for the purpose of implementing the Regulation, only the classification of the first operation which that waste must undergo subsequent to its shipment is relevant in determining the purpose of that shipment.

46 When the Regulation refers to the shipment of waste and distinguishes between shipments of waste destined for disposal and those destined for recovery, it is directed at the treatment which that waste must undergo when it arrives at its

destination, not the possible subsequent processing of waste which has been thus treated or to its residues. Moreover, that processing may take place in a different treatment plant and following further shipment.

47 In the case in the main proceedings, it appears from the order for reference that the national court is of the view that the processing which the waste at issue must undergo comprises two distinct operations, consisting, first, of the combustion of that waste and, secondly, of the use of its ash as a raw material in the production of cement clinker.

48 In the light of the foregoing considerations, only the first of the two operations mentioned above should be subject to classification with a view to establishing the purpose of the waste shipment in question.

49 The answer to the first question must therefore be that, where a waste treatment process comprises several distinct stages, it must be classified as a disposal operation or a recovery operation within the meaning of the Directive, for the purpose of implementing the Regulation, taking into account

The second question

50 In the light of the reply to the first question, it is not necessary to deal with the second question.

The third question

51 In the light of the reply to the first question, the third question must be understood to mean that the national court is essentially asking whether the calorific value of the waste which is to be combusted is a relevant criterion for the purpose of determining whether that operation constitutes a disposal operation as referred to in point D10 of Annex IIA to the Directive or a recovery operation as referred to in point R1 of Annex IIB to the Directive and, in addition, whether the Member States may define distinguishing criteria to that end.

52 First of all, as regards the first part of that question, the Court has already held, in C-228/00 *Commission* v *Germany* [2003] ECR I-1439, paragraph 47, that the criterion of the calorific value of waste is not relevant for the purpose of establishing whether an operation involving the combustion of waste is a recovery operation as referred to in point R1 of Annex IIB to the Directive.

53 It is clear from paragraph 47 of that judgment that, in order to be considered use principally as a fuel or other means to generate energy, within the meaning of point R1 of Annex IIB to the Directive, it is both necessary and sufficient that the combustion of waste meet the three conditions set out in paragraphs 41 to 43 of that judgment. First, the main purpose of the operation concerned must be to enable the waste to be used as a means of generating energy. Secondly, the conditions in which that operation is to take place must give reason to believe that it is indeed a 'means to generate energy'. Thirdly, the waste must be used principally as a fuel or other means of generating energy.

54 It is for the national court to establish whether, in the case in the main proceedings, those conditions are satisfied for the purpose of classifying the combustion of the waste at issue in cement kilns as a disposal operation or a recovery operation.

55 As regards the second part of the third question, it should also be recalled that the Regulation does not preclude Member States from laying down, in acts having general scope, criteria for distinguishing between a recovery operation and a disposal operation, provided that the criteria comply with those laid down in the Directive (see, to that effect, *Commission* v *Germany*, cited above, paragraphs 35 and 36).

56 In the light of the foregoing considerations, the answer to the third question must be that the calorific value of waste which is to be combusted is not a relevant

criterion for the purpose of determining whether that operation constitutes a disposal operation as referred to in point D10 of Annex IIA to the Directive or a recovery operation as referred to in point R1 of Annex IIB thereof. Member States may establish distinguishing criteria for that purpose, provided that the criteria comply with those laid down in the Directive.

The fourth question

57 In view of the answer to the first question, from which it follows that a waste treatment process should not be classified as a whole for the purpose of implementing the Regulation, there is no need to reply to the fourth question.

Costs

58 The costs incurred by the Netherlands, German and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Raad van State by judgment of 13 March 2001, hereby rules:

1. Where a waste treatment process comprises several distinct stages, it must be classified as a disposal operation or a recovery operation within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991 and by Commission Decision 96/350/EC of 24 May 1996, for the purpose of implementing Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Council Regulation (EC) No 120/97 of 20 January 1997, taking into account only the first operation that the waste is to undergo subsequent to shipment;

2. The calorific value of waste which is to be combusted is not a relevant criterion for the purpose of determining whether that operation constitutes a disposal operation as referred to in point D10 of Annex IIA to Directive 75/442, as amended by Directive 91/156 and by Decision 96/350, or a recovery operation as referred to in point R1 of Annex IIB thereof. Member

States may establish distinguishing criteria for that purpose, provided that those criteria comply with those laid down in the Directive.

Wathelet Timmermans La Pergola

Jann Rosas

Delivered in open court in Luxembourg on 3 April 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber