ORDER OF THE COURT (Third Chamber)
15 January 2004 *

In Case C-235/02,

REFERENCE to the Court under Article 234 EC by the Giudice per le indagini preliminari of the Tribunale di Gela (Italy) for a preliminary ruling in the criminal proceedings before that court against

Marco Antonio Saetti

and

Andrea Frediani

on the interpretation of Articles 1(a) and (f), 2(1)(b) and 4 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),

* Language of the case: Italian.

THE COURT (Third Chamber),

composed of: C. Gulmann, acting as President of the Third Chamber, J.-P. Puissochet (Rapporteur) and F. Macken, Judges,

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

having informed the court of referral that the Court proposes to give its decision by a reasoned order in accordance with Article 104(3) of the Rules of Procedure,

having invited the persons referred to in Article 23 of the Statute of the Court of Justice to submit any observations which they might wish to make in that regard,

after hearing the Advocate General,

makes the following

Order

1 By order of 19 June 2002, received at the Court on 26 June 2002, the Giudice per le indagini preliminari (judge responsible for preliminary inquiries) of the Tribunale di Gela (District Court, Gela) referred to the Court of Justice for a preliminary ruling under Article 234 EC four questions on the interpretation of

Articles 1(a) and (f), 2(1)(b) and 4 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) (hereinafter 'Directive 75/442').

2 Those questions were raised in the course of criminal proceedings against Mr Saetti and Mr Frediani, the director and former director respectively of the Gela oil refinery operated by AGIP Petroli SpA, who are accused inter alia of having failed to comply with Italian legislation on waste.

Legal framework

Community legislation

3 The first subparagraph of Article 1(a) of Directive 75/442 defines waste as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

4 Annex I to Directive 75/422, headed 'Categories of waste', includes, under category Q8, 'residues of industrial processes (e.g. slags, still bottoms, etc.)' and, under category Q16, 'any materials, substances or products which are not contained in the above categories'.

5 The second subparagraph of Article 1(a) of Directive 75/442 provides that the Commission of the European Communities is to draw up 'a list of wastes

belonging to the categories listed in Annex I'. That is the purpose of Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442 on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (OJ 1991 L 226, p. 3). That list was amended by Commission Decisions 2001/118/EC and 2001/119/EC and Council Decision 2001/573/EC, of 16 and 22 January and 23 July 2001 respectively (OJ 2001 L 47, p. 1 and p. 32, and L 203, p. 18) and came into force on 1 January 2002. Chapter 05, section 01 thereof lists 'wastes from petroleum refining'. That section sets out various types of waste and includes category 05 01 99, 'wastes not otherwise specified'. The note introducing the list explains that it is a harmonised list which will be periodically reviewed but that 'the inclusion of a material in the list does not mean that the material is a waste in all circumstances. Materials are considered to be waste only where the definition of waste in Article 1(a) of Directive 75/442 is met'.

6 Article 1(c) of Directive 75/442 defines 'holder' as the 'producer of the waste or the natural or legal person who is in possession of it'.

7 Article 1(d) defines the 'management' of waste as 'the collection, transport, recovery and disposal of waste, including the supervision of such operations and aftercare of disposal sites'.

8 Article 1(e) and (f) defines the disposal and recovery of waste as any of the operations provided for in Annexes II A and II B thereto respectively. Those annexes were adapted to scientific and technical progress by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32). One of the recovery

operations listed in Annex II B is R1, 'use principally as a fuel or other means to generate energy'.

9 Article 2 provides:

'1. The following shall be excluded from the scope of this directive:

(a) gaseous effluents emitted into the atmosphere;

(b) where they are already covered by other legislation:

...

(ii) waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;

...

2. Specific rules for particular instances or supplementing those of this directive on the management of particular categories of waste may be laid down by means of individual directives.'

10 Article 3(1) of Directive 75/442 provides, inter alia, that Member States are to take appropriate steps to encourage the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials. Article 4 of the Directive provides that Member States are to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular without risk to water, air, soil and plants and animals and without adversely affecting the countryside.

11 Articles 9 and 10 of Directive 75/442 state that any establishment or undertaking which carries out waste disposal operations or operations which may lead to recovery must obtain a permit from the competent authority.

12 Nevertheless, Article 11 of Directive 75/442 provides for exemption from the permit requirement under certain conditions.

National legislation

13 Directive 75/442 was transposed into Italian law by Decreto legislativo 5 febbraio 1997, No 22, attuazione delle direttive 91/156/CEE sui rifiuti, 91/689/EEC sui rifiuti pericolosi e 94/62/CE sugli imballaggi e sui rifiuti di imballagio (Legislative Decree No 22, of 5 February 1997, implementing Directives 91/156/EEC on waste, 91/689/EEC on hazardous waste and 94/62/EC on packaging and

packaging waste) (GURI of 15 February 1997, suppl. ord. No 38), subsequently amended by Decreto legislativo 8 novembre 1997, No 389 (GURI No 261, of 8 November 1997) (hereinafter 'Legislative Decree No 22/97').

14 Legislative Decree No 22/97 reproduces the definition of waste laid down in Directive 75/442. It requires an administrative permit for the management of certain types of waste. In those cases, the absence of a permit is subject to criminal penalties.

15 After the prosecution which forms the subject-matter of the main proceedings had commenced, Decreto legge 7 marzo 2002, No 22, recante disposizioni urgenti per l'individuazione della disciplina relativa all'utilizzazione del coke de petrolio (pet-coke) negli impianti de combustione (Decree-Law No 22, of 7 March 2002, laying down urgent provisions for regulation of the use of petroleum coke (pet-coke) in combustion plants) (GURI No 57, of 8 March 2002) was adopted. That legislation removed petroleum coke used as industrial fuel from the scope of Legislative Decree No 22/97 and regulated its use in combustion plants in the following manner:

'1. Petroleum coke with a sulphur content not exceeding 3% of mass may be used in combustion plants with a rated thermal input capacity equal to or greater than 50 MW per firing unit.

2. Petroleum coke may be used at the production site... (even if its sulphur content exceeds 3%).

3. Petroleum coke with a sulphur content not exceeding 6% of mass may be used in plants where at least 60% of sulphur compounds are fixed or combined with the production product.

4. The use of petroleum coke in kilns producing lime for the food industry is strictly prohibited.'

16 Decree-Law No 22 of 7 March 2002 was in turn amended by Legge 6 maggio 2002, No 82, conversione in legge, con modificazioni, del decreto legge 7 marzo 2002, No 22, recante disposizioni urgenti per l'individuazione delle disciplina relativa all'utilizzazione del coke de petrolio (pet-coke) negli impianti de combustione (Law of 6 May 2002, No 82, implementing, following amendment, Decree-Law No 22 of 7 March 2002 concerning urgent provisions for regulation of the use of petroleum coke (pet-coke) in combustion plants) (GURI No 105 of 7 May 2002). It stated that petroleum coke used as fuel for production purposes was excluded from the scope of Legislative Decree No 22/97. Article 2(2) of that decree-law, cited in the preceding paragraph of this order, went on as follows:

'Petroleum coke may also be used at production sites in combustion processes intended to generate electrical or thermal energy for purposes not directly related to refining processes, provided that emissions do not exceed the limits fixed by the relevant provisions.'

Main proceedings and the questions referred for a preliminary ruling

17 As a result of complaints concerning petroleum refinery activities at Gela, the Public Prosecutor of the Tribunale di Gela had a technical survey carried out in the installation. That survey determined that the refinery was using petroleum coke, resulting from the refining of crude oil, as fuel for its combined steam and electricity power station; most of the energy produced there is used by the refinery itself, but surplus electricity is sold to other industries or to the electricity company ENEL SpA.

18 The Public Prosecutor took the view that the petroleum coke constituted waste subject to Legislative Decree No 22/97 and, since it was being stored and used without the administrative permit required by that legislation, charged Mr Saetti and Mr Frediani with having failed to comply with that permitting requirement. In addition, at the request of the Public Prosecutor, the Giudice per le indagini preliminari sequestrated the two petroleum coke depots which supplied the refinery's combined heat and power station.

19 After the entry into force of Legislative Decree No 22/97 of 7 March 2002, referred to in paragraph 15 of this order, the public prosecutor ended the sequestration, since the new Italian legislation authorised the use of petroleum coke under certain conditions.

20 As regards the action to be taken in the proceedings following the entry into force of the Decree-Law of 6 May 2002, referred to in paragraph 16 of this order, the Giudice per le indagini preliminari essentially asks whether the Italian authorities are able to exclude petroleum coke used as fuel for industrial purposes and refinery operations from the scope of Legislative Decree No 22/97, in the light of

Directive 75/442. In particular, he is inclined to take the view that petroleum coke constitutes waste within the meaning of Article 1(a) of Directive 75/442 and that, in the absence of Community legislation on petroleum coke, as provided for in Article 2(1)(b) of that directive, the national authorities could not exclude it from the scope of Legislative Decree No 22/97, which was adopted for the purpose of implementing that directive.

21 In those circumstances, the Giudice per le indagini preliminari decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does petroleum coke fall within the meaning of "waste" as provided in Article 1 of Directive 75/442?

2. Does the use of petroleum coke as a fuel constitute a recovery operation within the meaning of Article 1 of Directive 75/442?

3. Does petroleum coke used as a fuel for production purposes fall within the categories of waste which a Member State may exclude from the scope of Community legislation on waste, following the adoption of specific legislation in accordance with Article 2 of Directive 75/442?

4. Does also allowing the use of petroleum coke at the production site for combustion processes intended to produce electrical or thermal energy for purposes not related to refinery processes, provided that emissions fall within

the limits laid down in the relevant provisions, even where its sulphur content exceeds 3% of mass, constitute a necessary and sufficient measure to ensure that such waste is recovered without endangering human health and without using processes or methods which could harm the environment, in accordance with Article 4 of Directive 75/442?'

Admissibility

22 First, Mr Saetti and Mr Frediani contend that the proceedings in the context of which the Giudice per le indagini preliminari acted are not of a judicial nature which allows referral for a preliminary ruling to be made to the Court on the basis of Article 234 EC. They maintain that criminal proceedings take on that character only once they have been referred back to the court hearing the case, except in particular cases which are not relevant here.

23 That argument must be rejected. It is settled case-law that the judge investigating a criminal matter or the investigating magistrate constitutes a court or tribunal within the meaning of Article 234 EC, appointed to give a ruling, independently and in accordance with the law, in cases coming within the jurisdiction conferred on it by law in proceedings intended to culminate in decisions of a judicial nature (see, inter alia, Case 65/79 *Chatain* [1980] ECR 1345, and Case 14/86 *Pretore di Salò* v *X* [1987] ECR 2545, paragraph 7).

24 Secondly, Mr Saetti and Mr Frediani contend that the interpretation of Community law requested of the Court serves no purpose, inasmuch as following the adoption of Decree-Law No 22 of 7 March 2002 and the Law of 6 May 2002, they could no longer be found guilty under national law for the actions which gave rise to the main proceedings. However it is construed, Directive 75/442 is as

such not enforceable against individuals and cannot itself directly serve as a basis for criminal proceedings. The latter must therefore be abandoned in any event, and the interpretation of the Directive has no bearing on it. For that reason as well, referral to the Court is inadmissible.

25 That argument must also be rejected. It is true that a directive may not of itself impose obligations on a private individual and may not therefore be relied on as such against such a person (see, inter alia, Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 20). Similarly, a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, inter alia, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 37).

26 In the present case, however, it is common ground that, at the time when the acts which gave rise to the criminal proceedings against Mr Saetti and Mr Frediani were established, those acts could, where relevant, constitute offenses punishable under criminal law. It is not for the Court to interpret or apply national law in order to establish the effects of the most recent national legislation, which no longer considers such acts to be infringements (see to that effect Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraphs 42 and 43).

27 In addition, it is clear from the order for reference that the proceedings in question could, on the basis of the Court's interpretation of Directive 75/442, result in that connection in a referral to the Corte costituzionale (Italy) for the purpose of deciding the legality of the national legislation.

28 It must be remembered that it is solely for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

29 While the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to decide whether it has jurisdiction, it pointed out that it may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39).

30 The questions referred for a preliminary ruling are accordingly admissible.

Questions referred for a preliminary ruling

31 Taking the view that the answer to the questions put to it may be deduced clearly from existing case-law, the Court, in accordance with Article 104(3) of the Rules of Procedure, informed the national court that it intended to give judgment by

reasoned order and invited the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit any observations which they might wish to make in that regard. Mr Saetti and Mr Frediani, the Italian and the Swedish Governments and the Commission stated that they had no objection to the use of that procedure.

First question

32 By this question, the national court asks whether petroleum coke constitutes waste within the meaning of Article 1(a) of Directive 75/442.

33 The scope of the concept of waste depends on the meaning of the term 'discard' used in Article 1(a) of Directive 75/442. The Court has held that the use of an operation listed in Annex II A or Annex II B to Directive 75/442 does not of itself allow a substance or object to be classified as waste and, conversely, that the concept of waste does not exclude substances and objects which are capable of further economic use. The system of supervision and management established by Directive 75/442 is intended to cover all objects and substances discarded by their owner, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or further use (Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, hereinafter '*Palin Granit*', paragraphs 22, 27 and 29).

34 Certain circumstances may constitute evidence that the holder has discarded a substance or object or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442. That will be the case, in particular, where the substance used is a production residue, that is to say a product not intended as

such (Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraph 84). The Court explained to that effect that waste-rock from granite quarrying, which is not the product primarily sought by the operator, in principle constitutes waste (*Palin Granit*, paragraphs 32 and 33).

35 However, one possible analysis which could be accepted is that goods, materials or raw materials resulting from a manufacturing or extraction process which is not primarily intended to produce that item may be regarded not as a residue but as a by-product which the undertaking does not wish to 'discard', within the meaning of the first paragraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without prior processing. Such an interpretation is not incompatible with the aims of Directive 75/442, for there is no reason to hold that the provisions of Directive 75/442, which are intended to regulate the disposal or recovery of waste, apply to goods, materials or raw materials which have an economic value as products, regardless of processing, and which as such are subject to the legislation applicable to those products (*Palin Granit*, paragraphs 34 and 35).

36 However, having regard to the obligation to interpret the concept of waste widely in order to limit its inherent risks and pollution, recourse to the reasoning applicable to by-products should be confined to situations in which the further use of goods, materials or raw materials is not a mere possibility but a certainty, without any prior processing, and as an integral part of the production process (*Palin Granit*, paragraph 36).

37 In addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not that substance is waste for the purposes of Directive 75/442 is thus the likelihood that that substance will be further used without any prior processing. If, in addition to the mere possibility of further use of the substance, there is also a financial advantage

to the holder in so doing, the likelihood of such further use is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to 'discard', but as a genuine product (*Palin Granit*, paragraph 37).

38 The Court therefore held that stone debris produced as mining residues which are lawfully used in the production process, without prior processing, in order to ensure the necessary filling in of underground galleries cannot be considered to be substances which the holder discards or intends to discard since, on the contrary, he needs them for his principal activity, subject, however, to the condition that he provides sufficient guarantees as to the identification and actual use of the substances (Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, paragraphs 36 to 39 and 43).

39 Other evidence of the existence of waste within the meaning of Article 1(a) of Directive 75/442 may lie in the fact that the treatment method for the substance in question is a standard waste treatment method or that the undertaking perceives the substance as waste and from the fact that, in the case of a production residue, it can be used only in a way that involves its disappearance or that its use must involve special measures to protect the environment (*ARCO Chemie Nederland and Others*, cited above, paragraphs 69 to 72, 86 and 87).

40 However, those elements are not necessarily conclusive, and whether something is in fact waste must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined (*ARCO Chemie Nederland*, paragraph 88).

41 As regards petroleum coke produced and used in an oil refinery, it is necessary to take into account the information set out in the document published by the Commission in accordance with Article 16(2) of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), which concerns the exchange of information between Member States and the industries concerned on best available techniques in order to achieve a high level of protection for the environment as a whole, associated monitoring and developments and their progress in the field of oil and gas refining, a document commonly known as a BREF (BAT reference document), as well as the general conditions in the refinery concerned, which, where relevant, must be determined by the court to which a dispute is referred.

42 Petroleum coke, composed of solid carbon and variable amounts of impurities, which is one of the numerous substances resulting from the refining of petroleum, is, according to the observations submitted by Mr Saetti and Mr Frediani, intentionally produced at the Gela refinery, given the characteristics of the crude oil which is treated there. For its part, the BREF states, inter alia, that petroleum coke 'is widely used as fuel in the cement and steel industry. It can also be used as a fuel for power plants if the sulphur content is low enough. Coke also has non-fuel applications as a raw material for many carbon and graphite products'.

43 Moreover, the file indicates that petroleum coke is used in Gela as the main component in the fuel used to power the integrated combined heat and power station which supplies the refinery's steam and electricity needs. Since the electricity generated is greater than the refinery's consumption, given the volume of vapour produced at the same time, the surplus is sold to other industries or to an electricity company.

44 If these conditions of production and use are established, the classification as waste within the meaning of Article 1(a) of Directive 75/442 can be excluded.

45 First, in those circumstances, petroleum coke cannot be classified as a production residue within the meaning of paragraph 34 of this order as the production of coke is the result of a technical choice (since petroleum coke is not necessarily produced during refinery operations), specifically intended for use as fuel, whose production costs are probably lower than the cost of other fuels which could be used to generate the steam and electricity which meet the needs of the refinery. Even if, as maintained by an adverse party in the main proceedings against Mr Saetti and Mr Frediani, the petroleum coke at issue automatically results from a technique which at the same time generates other petroleum substances which are the main results sought by the refinery's management, it is clear that, if it is certain that the coke production in its entirety will be used, mainly for the same purposes as the other substances, that petroleum coke is also a petroleum product, manufactured as such, and not a production residue. The file in the main proceedings sent to the Court appears to indicate that it is common ground that the petroleum coke is certain to be fully used as fuel in the production process and that all the resulting surplus electricity is sold.

46 Secondly, as regards the information referred to in paragraph 39 of this order, the fact that petroleum coke is used as a fuel for energy production, a use which is a standard waste recovery method, is not relevant, since the purpose of a refinery is precisely to produce different types of fuel from crude oil. Moreover, possible evidence concerning, first, the absence of any use other than one which leads to the disappearance of the substance at issue (not established here, since petroleum coke may be used as a raw material to manufacture carbon- and graphite-based products) and, secondly, the fact that its use must involve special measures to protect the environment (here established) are also irrelevant, since those factors apply to production residues and the petroleum coke produced and used in the circumstances referred to above does not fit that classification, as follows from the preceding paragraph of this order. The evidence concerning the fact that the

company considers petroleum coke to be waste, even if it is confirmed, is not sufficient to justify the inference that the petroleum coke at issue is waste, given the other circumstances previously mentioned. It could only be different if the refinery's management gave up the use of petroleum coke as the result of public opinion or was required to do so by a legal decision. In that case, it would be necessary to find that the holder of the petroleum coke is discarding it or intends to or is required to discard it.

47 The answer to the first question must therefore be that petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of Directive 75/442.

Second, third and fourth questions

48 Answers to these questions would be of use to the national court only if the petroleum coke at issue in the main proceedings had to be considered to be waste within the meaning of Directive 75/442. However, in the light of the information given in the order for reference and the observations submitted to the Court, which led to the answer to the first question, such does not appear to be the case. There is therefore no need to answer the second, third and fourth questions.

Costs

49 The costs incurred by the Italian, Austrian and Swedish 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 (Third Chamber),

in answer to the questions referred to it by the Giudice per le indagini preliminari of the Tribunale di Gela by order of 19 June 2002, hereby rules:

Petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste 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.

Luxembourg, 15 January 2004.

R. Grass

Registrar

V. Skouris

President