



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 16 May 2013¹

Case C-113/12

Donal Brady

v

Environmental Protection Agency

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Environment — Directives 75/442/EEC and 91/156/EEC — Concept of ‘waste’ — Slurry produced on a pig farm — Storage until use as fertiliser — Classification as waste — Classification as a by-product — Burden of proof — Personal liability of the producer for the infringement of European Union law on the control of waste by third parties who use the slurry as fertiliser on their own land — Failure to transpose Directive 91/676 into national law — General principles of European Union law — Fundamental rights — Proportionality)

1. In court proceedings challenging the conditions imposed on a pig breeder for the purposes of licensing that breeder to sell as fertiliser the slurry produced on his farm, the Supreme Court (Ireland) has referred to the Court of Justice a number of questions concerning the concept of ‘waste’ as used in Directive 75/442.² Over and above the interest inherent in that issue – in particular, in so far as it will enable the Court to outline its case-law on the conditions in accordance with which waste may become a by-product – these proceedings also raise a question which goes beyond the strict scope of Directive 75/442 and, as will be seen, falls within the ambit of the general principles of European Union (‘EU’) law and, more specifically, that of the guarantee of fundamental rights.

2. The latter issue raised in the main proceedings concerns the liability which may be imputed to a seller of slurry for inappropriate use of that slurry by a purchaser. In addition to that point, it is necessary to determine the extent to which the freedom of the Member States to regulate the marketing of waste allows them to impose conditions which may either amount to the prohibition of that trade or make it subject to disproportionate or arbitrary conditions. The background against which all those questions arise is a situation where the failure to transpose Directive 91/676³ into national law precluded the application of legislation capable of encompassing the use of slurry as fertiliser.

1 — Original language: Spanish.

2 — Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39).

3 — Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1).

I – Legislative framework

A – EU legislation

1. Directive 75/442 on waste

3. In the version in force at the material time,⁴ Article 1(a) of Directive 75/442 provided as follows:

‘For the purposes of this Directive:

(a) “waste” shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.’

4. In accordance with Article 2(1)(b) of the directive, the following were excluded from its scope ‘where they are already covered by other legislation’:

‘...

(iii) animal carcasses and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming; ...’

5. Under Article 8 of the directive:

‘Member States shall take the necessary measures to ensure that any holder of waste:

— has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B, or

— recovers or disposes of it himself in accordance with the provisions of this Directive.’

6. Articles 9 and 10 of the directive provided that establishments or undertakings which carried out the operations, referred to in Annexes II A and II B to the directive, for the disposal or recovery of waste were required to obtain a permit.

7. Article 15 of Directive 75/442 provided:

‘In accordance with the “polluter pays” principle, the cost of disposing of waste must be borne by:

— the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9; and/or

— the previous holders or the producer of the product from which the waste came.’

2. Directive 91/676 on nitrates

8. Article 1 of Directive 91/676 states that the directive has the objective of ‘reducing water pollution caused or induced by nitrates from agricultural sources’ and of ‘preventing further such pollution’.

⁴ — As amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32).

9. Under Article 3(1) and (2) of Directive 91/676:

‘1. Waters affected by pollution and waters which could be affected by pollution if action pursuant [to] Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I.

2. Member States shall, within a two-year period following the notification of this Directive, designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution. They shall notify the Commission of this initial designation within six months.’

10. Article 4 of the directive provides:

‘1. With the aim of providing for all waters a general level of protection against pollution, Member States shall, within a two-year period following the notification of this Directive:

- (a) establish a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A;⁵
- (b) set up where necessary a programme, including the provision of training and information for farmers, promoting the application of the code(s) of good agricultural practice.

2. Member States shall submit to the Commission details of their codes of good agricultural practice and the Commission shall include information on these codes in the report referred to in Article 11. In the light of the information received, the Commission may, if it considers it necessary, make appropriate proposals to the Council.’

11. Article 5 of Directive 91/676 places Member States under an obligation to establish action programmes in respect of designated vulnerable zones. Those programmes must include as mandatory measures the measures required under the code(s) of good agricultural practice and those referred to in Annex III to the directive, relating to periods when the land application of certain types of fertiliser is prohibited, the capacity of storage vessels for livestock manure, the methods of application of fertilisers and the maximum amount of fertiliser applicable by reference to its nitrogen content.

3. Council Directive 96/61 concerning integrated pollution prevention and control⁶

12. Directive 96/61 was codified and repealed by Directive 2008/1,⁷ which in turn was replaced by Directive 2010/75.⁸ In accordance with Article 1, the purpose of Directive 96/61 was ‘to achieve integrated prevention and control of pollution arising from the activities listed in Annex I. It lays down measures designed to prevent or, where that is not practicable, to reduce emissions in the air, water and land from the abovementioned activities, including measures concerning waste, in order to achieve a high level of protection of the environment taken as a whole, without prejudice to Directive 85/337/EEC and other relevant Community provisions.’

5 — Annex II A refers to periods when the application of fertiliser is inappropriate; the application of fertiliser to certain types of ground; the capacity and construction of storage vessels for livestock manures; measures to prevent water pollution by run-off and seepage into the groundwater and surface water of liquids containing livestock manures and effluents from stored plant materials such as silage; and procedures for the land application, including rate and uniformity of spreading, of both chemical fertiliser and livestock manure, that will maintain nutrient losses to water at an acceptable level.

6 — Council Directive 96/61/EC of 24 September 1996 (OJ 1996 L 257, p. 26).

7 — Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 (OJ 2008 L 24, p. 8).

8 — Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 (OJ 2010 L 334, p. 17).

13. Point 6.6 of Annex I to Directive 96/61 referred specifically to installations for the intensive rearing of pigs with more than 750 places for sows.

14. Under Article 3(c) of the directive, ‘Member States shall take the necessary measures to provide that the competent authorities ensure that installations are operated in such a way that: ... (c) waste production is avoided in accordance with Directive 75/442/EEC ...; where waste is produced, it is recovered or, where that is technically and economically impossible, it is disposed of while avoiding or reducing any impact on the environment’.

15. In accordance with Article 9(3) of the directive, ‘[i]f necessary, the permit shall include appropriate requirements ensuring protection of the soil and ground water and measures concerning the management of waste generated by the installation.’

4. Regulation No 1774/2002 laying down health rules concerning animal by-products not intended for human consumption⁹

16. The aim of Regulation No 1774/2002 was to ensure that the Member States established systems guaranteeing the flow of specified categories of animal by-product within certain authorised chains until the time of their disposal or use and, in particular, allowing only animal by-products which do not present a risk to animal and public health to enter the food chain. That regulation was replaced by Regulation No 1069/2009.¹⁰

B – *National legislation*

17. The Environmental Protection Agency Act 1992 (‘the 1992 Act’) created the Environmental Protection Agency (‘the EPA’), the functions of which include ‘the licensing, regulation and control of activities for the purposes of environmental protection’ (Section 52(1)(a)).

18. The Waste Management Act 1996 (‘the 1996 Act’) was adopted with the purpose, inter alia, of transposing Directive 75/442, as amended by Directive 91/156, into national law. Section 4 provides:

‘1. In this Act waste means any substance or object belonging to a category of waste specified in the First Schedule or for the time being included in the European Waste Catalogue which the holder discards or intends or is required to discard, and anything which is discarded or otherwise dealt with as if it were waste shall be presumed to be waste until the contrary is proved.

...

3. In this Act, “disposal”, in relation to waste, includes any of the activities specified in the Third Schedule, and “waste disposal activity” shall be construed accordingly.

4. In this Act, “recovery”, in relation to waste, means any activity carried on for the purposes of reclaiming, recycling or re-using, in whole or in part, the waste and any activities related to such reclamation, recycling or re-use, including any of the activities specified in the Fourth Schedule, and “waste recovery activity” shall be construed accordingly.’

9 — Regulation No 1774/2002 of the European Parliament and of the Council of 3 October 2002 (OJ 2002 L 273, p. 1).

10 — Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 (OJ 2009 L 300, p. 1).

19. Under Section 51(2)(a)(iii) of the 1996 Act:

‘Subject to paragraph (b), a waste licence ... shall not be required for the recovery of ... faecal matter of animal or poultry origin in the form of manure or slurry ...’

20. The 1992 Act established a scheme for integrated pollution control licensing, broadly comparable to that set out in Directive 96/61. Ireland transposed Directive 96/61 into national law by means of the Protection of the Environment Act 2003 (‘the 2003 Act’). Accordingly, in the case under consideration, the licence was not granted under national measures adopted in order to implement Directive 96/61.

II – Facts

21. Mr Brady – the appellant in the main proceedings – is the owner of a pig farm in Ireland. Although his main activity centres on pig breeding, he also exploits the slurry generated by the farm as a secondary product, by selling it to other farmers for use as fertiliser.

22. Since the application of that fertiliser to cultivated areas is a seasonal activity, the slurry must go through a period of storage on Mr Brady’s farm until it is delivered to other farmers. In 1999, the EPA granted Mr Brady a licence to extend his premises and to market slurry. Under that licence, Mr Brady is required, in particular, to ensure that the farmers use the slurry in strict compliance with certain conditions.

23. One of those conditions is entitled ‘Waste Management’. In so far as is relevant for present purposes, that condition imposes the following obligations on Mr Brady:

‘(a) ... to identify in advance of the sale of any fertiliser all lands not in his possession, ownership or control, on which the fertiliser is to be used;

...

(c) to ensure that the purchaser of the fertiliser does not spread it on lands that are not in the purchaser’s possession, ownership or control;

...

(f) to monitor the use of the fertiliser by persons who purchase it for use on their lands and to direct the manner in which it is to be used;

(g) to monitor surface waters that bisect areas on which the fertiliser is applied, i.e. at locations not under [Mr Brady’s] control;

(h) to monitor wells located on lands on which the fertiliser is spread, i.e. on lands not under [Mr Brady’s] control;

(i) to maintain at all times a register of use of the fertiliser for inspection by the EPA ...’

24. The EPA licence was challenged before the High Court, which ruled against Mr Brady, who then appealed to the Supreme Court, that is to say, the judicial body which has made the present request for a preliminary ruling.

25. According to the Supreme Court, the issues in dispute between the parties to the proceedings are the following:

- (a) Whether (i) pig slurry is in itself waste or (ii) it constitutes waste only in certain cases; and (iii) what criteria must be applied when assessing those matters;
- (b) Whether the EPA is entitled to attach to the licence a condition requiring Mr Brady to monitor the activities of farmers to whom he supplies slurry for use as fertiliser.

III – The reference for a preliminary ruling

26. The questions referred are worded as follows:

‘In the absence of a definitive interpretation of the meaning of “waste” for the purposes of Union law, is a Member State permitted by national law to impose upon a producer of pig slurry the obligation to establish that it is not waste, or is waste to be determined by reference to objective criteria of the type referred to in the case law of the Court of Justice of the European Union:

1. If waste is to be determined by reference to objective criteria of the type referred to in the case law of the Court of Justice of the European Union, what level of certainty of re-use of pig slurry is required, ... which a licensee collects and stores or may store for upwards of 12 months, pending its transfer to users?
2. If pig slurry is waste, or is determined to be waste in accordance with the application of the appropriate criteria, is it lawful for a Member State to impose upon its producer – who does not use it on his own lands, but disposes of it to third party landowners for use as fertilisers on those third parties’ lands – personal liability for compliance by those users with Union legislation concerning the control of waste and/or fertilisers, in order to ensure that the third parties’ use of that pig slurry by land spreading will not give rise to a risk of significant environmental pollution?
3. Is the aforesaid pig slurry excluded from the scope of the definition of “waste” by virtue of Article 2(1)(b)(iii) of Directive 75/442/EEC, as amended by Council Directive 91/156, by reason of its being “already covered by other legislation”, and in particular by Council Directive 91/676/EEC, in circumstances where, at the time the licence was granted, Ireland had not transposed Council Directive 91/676/EEC, no other domestic legislation controlled the application of pig slurry to land as fertiliser, and Council Regulation (EC) No 1774/2002 had not then been adopted?’

27. The Supreme Court takes the view that the criteria laid down in the case-law of the Court of Justice on the concept of ‘waste’ should apply to pig slurry at the time of production and storage and not afterwards, when it may be in course of re-use, in this case by other farmers.

28. The referring court believes that an approach which requires pig slurry to be treated as ‘waste’ in all circumstances does not readily appear consistent with the principles laid down by the Court of Justice in its case-law. Nevertheless, the Supreme Court is not satisfied either that the statements made by the Court of Justice in the *Commission v Spain* series of cases¹¹ fall to be construed as broadly as Mr Brady submits.

¹¹ — Judgments cited in footnote 12.

29. According to the Supreme Court, if pig slurry always constitutes ‘waste’, or must be regarded as such for the purposes of treating and discarding it or otherwise disposing of it as ‘waste’, the question which arises is whether or not, in the overall scheme of the control of pollutants, waste intended for use without further processing on third party lands is to be controlled by the user – namely, the owner of those third party lands – or whether it is to be controlled on those third party lands by the original producer.

IV – The procedure before the Court of Justice

30. The request for a preliminary ruling was received at the Court Registry on 1 March 2012.

31. Written observations have been submitted by the parties to the main proceedings, and by the French Government and the Commission.

32. At the hearing on 27 February 2013, oral argument was presented by the parties to the main proceedings and by the Commission.

V – Arguments

33. In relation to the introductory question, the Commission submits that, since there are no provisions in Irish law applicable to slurry where it is not regarded as ‘waste’ within the meaning of the 1996 Act, in which the same definition is laid down as in Directive 75/442, it is necessary to establish: (a) whether the slurry is ‘waste’; (b) whether it is excluded from the scope of Directive 75/442 pursuant to Article 2 of that directive; and (c) whether it can give rise to the imposition of the disputed conditions.

34. On the other hand, Mr Brady, the French Government and the Commission argue that, since Directive 75/442 does not make a *renvoi* to national law, there is a need for an autonomous and uniform definition of ‘waste’, established in accordance with the criteria laid down in Article 5 of Directive 2008/98, which the national authorities are under a duty to apply. Lastly, the EPA argues that the request for a preliminary ruling concerns, first, the nature of the criteria for classifying a substance as waste (an area in which, it submits, the terminology used in secondary law is not systematically consistent) and, second, the burden of proof (which the Member States may lawfully impose on producers of slurry).

35. As far as Question 1 is concerned, Mr Brady claims that, in the circumstances of the case and in accordance with the case-law, the condition of certainty is satisfied without it being relevant that the slurry may be used by other persons or that those persons may apply it improperly. For its part, the French Government submits that slurry should not be regarded as ‘waste’ if its use as fertiliser is part of a lawful practice and if its storage is limited to the needs of the operations involved – a matter for the national court to determine.

36. The Commission disputes the correctness of the case-law to the effect that the use of slurry for needs other than agricultural needs does not preclude its classification as a by-product, since that approach is incompatible with the need to interpret the concept of ‘waste’ in the light of Article 191 TFEU. The Commission states that the condition of certainty will not be satisfied unless it can be proved, at the time of storage, that the slurry can be applied by the producer to his own land in quantities which do not exceed the genuine agricultural needs of his farm and/or unless it has a positive economic value confirmed by the producer and is intended for use on the land of other producers on the basis of a contract or offer in quantities no higher than those which may be used on that land in accordance with the same conditions. The EPA contends that it would be spurious to rely on the fact that its functions are defined by reference to the concept of ‘waste’ as used in

Directive 75/442 in order to frustrate the objective of the integrated control of pollution, pursued in the context of the 1992 Law. In the EPA's opinion, the degree of certainty to be required is that which excludes all reasonable doubt on the part of the competent authority that the producer will not discard the slurry and that the slurry will actually be used as fertiliser under the proper conditions, a matter which can be established only by the producer himself and which it falls to him to prove; otherwise, a presumption would arise that the slurry constitutes 'waste' which the producer may be required to dispose of under national law in accordance with a scheme which, in the case of Ireland, is the one laid down in the 1992 Act, even though that act classifies as 'waste' substances which are not waste under Directive 75/442.

37. With regard to Question 2, Mr Brady claims that it should be answered in the negative since, even if slurry were classified as 'waste', it would be excluded from the scope of Directive 75/442, pursuant to Article 2(1)(b)(iii) of that directive, as a substance already covered by Directive 91/676. Mr Brady further submits that the disputed conditions disregard the principles of legal certainty and proportionality.

38. In the Commission's view, if slurry is 'waste' and is not excluded from the scope of Directive 75/442, its use should be regarded as 'recovery' or 'disposal' for the purposes of Articles 8 and 15 of that directive, and it is consistent with the discretion allowed to the Member States under Article 288 TFEU for them to impose conditions on pig breeders in order to ensure that the use of slurry does not create a risk for the environment. The Commission submits that, if slurry falls outside the scope of Directive 75/442, there is nothing, in the light of Articles 4(2) and 193 TFEU, to preclude Member States from establishing rules to ensure the environmentally safe use of slurry. The French Government argues that EU law does not preclude the Member States from providing that, where slurry is 'waste', the producer can be held liable for the use of that slurry by other producers. Arguing along the same lines, the EPA maintains that it never claimed that the producer should be directly responsible for the actions of the farmers who use the slurry as fertiliser but rather that, in all cases, the licensee is required, at most, to ensure that third parties act in a proper manner and to cease supplying them with slurry if they do not.

39. Lastly, with regard to Question 3, Mr Brady submits that it should be answered in the affirmative, since Ireland is not entitled to rely on a failure to fulfil its obligations in order to render inapplicable provisions of EU law in force, under which an individual has the right to rely on the exclusion of slurry from the scope of Directive 75/442 as against the EPA. The EPA contends that, as Directive 91/676 has not been transposed into national law, it cannot produce legal effects, and that, if the directive had been transposed, it would cover only the use of slurry as fertiliser but not the treatment of slurry by the producer, since waste prevention and recovery are objectives of Directive 96/61. For its part, the Commission argues that a substance cannot be regarded as covered by 'other legislation' where a Member State has not implemented the other legislation in question and that legislation accordingly does not ensure a level of protection equivalent to that pursued by Directive 75/442; even if Directive 91/676 had been implemented, it would not be certain that it could be deemed to ensure that equivalent level of protection, since the vulnerable zones to which its rules apply may not cover all the territory of a Member State.

VI – Assessment

A – The questions referred

40. The Supreme Court refers three questions, prefaced by a question which is, to a certain extent, introductory and which sets out in general terms the issue which those three questions seek to express in specific terms.

41. To my mind, the ‘introductory’ question calls for some explanation. In formulating that question, the referring court starts from the premiss that there is no ‘definitive interpretation of the meaning of “waste” for the purposes of Union law’, which leads it to ask whether: (A) a Member State may require a producer to establish that slurry is not waste or (B) the classification of slurry as waste must be made in accordance with objective criteria of the kind laid down in the case-law of the Court of Justice.

42. It should be noted, first, that the premiss from which the Supreme Court starts cannot mean that there is any doubt that the concept of ‘waste’ is an autonomous concept of EU law. Rather, it appears to refer, as the EPA claims, to the alleged difficulty of reconciling certain judgments of the Court of Justice in that connection.¹²

43. In consequence, the first task of this Opinion will be to define the Community concept of ‘waste’. To that end, as we shall see, it will be necessary to consider the criterion of the certainty which may be required with regard to an intention to exploit commercially substances which could, in principle, be regarded as ‘waste’, since such exploitation is decisive for the purposes of a definitive classification of the substance concerned. Accordingly, the reply to the query raised in the introductory question should go hand in hand with the reply to the first question referred by the Supreme Court, that is, the question asking ‘what level of certainty of re-use of pig slurry is required ... which a licensee collects and stores or may store for upwards of 12 months, pending its transfer to users’.

44. After that first step has been completed, it will be time to examine the alternative presented by the Supreme Court, which – I shall reveal now – I believe to be a false alternative. The fact that a Member State may – or may not – impose on a producer the burden of proving that slurry is not ‘waste’ does not mean that the classification of slurry as ‘waste’ should not be made in accordance with the objective criteria considered in the case-law of the Court. On the contrary, as the EPA has argued, the question makes sense only if it is construed as referring to the determination of who has responsibility for proving, in accordance with the criteria laid down by the Court, that slurry is ‘waste’.

45. The Commission and the EPA contend that, after the introductory question and Question 1 have been answered, it will be appropriate to reply to Question 3. In their opinion, since Question 3 raises the issue of whether there is ‘other legislation’ which would render Directive 75/442 inapplicable, it should be answered before Question 2 is addressed, which asks whether a system of liability of the kind established in Ireland, in relation to compliance with the EU legislation on waste and/or fertiliser, is lawful.

46. I agree with the approach suggested by the Commission and the EPA, since, before examining the system of liability at issue, it will be necessary to identify exactly which EU legislation governed the treatment of slurry at the material time and could, if breached, result – where relevant – in a producer being liable in the terms laid down in the Irish legislation.

B – *The introductory question and Question 1*

47. The proceedings which have given rise to the present request for a preliminary ruling concern the conditions attached to a licence, issued by the EPA on 22 October 1999, to sell slurry as fertiliser.

12 — On the one hand, the case-law devolving from Case C-416/02 *Commission v Spain* [2005] ECR I-7487 and Case C-121/03 *Commission v Spain* [2005] ECR I-7569, and, on the other hand, the case-law devolving from Case C-194/05 *Commission v Italy* [2007] ECR I-11661 and Case C-195/05 *Commission v Italy* [2007] ECR I-11699.

48. On that date, Ireland had already implemented Directive 75/442 by means of the 1996 Act, Article 4 of which lays down a definition of ‘waste’ equivalent to that laid down in the directive. This means that the Court’s reply will be of use to the Supreme Court only if it is confined to that legislative context and, consequently, answers the questions referred by the Supreme Court in the light of Directive 75/442, as amended by Directive 91/156.

49. Accordingly, it is not appropriate in these proceedings to rely on provisions of legislation adopted after the reference date. That applies, in particular, to provisions of legislation which, like Directive 2008/98,¹³ reformed or substantially supplemented the content of Directive 75/442. However, that does not mean that any reference to that subsequent legislation would be inappropriate, since, to a large extent, its provisions reflect the intention of the legislature to give formal expression to a number of the criteria laid down by the Court in its case-law on Directive 75/442. Such is the case, for example, of Article 5 of Directive 2008/98, which, in laying down the conditions which must be fulfilled in order for a substance or object to be regarded as a by-product and not as waste, relies on the criteria laid down by the Court in its case-law on the definition of ‘waste’ for the purposes of Directive 75/442. Accordingly, these are conditions which, in any event, are perfectly applicable when it comes to establishing whether or not, in accordance with the EU law applicable in Ireland in 1999, the slurry produced on Mr Brady’s farm should be classified as ‘waste’, in the light of Mr Brady’s wish to market it and thereby to convert it into a by-product.

50. Turning to the task of determining whether slurry is ‘waste’ within the meaning of Directive 75/442, I must begin by stating that I do not agree with the finding of the Supreme Court concerning the ‘absence of a definitive interpretation of the meaning of “waste” for the purposes of Union law’. Nor do I believe that the relevant case-law of the Court is contradictory or in any way perplexing. Rather, the difficulty is that the concept of ‘waste’ laid down in Directive 75/442 is in itself open or, to put it another way, ‘functional’ or ‘conditional’, in so far as it is essentially constructed around the criterion of the intended use of the objects, substances or products which, in principle, because they are of no use, harmful or prohibited, must be disposed of, and, furthermore, must be disposed of in such a manner that they are not harmful to the environment.

51. Accordingly, there is an objective dimension to the concept of ‘waste’, which does not raise any difficulty and is reflected in the list of products, objects and substances referred to in Annex I to Directive 75/442 as ‘Categories of waste’; there is also a dimension which, on initial consideration, can be described as ‘intentional’, which centres on the intention to use those products, objects and substances by trading in them under certain conditions, thereby excluding them from the obligation of disposal to which they would otherwise necessarily be subject.

52. The objective dimension of the concept is of itself sufficient for the purposes of classifying as ‘waste’ any of the objects, substances or products listed in Annex I to Directive 75/442. However, the ‘intention’ – borne out by a number of factual and legal circumstances – to use those objects, substances or products in trade means that they can no longer be classified as ‘waste’. That ‘intentional’ dimension of the concept is, ultimately, decisive for the purposes of acquiring the function of a by-product. In other words, the use to which the slurry – which is, objectively, ‘waste’ – is put may, in certain circumstances, convert it, functionally and legally, into a by-product which, as such, is not governed by the directive.

13 — Directive 2008/98/EEC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives (OJ 2008 L 312, p. 3).

53. The case-by-case nature of the rulings of the Court on this subject explains the differences that can be observed between the *Commission v Spain* judgments, on the one hand, and the *Commission v Italy* judgments, on the other. Those judgments all state that the concept of ‘waste’ turns on the meaning of the term ‘discard’¹⁴ and on the intention to market or exploit goods, materials or raw materials which could in principle be classified as waste.¹⁵ All those judgments also conclude that that intention must be demonstrated with certainty.¹⁶ The difference lies in the fact that, having applied the criteria concerned to each of the cases examined, the view of the Court on the certainty demonstrated was different in each case.

54. The reason for that difference clearly lies in the fact that the subject-matter of each case was very different. In *Commission v Spain*, the Court was required to rule on slurry generated by a particular farm, whereas *Commission v Italy* concerned the examination of national legislation on the environment.

55. That meant that, in *Commission v Spain*, the Court found that ‘it is clear from the contents of the case file that the slurry is used as an agricultural fertiliser ... spread for that purpose on clearly identified land [and] [i]t is stored in a pit awaiting spreading’,¹⁷ meaning that ‘[t]he person running the farm in question is not ... seeking to discard it, with the result that the slurry is not “waste” within the meaning of Directive 75/442’.¹⁸ This was clearly a judgment relating to a specific situation of which there was evidence in the case-file and to which the Court was able to apply directly the criteria laid down in its case-law concerning the conditions required for slurry to be regarded as a by-product and not as ‘waste’.

56. On the other hand, *Commission v Italy* fitted the mould of an abstract judgment on general provisions which the Court found established an unacceptable presumption, namely that, in certain situations, earth and rocks from excavations did not constitute waste but rather, by reason of their possible economic usefulness, a by-product.

57. To my mind, there is no contradiction at all between those judgments. In both, the Court took into account its case-law on the certainty required in relation to the intention to exploit commercially, under certain conditions, material which otherwise the holder could or would be obliged to discard; once it has been established, that intention converts the material concerned into a by-product. The difference is that, in *Commission v Spain*, it could be proved that, in that particular case, there was no intention to discard the slurry but rather to use it as fertiliser, while in *Commission v Italy*, it was held that the national legislation examined established a general presumption which made it impossible actually to establish an intention to market as a by-product material which, in principle, should be regarded as waste.

58. That being so, having dispelled any possible doubts as to the uniformity and consistency of the relevant case-law of the Court, it is now necessary to apply that case-law to the case under consideration.

59. In the present case, any difficulty inherent in the issue of whether or not slurry is objectively ‘waste’ can be avoided, since it is clear that it is. 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’. However, as far as slurry in particular is concerned, there is no need to check

14 — *Commission v Spain* (C-416/02), paragraph 86, and *Commission v Italy* (C-194/05), paragraph 32; both judgments cite Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26.

15 — *Commission v Spain* (C-416/02), paragraph 87, and *Commission v Italy* (C-194/05), paragraph 38; both judgments cite Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraphs 34 to 36.

16 — *Commission v Spain* (C-416/02), paragraph 90, and *Commission v Italy* (C-194/05), paragraph 46.

17 — *Commission v Spain* (C-416/02), paragraph 94.

18 — *Commission v Spain* (C-416/02), paragraph 94.

whether it is covered by the annex because Directive 75/442 itself explicitly attributes to it the status of ‘waste’, given that, under Article 2(1)(b) of the directive, the following are excluded from its scope ‘where they are already covered by other legislation: ... (iii) ... the following agricultural waste: faecal matter ...’ Clearly, the reason that the legislature considered it necessary expressly to exclude faecal matter from the scope of Directive 75/442 is because, otherwise, owing to the content and scheme of the directive, its inclusion in the scope of the directive as material which is, in itself, ‘waste’ was unavoidable.

60. In that connection, some aspects of the introductory question referred by the Supreme Court cease to be relevant because there is no need to examine whether slurry ‘is waste to be determined by objective criteria of the type referred to in the case-law of the Court of Justice’ (introductory question). Slurry is, objectively, waste because Directive 75/442 provides that it is.

61. Accordingly, the issue is not whether slurry is ‘waste’ but rather whether, in terms of function, it is possible for slurry to cease to be ‘waste’ and under what conditions. In other words, the question raised is whether, in terms of function, slurry can become a by-product.

62. For that to be possible, it is necessary, in accordance with the case-law of the Court, to establish that the holder ‘intends to exploit or market [the slurry] on terms advantageous to himself in a subsequent process – including, as the case may be, in order to meet the needs of economic operators other than the producer of those substances – provided that such re-use is a certainty, does not require any further processing prior to re-use and forms an integral part of the process of production or use’.¹⁹

63. While the decisive criterion for classifying a substance as ‘waste’ is, as we have seen, that of the intention or need to ‘discard’ that substance, the essential criterion for determining whether waste has become a by-product is the intention to re-use it by exploiting or marketing it.

64. That other intention, which is the one that is relevant here, clearly must relate to proper and appropriate use, in other words, use which satisfies the conditions laid down by the legislation applicable in each case to the exploitation of products which can be traded. In particular, use must be a certainty, as pointed out in the paragraph of *Commission v Italy* which I have just cited.

65. We thus arrive at the central point of this first question: in order for waste to be regarded as a by-product, who must establish the intention to re-use it, and with what degree of certainty?

66. In my opinion, the intention must be shown by the holder of the waste; and the degree of certainty with which it is shown must be sufficient to enable all reasonable doubt that the waste might be treated inappropriately or unlawfully to be ruled out.

67. As to the first point, it seems clear to me that the only person who can show that there is an intention to re-use the waste is the holder. The reason is obvious: it is a question of establishing an intention which can only be his. The truth of such a claim cannot lie in a mere assessment of intentions. If the holder of the slurry satisfies the conditions laid down by the State for the use of slurry as fertiliser, he will have established that his intention is not to discard waste but rather to market a by-product.

68. Accordingly, it is for the Member State to determine the conditions for the appropriate use of waste as a by-product. Furthermore, it is also for the Member State to decide what evidence is required in order for the person concerned to establish his intention. In that regard, the case-law of the Court relating to proof of the intention to discard waste is perfectly applicable. That is because, just as ‘[Directive 75/442] does not provide any single decisive criterion for discerning whether the

¹⁹ — *Commission v Italy* (C-194/05), paragraph 38.

holder intends to discard a given substance or object’,²⁰ nor does it do so for the case where there is an intention to reuse waste, so that, in this regard also, it is necessary to accept that ‘Member States are free, in the absence of Community provisions, to choose the modes of proof of the various matters defined in the directives which they are transposing, provided that the effectiveness of Community law is not thereby undermined’.²¹ That, moreover, is the approach provided for in Article 6(4) of Directive 2008/98 for cases where no criteria have been set at Community level for determining whether ‘waste’ has ceased to be ‘waste’.²²

69. As to the degree of certainty which may be required in respect of the intention, I believe – as I have stated – that the aim must be to exclude beyond all reasonable doubt any possibility that, owing to inappropriate treatment, the material which the holder purports to exploit as a by-product will ultimately be treated as waste which the holder discards in an improper manner.

70. Proof that the intention is a certainty necessarily requires a guarantee that the holder of the waste complies strictly with the conditions laid down for its use as a by-product. In other words, the intention of the holder to exploit waste commercially will be sufficiently demonstrated if he proves that he is in a position to do so in accordance with the legislation laid down for that purpose.

71. Those conditions must be such that, once compliance with them is ensured, it is possible to put aside all reasonable doubt concerning the ability of the holder to handle the waste safely while it is not put to the commercial use intended (in other words, while it continues to be waste), and concerning fulfilment of the obligations relating to such use.

72. To be specific, the conditions in question must be those which, as I have said, were subsequently laid down in Article 5 of Directive 2008/98, thereby giving formal expression to the relevant case-law of the Court, in other words, that: ‘further use of the substance or object is certain; the substance or object can be used directly without any further processing other than normal industrial practice; the substance or object is produced as an integral part of a production process; and further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts’.

73. As a first interim conclusion, I believe that it falls to the producer of slurry who wishes that slurry to cease being ‘waste’ within the meaning of the directive to prove his ‘intention’ to market the slurry as fertiliser and to do so with a degree of certainty sufficient to dispel all reasonable doubt that the slurry might be improperly used. In particular, that ‘intention’ will be established to the requisite degree of certainty if the conditions laid down in the legislation for the exploitation of slurry as fertiliser are fulfilled; it falls to the national court to determine whether those conditions are sufficient to ensure, beyond all reasonable doubt, that the use of fertiliser is exactly that – in other words, to ensure that it does not amount to the act of discarding waste.

74. That brings us to the second question referred by the Supreme Court, namely, the issue of the specific conditions imposed, in particular, the condition relating to liability for infringement of the legislation on the treatment and monitoring of waste; in other words, the legislation with which, ultimately, there must be compliance in order for slurry to cease being waste and become a by-product.

20 — *Commission v Italy* (C-194/05), paragraph 44.

21 — *Commission v Italy* (C-194/05), paragraph 44, which cites Joined Cases C-418/97 and C-419/97 *ARCO CEIME Nederland and Others* [2000] ECR I-4475, paragraph 41, and Case C-457/02 *Niselli* [2004] ECR I-10853, paragraph 34.

22 — In that connection, see Case C-358/11 *Lapin Luonnonsuojelupiiri* [2013] ECR, paragraphs 55 and 56.

75. However, as I pointed out in point 46 above, it is first necessary to identify exactly which legislation, through its infringement, gives rise to the system of liability called into question by the referring court.

C – Question 3

76. To my mind, Question 3 does not present serious difficulty.

77. Under Article 2(1)(b) of Directive 75/442, faecal matter is among the materials and substances excluded from the scope of that directive ‘where they are already covered by other legislation’.

78. It is therefore a question of identifying whether such ‘other legislation’ exists in the present case. In 1999, the Community legislation which might have fulfilled that role had not been implemented in Ireland, namely, Directive 91/676 on nitrates, which lays down an autonomous system for the treatment of waste; nor had Regulation No 1774/2002 on health rules concerning animal by-products yet been adopted. As the Supreme Court states, there was no national legislation capable of serving as such ‘other legislation’

79. Accordingly, the case before the referring court must be disposed of on the basis of Directive 75/442.

80. As Mr Brady has argued, the fact that Ireland had not transposed Directive 91/676 into national law certainly does not permit that Member State to rely on failure to fulfil its obligation to implement the directive as justification for the fact that the directive was not applied for the benefit of individuals. That being so, it is also the case that Article 2(1)(b) of Directive 75/442 refers to materials ‘covered by other legislation’, and that ‘cover’ must be understood as necessarily equivalent to the cover provided under Directive 75/442 both in terms of its extent and scope and as regards the level of protection guaranteed. To my mind, Directive 91/676 does not present the necessary equivalence with Directive 75/442 as regards the breadth of its scope, since – as the Commission has observed – whereas Directive 75/442 is applicable in the entirety of the territory of the Member States, Directive 91/676 is restricted to specified ‘vulnerable zones’ on which certain waters are situated or through which such waters flow. This is without prejudice to the considerations which I shall set out below in reply to the second question referred by the Supreme Court.

81. Accordingly, as an interim conclusion, I believe that, in the circumstances of the case, slurry does not *ab initio* fall outside the scope of Directive 75/442 – as Mr Brady claims – since there is no other legislation which is applicable to it.

D – Question 2

82. The referring court asks whether a Member State may make a producer of slurry liable for the use made of that slurry by third parties to whom he has disposed of it for use by them as fertiliser. This is, in fact, the central question in the present proceedings and, especially, in the main proceedings.

83. While the parties agree that Member States may establish systems which guarantee the environmentally safe treatment of slurry, the difficulty is whether they may do so in the terms laid down in the Irish legislation. The EPA seeks to place those terms in perspective, claiming that, rather than making the producer liable for the conduct of third parties, it is a question of compelling the producer to ensure that the slurry is used properly and to cease supplying slurry to those who use it inappropriately.

84. Construed as an obligation to refrain from supplying slurry as fertiliser to anyone who breaches the objective conditions which the producer is obliged to enforce, the latter's liability relates to his own acts and, therefore, any reservations arising as a result of the requirement of objective liability for the conduct of others are dispelled.

85. In the interests of clarity of expression, it is appropriate to reproduce again the conditions imposed by the EPA which are disputed in the main proceedings:

'(a) ... to identify in advance of the sale of any fertiliser all lands not in his possession, ownership or control, on which the fertiliser is to be used;

...

(c) to ensure that the purchaser of the fertiliser does not spread it on lands that are not in the purchaser's possession, ownership or control;

...

(f) to monitor the use of the fertiliser by persons who purchase it for use on their lands and to direct the manner in which it is to be used;

(g) to monitor surface waters that bisect areas on which the fertiliser is applied, i.e. at locations not under [Mr Brady's] control;

(h) to monitor wells located on lands on which the fertiliser is spread, i.e. on lands not under [Mr Brady's] control;

(i) to maintain at all times a register of use of the fertiliser for inspection by the EPA ...'

86. It seems to me that those conditions entail rather more than an obligation not to sell slurry to anyone who is not in a position to use it as fertiliser. Some of the conditions – points (c) and (f) – impose on the producer the obligation to monitor the conduct of a third party, while others – points (g) and (h) – require the producer to check physical features of the area where the slurry is applied, which is far from being a reasonable requirement.

87. To my mind, it is certainly appropriate to require a producer of slurry to sell it only to persons who satisfy certain objective conditions which are necessary to ensure that those persons will use the slurry appropriately, albeit provided that compliance with those conditions, however difficult they may be, can be established by the purchaser by means of a licence appropriately issued for that purpose by the competent authority. Otherwise, the requirement that a producer must monitor information and conduct which are beyond his reach amounts to rendering impossible the trade in slurry as fertiliser or, as the case may be, to permitting it only under the liability (it is of little importance whether such liability is civil, administrative or criminal) of the seller for the future conduct of a third party.

88. The first approach is not entirely consistent with the spirit of Directive 75/442 which, according to its interpretation in case-law, is aimed at securing the organisation of the trade in slurry in such a way that protection of the environment is guaranteed (in all cases in a reasonable and proportionate manner), rather than seeking the absolute prohibition of that trade. The alternative approach entails, with greater certainty, the breach of fundamental principles of the European Union and the infringement of certain rights guaranteed by it.

89. Those principles include the principle of legal certainty and the prohibition of arbitrariness on the part of public authorities, both of which are inherent in the rule of law, on the observance of which the European Union is founded (Article 2 TEU), since, ultimately, the grant of the licence required for the marketing of a product is subject to conditions which, because they are unreasonable, amount to a prohibition, but which thus lack the minimum clarity which must be required for the purposes of delimiting the scope of what is prohibited vis-à-vis what is regulated.

90. The rights concerned include, first, all the rights which form the mainspring for the principles of legality and of the proportionality of criminal offences and penalties, recognised in Article 49 of the Charter of Fundamental Rights of the European Union, since these are all based on the right of individuals to be liable solely for their own acts or for the acts of persons for whom they are legally responsible, which means that it is not possible to lay down conditions of the kind under examination here, which can be satisfied only at the risk of incurring liability for the conduct of a third party with whom a mere business relationship exists. Admittedly, the case-law accepts the possibility of liability for the actions of a third party in the case of an employer, where infringements are committed by his employees or persons reporting to him,²³ but the present case lacks the employer and employee relationship on which that case-law is based because between the producer of slurry and the person who purchases it for use as fertiliser there exists only a buying and selling relationship.

91. The rights concerned also include the right to property, since the Irish legislation lays down conditions for the marketing of slurry which present the producer with an unacceptable choice: either he disposes of the slurry and bears the ensuing financial cost, or he markets it and assumes a not insignificant risk of liability for third-party conduct, for which insurance cover might be possible, once again generating a cost which, quite conceivably, is not low. In both cases, it is clear that the producer's right to property is undermined through the imposition on him of economic burdens to the detriment of his finances, meaning that there is 'a disproportionate and intolerable interference' which impairs a fundamental right,²⁴ whereas the establishment of more reasonable conditions would have enabled the producer to secure an economic outlet for the slurry by dealing with it in such a way that it did not involve an expense for him in any event but rather, in certain conditions, allowed him to obtain a profit.

92. In short, the Irish legislation imposes on the producer of slurry unreasonable conditions for the re-use of slurry as fertiliser. It is disproportionate to require the checking of certain information about the conduct of a third party when, in fact, that information can be available only to the public authorities and when, in the absence of the information, the alternative is to assume personal liability for that conduct.

93. In that connection, I can only refer to the argument put forward by the EPA to the effect that the national legislation at issue does not seek to make the producer directly liable for the acts of a third party but rather to compel him to sell slurry only to persons who will use it correctly as fertiliser. Although – as is apparent from the reasoning of the High Court in paragraphs 38 to 43 of its judgment on appeal – that might be the spirit in which the national legislation is applied in practice, the fact is that, in the light of its wording, it is perfectly possible for the legislation to be applied in a different way which is more in keeping with the aim of a genuine requirement of personal liability for third-party conduct. Since the Court of Justice is required to have regard to the way in which the national provision is worded rather than to the possible ways in which it can be applied, I believe that it must consider the interpretation which spontaneously reflects the tenor of its formulation, especially since, in the present case, the meaning of the legislation concerned immediately evokes the idea of strict personal liability for the conduct of a third party.

23 — For example, Case C-326/88 *Hansen* [1990] ECR I-2911, paragraphs 16 to 20, which was recently referred to in Case C-210/10 *Urbán* [2012] ECR, paragraph 47.

24 — Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 68.

94. Certainly, it cannot be denied that such an approach objectively guarantees protection of the environment in absolute terms. However, it is unacceptable that this result is achieved by means of legislation which formally purports merely to make the trade in slurry a regulated activity, not to prohibit it.

95. Moreover, that reflects no regard for the fact that EU law does not require the use of slurry as fertiliser to be prohibited but rather, on the contrary, as is apparent from Directive 91/676, it provides for such use as a regulated activity. As was observed in point 80 above, Directive 91/676 – unlike Directive 75/442 – is not applicable to the entirety of the territory of the Member States and is instead confined to certain ‘vulnerable zones’. In any event, it cannot be ruled out that Mr Brady’s farm is situated in one of those ‘vulnerable zones’ and that, in consequence, Directive 91/676 and its conditions for the use of fertiliser were applicable to it. Accordingly, the legislative situation in Ireland at the material time is the result of the failure to transpose into national law a directive which, had it been properly implemented, would have covered Mr Brady’s activity and made it subject to more proportionate and reasonable conditions than those imposed under domestic law.

96. In any event, even if Directive 91/676 were not directly applicable to Mr Brady’s situation, the transposition of that directive into Irish law would have enabled the national courts to rely on legislation concerning fertiliser which was capable of being applied, on a broad interpretation, to facts which are substantively comparable to those contemplated in that directive.

97. Accordingly, as my final interim conclusion, I believe that it is not compatible with EU law for a Member State to require that a producer who sells slurry as fertiliser to a third party must be personally liable for compliance by that third party with the EU legislation on the monitoring of waste and/or fertiliser.

VII – Conclusion

98. In the light of the foregoing considerations, I propose to the Court that it reply as follows to the questions referred for a preliminary ruling:

- (1) It is for the producer of slurry to prove his intention to use it as fertiliser and to do so with a degree of certainty sufficient to dispel all reasonable doubt as to the risk of improper use. That intention will be established if the conditions laid down in the national legislation governing the exploitation of slurry as fertiliser are satisfied, and it is for the national court to determine whether those conditions are sufficient to ensure, beyond all reasonable doubt, that the use of the fertiliser does not amount to the act of discarding waste.
- (2) In the circumstances of the case, slurry does not fall outside the scope of Directive 75/442, since no other applicable legislation exists.
- (3) It is not compatible with European Union law for a Member State to make a producer of slurry liable for ensuring that a purchaser of the slurry complies with the conditions which guarantee that the use of slurry as fertiliser is not harmful to the environment, provided that the slurry ceases, in functional terms, to be ‘waste’ and is regarded as a ‘by-product’.