



Reports of Cases

Case C-113/12

Donal Brady

v

Environmental Protection Agency

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

(Environment — Directive 75/442/EEC — Slurry produced in a piggery and stored there pending its transfer to farmers who use it as fertiliser on their land — Classification as ‘waste’ or ‘by-product’ — Conditions — Burden of proof — Directive 91/676/EEC — Failure to transpose — Personal liability of the producer as to compliance by those farmers with EU law concerning the management of waste and fertilisers)

Summary — Judgment of the Court (Fourth Chamber), 3 October 2013

1. *Environment — Waste — Directive 75/442 — Concept of waste — Substance which is discarded — Criteria for assessment*

(Art. 174(2) EC; Council Directive 75/442, Art. 1(a))

2. *Environment — Waste — Directive 75/442 — Concept of waste — Substance which is discarded — Livestock effluent — Exclusion — Conditions*

(Council Directive 75/442, Art. 1(a))

3. *Environment — Waste — Directive 75/442 — Concept of waste — Substance which is discarded — Livestock effluent — Exclusion — Scope*

(Council Directive 75/442, Art. 1(a), (b) and (c))

4. *Environment — Waste — Directive 75/442 — Concept of waste — Substance which is discarded — Livestock effluent — Exclusion — Burden of proof*

(Council Directive 75/442, Art. 1(a))

5. *Environment — Waste — Directive 75/442 — ‘Other legislation’ within the meaning of Article 2(1)(b) — Directive not transposed into national law — Not included*

(Council Directives 75/442, Art. 2(1)(b)(iii), and 91/676)

6. *Environment — Waste — Directive 75/442 — Obligations owed by the Member States in respect of holders of waste — Obligation on operators to have obtained a permit or to be exempt from the requirement for a permit prior to any waste disposal or waste recovery operations — Scope — Liability for compliance with EU law concerning the management of waste and fertilisers*

(Council Directive 75/442, Arts 1(a), 8, 10 and 11)

1. See the text of the decision.

(see paras 38-42, 44, 49)

2. The first subparagraph of Article 1(a) of Directive 75/442 on waste, as amended by Decision 96/350, must be interpreted as meaning that slurry produced in an intensive pig farm and stored pending delivery to farmers in order to be used by them as fertiliser on their land constitutes not waste within the meaning of that provision but a by-product when that producer intends to market the slurry on terms economically advantageous to himself in a subsequent process, provided that such reuse is not a mere possibility but a certainty, without any further processing prior to reuse and as part of the continuing process of production.

For the purpose of determining whether the reuse of the slurry through spreading by other farmers is sufficiently certain to justify its storage for a period other than that necessary for its collection with a view to disposal, it should be checked, in particular, that the plots of land of those farmers on which that reuse is to take place are, from the outset, clearly identified.

It is also important that the actual storage of the slurry be strictly limited to the needs of the spreading operations envisaged, which means, first, that the quantities stored must be limited in such a way that they are, in their entirety, indeed intended to be so reused and, second, that the period of storage must be limited in the light of the requirements resulting in this regard from the seasonal nature of the spreading operations.

In this connection, it is incumbent, in particular, upon the national courts to satisfy themselves that the storage facilities which the producer of the slurry uses are designed so as to prevent any run-off of that substance or seepage into the soil, and that they provide sufficient capacity to store the slurry produced pending its actual handing over to the farmers concerned.

Furthermore, the reuse of the slurry by the third parties concerned, as programmed by the producer, must be such as to confer upon him an advantage over and above merely being able to discard that product, since such a circumstance, when established, indeed increases the likelihood of actual reuse.

(see paras 52, 55-57, 60, operative part 1)

3. The conclusion that reuse of the slurry is, in a given situation, sufficiently certain for it to be considered a by-product while stored by the holder and until it is actually delivered to the relevant third parties does not at all affect the fact that that slurry may, in some circumstances, become waste after its delivery, in particular if it were to become apparent that it is ultimately discharged by those third parties into the environment in an uncontrolled manner, in conditions which enable it to be regarded as waste.

In such a case, account should be taken of the fact that the person who is in fact in possession of products immediately before they become waste must be regarded as having produced that waste within the meaning of Article 1(b) of Directive 75/442 on waste, as amended by Decision 96/350, and thus be categorised as its holder within the meaning of Article 1(c) of that directive.

(see paras 50, 51)

4. EU law does not preclude the burden of proving that the criteria for finding that a substance such as slurry produced and stored pending delivery to farmers in order to be used by them as fertiliser on their land constitutes a by-product are met from resting on the producer of that slurry, provided that this does not result in the effectiveness of EU law, and in particular of Directive 75/442 on waste, as amended by Decision 96/350, being undermined and that compliance with the obligations flowing from EU law is ensured, in particular the obligation not to make subject to the provisions of that directive substances which, on application of those criteria, must be regarded as by-products to which the directive does not apply.

Directive 75/442 does not contain specific provisions relating to the question of determining the person upon whom rests the burden of proof as to fulfilment of the criteria entailing a finding that a substance must be classified as a by-product and not as waste within the meaning of that directive. Accordingly, the national court is to apply in this regard the provisions of its own legal system provided that, in so doing, the effectiveness of EU law and in particular of Directive 75/442 is not undermined and compliance with the obligations flowing from EU law is ensured. It follows, in particular, that such national rules relating to the burden of proof cannot result in it being excessively difficult to prove that substances must, on application of those criteria, be regarded as by-products.

(see para 61, 62, 65, operative part 2)

5. Article 2(1)(b)(iii) of Directive 75/442 on waste, as amended by Decision 96/350, must be interpreted as meaning that, where Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources has not been transposed into the law of a Member State, livestock effluent produced while operating a pig farm located in that Member State cannot be considered to be, by virtue of the existence of the latter directive, covered by other legislation within the meaning of that provision.

In order for Community or national legislation to be regarded as ‘other legislation’ within the meaning of Article 2(1)(b)(iii) of Directive 75/442, it must contain precise provisions organising management of the waste in question and result in a level of protection of the environment which is at least equivalent to that resulting from that directive.

Where a Member State has not adopted the measures necessary to implement Directive 91/676, the latter cannot in any event be considered to result in a level of protection of the environment which is at least equivalent to that sought by Directive 75/442, since that failure to transpose means, on the contrary, that, if management of the livestock effluent in question were not subject to Directive 75/442, it would not be subject to any other legislation.

(see paras 67, 69, 70, operative part 3)

6. In a situation where slurry produced and held by a pig farm is to be classified as waste within the meaning of the first subparagraph of Article 1(a) of Directive 75/442 on waste, as amended by Decision 96/350:

- Article 8 of that directive must be interpreted as precluding the holder from being authorised, under any conditions, to transfer that waste to a farmer who uses it as fertiliser on his land if it transpires that that farmer neither possesses the permit referred to in Article 10 of the directive nor is exempted from the requirement to possess such a permit and registered in accordance with Article 11 of the directive; and
- Articles 8, 10 and 11 of the directive, read together, must be interpreted as precluding the transfer of that waste by the holder to a farmer who uses it as fertiliser on his land, and who possesses a permit as referred to in Article 10 or is exempted from the requirement to possess such a permit and is

registered in accordance with Article 11, from being subject to the condition that the holder assumes liability for compliance by that other farmer with the rules that are to apply to the recovery operations carried out by the latter by virtue of EU law concerning the management of waste and fertilisers.

Where a holder of waste has it handled by an undertaking which possesses a permit or is exempted from the requirement for a permit in order to recover that waste, it is exclusively that undertaking, having become the holder of the waste in question, and not the earlier holder of the waste, that is responsible for carrying out the recovery operations while complying, in this regard, with all the conditions to which those operations are subject under the applicable legislation.

(see paras 81-83, operative part 4)