Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 October 2013 *

(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 European Union law concerning the management of waste and fertilisers)

In Case C-113/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 23 February 2012, received at the Court on 1 March 2012, in the proceedings

Donal Brady

v

Environmental Protection Agency,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 February 2013,

after considering the observations submitted on behalf of:

— Mr Brady, by A. Collins SC and D. Gearty, Solicitor,

— the Environmental Protection Agency, by A. Doyle, Solicitor, N. Butler SC and S. Murray BL,

— the French Government, by G. de Bergues and S. Menez, acting as Agents,

— the European Commission, by K. Mifsud-Bonnici, D. Düsterhaus and A. Alcover San Pedro, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013,

* Language of the case: English.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32) ('Directive 75/442').

2 The request has been made in proceedings between Mr Brady and the Environmental Protection Agency ('the EPA') concerning certain conditions attached to a licence to increase the size of a piggery issued by that authority to Mr Brady.

Legal context

European Union law

Directive 75/442

3 Directive 75/442 was repealed and replaced by Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9), which was itself subsequently repealed and replaced by Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3). However, in view of the date on which the licence at issue in the dispute in the main proceedings was issued, that dispute remains governed by Directive 75/442.

4 The first subparagraph of Article 1(a) of Directive 75/442 stated:

'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.'

5 The second subparagraph of Article 1(a) of Directive 75/442 entrusted the Commission of the European Communities with the task of drawing up 'a list of wastes belonging to the categories listed in Annex I'. In Decision 94/3/EC of 20 December 1993 (OJ 1994 L 5, p. 15), the Commission drew up such a list ('the European Waste Catalogue'), which includes, among 'waste resulting from agricultural … primary production', 'animal faeces, urine and manure (including spoiled straw), effluent, collected separately and treated off-site'.

6 Article 1(b) and (c) of Directive 75/442 contained the following definitions:

'(b) "producer" shall mean anyone whose activities produce waste …

(c) "holder" shall mean the producer of the waste or the natural or legal person who is in possession of it'.

7 Article 2(1)(b)(iii) of Directive 75/442 stated:

'The following shall be excluded from the scope of this Directive:

…

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

…

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

8 Article 4 of Directive 75/442 provided:

'Member States shall 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,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.'

9 Article 8 of Directive 75/442 provided:

'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.'

10 Article 10 of Directive 75/442 stated that any establishment or undertaking which carried out waste recovery operations listed in Annex II B had to obtain a permit from the competent authority.

11 The operations listed in Annex II B included, numbered R 10, '[l]and treatment resulting in benefit to agriculture or ecological improvement'.

12 Article 11(1) and (2) of Directive 75/442 stated:

'1. … the following may be exempted from the permit requirement imposed in … Article 10:

…

(b) establishments or undertakings that carry out waste recovery.

This exemption may apply only:

— if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirements,

and

— if the types or quantities of waste and methods of … recovery are such that the conditions imposed in Article 4 are complied with.

2. The establishments or undertakings referred to in paragraph 1 shall be registered with the competent authorities.'

Directive 91/676/EEC

13 The sixth recital in the preamble to 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) states:

'…it is … necessary, in order to protect human health and living resources and aquatic ecosystems and to safeguard other legitimate uses of water, to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent further such pollution; … for this purpose it is important to take measures concerning the storage and the application on land of all nitrogen compounds and concerning certain land management practices'.

14 As set out in 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 … 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. …'.

15 Article 4(1)(a) of Directive 91/676 sets out, with the aim of providing a general level of protection against pollution for all waters, that Member States are to 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 to the directive. The items set out in Annex II A relate in particular to periods when the land application of fertiliser is inappropriate, land application in the light of the nature and the state of the ground, the conditions for land application in the light of proximity to watercourses, the capacity and construction of storage vessels for livestock manure, and procedures for land application.

16 Under Article 5(1) and (4) of Directive 91/676, the Member States are obliged to establish action programmes in respect of designated vulnerable zones, which have to contain the measures referred to in Annex III and the measures prescribed in the code(s) of good agricultural practice except those which have been superseded by the measures in Annex III. The measures referred to in Annex III must, as is clear from that annex, include rules relating, in particular, to periods when the land application of certain types of fertiliser is prohibited, the capacity of storage vessels for livestock manure, limitation of the land application of fertilisers so as to ensure a balanced presence of nitrogen in the soil, and maximum quantities of manure that can be applied to the land on the basis of the manure's nitrogen content.

Irish law

17 The Waste Management Act, 1996 ('the 1996 Act'), was adopted for the purpose of transposing Directive 75/442 into national law. Section 4(1) of the 1996 Act provides:

'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.'

18 Section 51(2)(a) of the 1996 Act states:

'Subject to paragraph (b), a waste licence … shall not be required for the recovery of–

...

(iii) faecal matter of animal or poultry origin in the form of manure or slurry …'.

19 Section 52 of the Environmental Protection Agency Act, 1992 ('the 1992 Act'), states:

'(1) The functions of the [EPA] shall … include–

(a) the licensing, regulation and control of activities for the purposes of environmental protection,

…

(2) In carrying out its functions, the [EPA] shall–

…

(b) have regard to the need for a high standard of environmental protection and the need to promote sustainable and environmentally sound development, processes or operations,

…'

20 The referring court explains that, although the 1992 Act established a licensing scheme which has certain similarities with that envisaged by Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), that directive was not transposed into Irish law until 2003, and therefore the licence at issue in the main proceedings was not granted pursuant to measures of national law adopted to implement that directive.

21 The referring court also points out that, on the date on which that licence was granted, Directive 96/676 had not yet been transposed into Irish law and no other domestic legislation controlled the use of animal fertiliser on agricultural land.

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 Mr Brady operates an intensive pig farm having about 2 000 sows.

23 On 9 March 1998, Mr Brady applied for a licence to extend his farm, stating in the application that he had constructed tanks on his land of a capacity to store the equivalent of the farm's annual output of slurry and that he had entered into agreements with various farmers under which they undertook to purchase slurry for use as fertiliser on their land.

24 The licence that the EPA granted to Mr Brady, by decision of 22 October 1999, provides, in particular, that he is required to ensure that the farmers to whom he supplies slurry use it in strict accordance with the conditions set out in the licence.

25 In support of the action which he brought before the High Court against that decision, Mr Brady submitted, first, that the slurry at issue in the main proceedings is not 'waste' within the meaning of Directive 75/442 and the 1996 Act, but a by-product of his farm which he sells as fertiliser, so that the EPA did not have, on the basis of the 1992 Act, the power to regulate the disposal or the recovery of that slurry in the manner laid down in the contested licence.

26 Second, in Mr Brady's submission the EPA is not justified in imposing upon him, the obligation – enforceable by criminal sanction and impossible to satisfy – of controlling how the slurry he sells to other farmers is used by them, in particular as the European Union has enacted specific legislation intended to apply to the spreading of livestock effluent as fertiliser, namely Directive 91/676.

27 In this connection, the referring court states that Mr Brady contended in support of his action that the effect of the waste management conditions in the contested licence is to impose upon him, inter alia, the following obligations:

'…

(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;

(d) to ensure that none of [Mr Brady's] fertiliser is provided to lands that receive waste for landspreading from any other off-farm source which is not included in the Nutrient Management Plan, other than by agreement with the [EPA];

(e) to agree in advance a Nutrient Management Plan in respect of lands not owned by [Mr Brady] and farmed by persons not under his 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 and for the … purpose of submitting monthly reports to the EPA. The register must consist of fertiliser spreading: the name of the person who carries it out: weather and ground conditions at the time, and the weather forecast for the following 24 hours: the nutrient requirements for individual plots: and the volume of fertiliser applied to those plots.'

28 Following the dismissal of his action by the High Court, Mr Brady appealed to the Supreme Court. He relies in support of his appeal upon two grounds, alleging, first, that the High Court erred in law in classifying the slurry produced on his farm as waste and, second, that if that slurry should indeed be classified as waste, the EPA is not justified in imposing, as part of the licence which it has granted to him, conditions requiring him to control spreading activities carried out by third parties on land owned by them and to be liable for those activities.

29 The Supreme Court considers that, although the judgments in Case C-416/02 *Commission* v *Spain* [2005] ECR I-7487; Case C-121/03 *Commission* v *Spain* [2005] ECR I-7569; Case C-194/05 *Commission* v *Italy* [2007] ECR I-11661; Case C-195/05 *Commission* v *Italy* [2007] ECR I-11699; and Case C-263/05 *Commission* v *Italy* [2007] ECR I-11745 contain various useful pointers in this regard, uncertainty remains as to whether the slurry at issue in the main proceedings must be classified as waste.

30 Observing that it follows in particular from that case-law that slurry remains waste if it is required to remain in long-term storage giving rise to a risk of pollution of the type intended to be prevented by the requirements of European Union law, the referring court raises in particular the question of the criteria for determining whether such a situation arises in the dispute before it.

31 It observes in this regard, first, that, bearing in mind that the sale of fertiliser is a seasonal undertaking, it is inevitable that the substantial volume of slurry generated by the activities of the appellant in the main proceedings will give rise to long-term storage, which should not, however, normally exceed the period of 12 months between two spreading seasons. It points out, second, that it has no material before it indicating whether the mere existence of this type of long-term storage in tanks authorised for that purpose does, or is likely to, lead to pollution.

32 Furthermore, on the assumption that the slurry at issue in the main proceedings is to be regarded as waste, the question then arises whether European Union law permits the EPA to attach to an operating licence conditions the effect of which is to continue to impose on Mr Brady obligations as to the eventual subsequent use of his slurry by other farmers or whether liability for such use must rest with those farmers.

33 It was in those circumstances that the Supreme Court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘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 reuse 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(l)(b)(iii) of Directive [75/442], by reason of its being “already covered by other legislation”, and in particular by [Directive 91/676], in circumstances where, at the time the licence was granted, Ireland had not transposed [Directive 91/676], no other domestic legislation controlled the application of pig slurry to land as fertiliser, and [Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ 2002 L 273, p. 1)] had not then been adopted?’

Consideration of the questions referred

Question 1

34 By its introductory question and Question 1, which it is appropriate to deal with together, the referring court seeks, in essence, to ascertain, first, under what conditions slurry produced in an intensive pig farm and stored pending its transfer to farmers in order to be used by them as fertiliser on their land may be classified as a by-product and consequently cease to be regarded as 'waste' within the meaning of Directive 75/442 and, in particular, what level of certainty is required as regards the reuse of the slurry envisaged. Second, the referring court wishes to ascertain to what extent the burden of proving that those conditions are satisfied can rest on the producer of that slurry.

The first part of Question 1

35 As regards the circumstances in which pig slurry stored by a producer pending its transfer to farmers in order to be used by them as fertiliser on their land must be classified as a by-product rather than as 'waste' within the meaning of Directive 75/442, it should be recalled that the first subparagraph of Article 1(a) of that directive defines waste as 'any substance or object in the categories set out in Annex I which the holder discards or intends … to discard'.

36 Both Annex I to Directive 75/442 and the list of wastes that is included in the European Waste Catalogue adopted on the basis of the second subparagraph of Article 1(a) of that directive are intended only as guidance (see, in particular, the judgment of 29 October 2009 in Case C-188/08 *Commission* v *Ireland*, paragraph 33 and the case-law cited).

37 Therefore, the fact that the European Waste Catalogue refers to 'animal faeces, urine and manure (including spoiled straw), effluent, collected separately and treated off-site' is not decisive for the purpose of assessing the concept of waste. That general mention of livestock effluent does not take into account the conditions in which the effluent is used and which are decisive for the purposes of such an assessment (see, to this effect, Case C-121/03 *Commission* v *Spain*, paragraph 66).

38 According to settled-case-law, classification as 'waste', within the meaning of Directive 75/442, is to be inferred primarily from the holder's actions and the meaning of the term 'discard', referred to in the first subparagraph of Article 1(a) of the directive (see, inter alia, Case C-194/05 *Commission* v *Italy*, paragraph 32, and Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 53).

39 The term 'discard' must be interpreted in the light not only of the essential objective of Directive 75/442, which, according to the third recital in the preamble thereto, is 'the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste', but also of Article 174(2) EC. That provision states that 'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken …'. It follows that the term 'discard' and, accordingly, the concept of 'waste' within the meaning of that directive cannot be interpreted restrictively (see, inter alia, Case C-194/05 *Commission* v *Italy*, paragraph 33 and the case-law cited, and *Commune de Mesquer*, paragraphs 38 and 39).

40 The Court has held in particular that among the circumstances that 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, is the fact that a substance is a production or consumption residue, that is to say, a product which was not itself sought (see, inter alia, Case C-194/05 *Commission* v *Italy*, paragraph 34 and the case-law cited, and *Commune de Mesquer*, paragraph 41).

41 Such evidence may likewise be constituted by the fact that the substance in question is a production residue for which special precautions must be taken if it is used owing to the environmentally hazardous nature of its composition (see Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraph 87, and Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraph 43).

42 It is also clear from the case-law that neither the method of treatment reserved for a substance nor the use to which that substance is put determines conclusively whether or not the substance is to be classified as waste and that the concept of waste does not exclude substances and objects which are capable of economic reuse. The system of supervision and control established by Directive 75/442 is intended to cover all objects and substances discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or reuse (Case C-194/05 *Commission* v *Italy*, paragraphs 36 and 37, and *Commune de Mesquer*, paragraph 40).

43 In light of the guidance provided by the case-law as set out above, it must be held that effluent generated by an intensive pig farm, which is not the product primarily sought by the farmer and any recovery of which by spreading as fertiliser must, as is apparent in particular from the sixth recital in the preamble to Directive 91/676 and the mechanism established by that directive, involve the taking of special precautions owing to the potentially hazardous nature of its composition from an environmental point of view, is, in principle, waste (see, by analogy, Case C-194/05 *Commission* v *Italy*, paragraph 35 and the case-law cited, and *Commune de Mesquer*, paragraph 41).

44 However, it is also clear from the case-law of the Court that, in certain situations, goods, materials or raw materials resulting from an extraction or manufacturing process the primary aim of which is not their production may be regarded not as a residue, but as by-products, which their holder does not seek to 'discard', within the meaning of the first subparagraph of Article 1(a) of Directive 75/442, but which he intends to exploit or market 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 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 (see, inter alia, Case C-121/03 *Commission* v *Spain*, paragraph 58; Case C-194/05 *Commission* v *Italy*, paragraph 38; and *Commune de Mesquer*, paragraph 42).

45 As regards, more specifically, livestock effluent such as that at issue here, the Court has already held that it may fall outside classification as waste if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations (Case C-121/03 *Commission* v *Spain*, paragraph 60).

46 The Court has also stated that it is not appropriate to limit that analysis to livestock effluent used as fertiliser on land forming part of the same agricultural holding as that which generated the effluent. It is possible for a substance not to be regarded as 'waste' within the meaning of Directive 75/442 if it is certain to be used to meet the needs of economic operators other than the operator which produced it (Case C-121/03 *Commission* v *Spain*, paragraph 61).

47 It is for the national courts, taking account of the guidance provided by the Court's case-law and of all the circumstances of the situation on which they have to give judgment, to determine whether a by-product actually exists, while ensuring in this regard that classification as a by-product is limited to the situations that fulfil the conditions recalled in paragraph 44 of the present judgment.

48 So far as concerns determining that the reuse of the slurry stored pending spreading is sufficiently certain, it is to be pointed out first of all that, as follows from the case-law recalled in paragraphs 45 and 46 of the present judgment, the mere fact that such reuse will not, as a matter of fact, become absolutely certain until the spreading operations envisaged have in fact taken place through action by the third-party purchasers concerned does not preclude classification as a by-product.

49 What subsequently happens to an object or a substance is not in itself determinative of its nature as waste, which, in accordance with Article 1(a) of Directive 75/442, is established on the basis of whether the holder of that object or substance discards it or intends or is required to discard it (Case C-194/05 *Commission* v *Italy*, paragraphs 49 and 50 and the case-law cited).

50 It should indeed be pointed out in this regard that, if the referring court were to come to the conclusion that the reuse of the slurry envisaged by Mr Brady is, in this instance, sufficiently certain for the slurry to be considered, while stored by him and until it is actually delivered to the relevant third parties, a by-product which the person concerned seeks not to 'discard' within the meaning of the first subparagraph of Article 1(a) of Directive 75/442 but to exploit or market, that would 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 (see, to this effect, Case C-416/02 *Commission* v *Spain*, paragraph 96).

51 In such a case, account should be taken of the fact that, according to the Court's case-law, 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 and thus be categorised as its 'holder' within the meaning of Article 1(c) of that directive (see, in particular, *Commune de Mesquer*, paragraph 74).

52 For the purpose of determining whether the reuse of the slurry through spreading by other farmers, as envisaged by the appellant in the main proceedings, is sufficiently certain to justify its storage for a period other than that necessary for its collection with a view to disposal, it is incumbent, on the other hand, on the referring court, as is apparent from the case-law recalled in paragraph 45 of the present judgment, to satisfy itself, in particular, that the plots of land of those farmers on which that reuse is to take place are, from the outset, clearly identified. Such identification is capable of showing that the quantities of slurry to be delivered are in principle actually intended to be used for the purpose of fertilising the plots of land of the farmers concerned.

53 Therefore, if the producer of the slurry wishes to store it for a longer period than that necessary for its collection with a view to disposal, he must have firm commitments from operators to take delivery of the slurry for the purpose of using it as fertiliser on duly identified plots of land.

54 As to the condition, also recalled in paragraph 45 of the present judgment, that the storage of the livestock effluent must be limited to the needs of the spreading operations, it should be noted that this condition is explained, in particular, by the fact that storage operations with a view to reuse of a substance may, in light of their duration, constitute a burden for the holder and be potentially the cause of precisely the environmental pollution which Directive 75/442 seeks to limit (see, to this effect, Case C-194/05 *Commission* v *Italy*, paragraph 40).

55 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.

56 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 (see, to this effect, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, paragraph 40) 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, that is to say, it must not exceed what is required in order for the producer to be able to meet his existing contractual commitments to deliver slurry for spreading purposes during the spreading season in progress and the coming one.

57 Furthermore, it is likewise for the national courts to determine, having regard to all the relevant circumstances, that the reuse of the slurry by the third parties concerned, as programmed by the producer, is 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, to this effect, Case C-194/05 *Commission* v *Italy*, paragraph 52, and *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, paragraph 37).

58 As is apparent from the case-law recalled in paragraph 44 of the present judgment, the slurry at issue in the main proceedings can in fact be considered to have economically the value of a product only if the view can be taken that that slurry is indeed intended to be actually exploited or marketed on terms economically advantageous to its holder.

59 The relevant circumstances liable to require being taken into account by the national courts for the purpose of determining whether the aforesaid requirements are met include the circumstance that the substances concerned are the subject of actual commercial transactions and meet the buyers' specifications (see, to this effect, *Commune de Mesquer*, paragraph 47). Thus, it may be pertinent, in this connection, to examine the conditions, in particular the financial conditions, under which the transactions between the producer and the purchasers of the slurry take place. The same applies to the burdens, in particular those linked to storage of the substances concerned, which are brought about for the holder by the reuse of those substances, since such burdens must not prove excessive for him (see, to this effect, *Commune de Mesquer*, paragraph 59).

60 In light of all the foregoing, the answer to the first part of Question 1 is that the first subparagraph of Article 1(a) of Directive 75/442 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. It is for the national courts to determine, taking account of all the relevant circumstances obtaining in the situations before them, whether those various criteria are satisfied.

The second part of Question 1

61 So far as concerns determination of the person upon whom rests the burden of proof as to fulfilment of the criteria entailing, in accordance with the Court's case-law recalled in paragraph 44 of the present judgment, a finding that a substance must be classified as a by-product and not as 'waste' within the meaning of Directive 75/442, it must be pointed out that the directive does not contain specific provisions relating to this question. 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 European Union law and in particular of Directive 75/442 is not undermined and compliance with the obligations flowing from European Union law is ensured (see, to this effect, *ARCO Chemie Nederland and Others*, paragraph 70, and Case C-194/05 *Commission* v *Italy*, paragraphs 44, 52 and 53).

62 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 the criteria resulting from that case-law, be regarded as by-products.

63 Subject to this reservation, it should be recalled that the Court has already held that leftover rock and sand residue from ore-dressing operations in the working of a mine which their holder uses lawfully for the necessary filling-in of the galleries of that mine are not classified as 'waste' for the purposes of

Directive 75/442 where that holder provides sufficient guarantees as to the identification and actual use of those substances, and that it has, moreover, stated that such case-law can be applied to livestock effluent (see Case C-121/03 *Commission* v *Spain*, paragraphs 59 and 60 and the case-law cited).

64 As the Advocate General has observed in point 67 of his Opinion, it is indeed clear that as a general rule, since establishing an intention is involved, only the holder of the products can prove that he intends not to discard those products but to permit their reuse in circumstances that are appropriate for their being classified as a by-product within the meaning of the Court's case-law.

65 In light of the foregoing, the answer to the second part of Question 1 is that European Union law does not preclude the burden of proving that the criteria for finding that a substance such as the slurry produced, stored and transferred in circumstances such as those of the main proceedings constitutes a by-product are met from resting on the producer of that slurry, provided that this does not result in the effectiveness of European Union law, and in particular of Directive 75/442, being undermined and that compliance with the obligations flowing from European Union 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, under the Court's case-law, be regarded as by-products to which the directive does not apply.

Question 3

66 By Question 3 which it is appropriate to deal with second, the referring court seeks to ascertain, in essence, whether Article 2(1)(b)(iii) of Directive 75/442 must be interpreted as meaning that livestock effluent produced while operating a pig farm located in a Member State is 'covered by other legislation' within the meaning of that provision and, therefore, excluded from the scope of Directive 75/442 by virtue of the existence of Directive 91/676 where the latter directive has not yet been transposed into the law of that Member State.

67 It is settled case-law that, 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 (see, in particular, Case C-121/03 *Commission* v *Spain*, paragraph 69 and the case-law cited, and Case C-252/05 *Thames Water Utilities* [2007] ECR I-3883, paragraph 34).

68 The Court has also explained that, whilst the European Union legislature thus adopted a rule that, in the absence of specific Community legislation and, alternatively, specific national legislation, Directive 75/442 applies, that was in order to avoid the management of that waste not being subject to any legislation in certain situations (see Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, paragraph 50).

69 Without there being any need, in the present case, to rule on whether a directive, such as Directive 91/676, if it were transposed into national law, would have to be regarded as 'other legislation' within the meaning of Article 2(1)(b) of Directive 75/442, it need merely be observed that, where a Member State has not adopted the measures necessary to implement the aforesaid directive, 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 at issue in the main proceedings were not subject to Directive 75/442, it would not be subject to any other legislation.

70 It follows that the answer to Question 3 is that Article 2(1)(b)(iii) of Directive 75/442 must be interpreted as meaning that, where Directive 91/676 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.

Question 2

71 By Question 2, the referring court seeks, in essence, to ascertain whether, in a situation where slurry produced and held by a pig farm is to be classified as 'waste' within the meaning of Directive 75/442, European Union law precludes a Member State from rendering a producer who transfers the slurry to other farmers for use as fertiliser on their land personally liable for compliance by those farmers with European Union legislation concerning the management of waste and fertilisers.

72 First of all, it should be noted that, as is clear from the very wording of this question and for the reasons that are apparent from the order for reference, the question is asked only if the livestock effluent at issue in the main proceedings should be classified as 'waste' within the meaning of the first subparagraph of Article 1(a) of Directive 75/442.

73 In this regard, it is to be observed at the outset that – in the light, in particular, of the answer to Question 3 – if that proves to be the case the provisions of Directive 75/442 must apply in respect of a situation such as that at issue in the main proceedings.

74 Under Article 8 of Directive 75/442, the Member States must ensure that 'any holder of waste' either recovers or disposes of waste himself in accordance with the provisions of that directive or 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 to the directive. Such obligations imposed upon any holder of waste are the corollary to the prohibition on the abandonment, dumping or uncontrolled disposal of waste laid down in Article 4 of the directive (see, in particular, Case C-1/03 *Van de Walle and Others* [2004] ECR I-7613, paragraph 56).

75 Here, it is not in dispute that the appellant in the main proceedings, who does not seek in the slightest to recover, or dispose of, himself the waste that he may have produced, is, as 'holder' of that waste and in accordance with the first indent of Article 8 of Directive 75/442, required to have 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 to the directive.

76 It must be stated in this regard, first, that it cannot be inferred from the information in the order for reference that the farmers to whom Mr Brady intends to pass his slurry can be regarded as entitled to carry out recovery operations for the purposes of Article 8 of Directive 75/442.

77 There is nothing to indicate that those farmers would possess the permit required under Article 10 of Directive 75/442 for the purpose of carrying out such recovery operations. Nor can it be inferred from the information submitted to the Court that the farmers would be exempted from the requirement for such a permit in compliance with the conditions laid down, in this regard, by Article 11 of the directive.

78 If it were to be confirmed – a matter which it is, if necessary, for the referring court to determine – that the farmers to whom Mr Brady intends to transfer the waste of which he is the holder neither possess the permit required in Article 10 of Directive 75/442 nor are exempted from that requirement, in accordance with the conditions laid down in Article 11(1) and (2) of the directive, it would follow that Article 8 of the directive precludes the transfers thereby envisaged and, therefore,

precludes those transfers from being the subject-matter of any authorisation issued by an authority such as the EPA irrespective, moreover, of the conditions that would be imposed on issue of that authorisation.

79 Second, it must be added that, if it should be found that the farmers concerned do possess the permit required under Article 10 of Directive 75/442 or are duly exempted from such a requirement and registered in accordance with Article 11(1) and (2) of the directive, the handing over of the waste at issue by Mr Brady to such farmers cannot be subject to conditions in his regard intended to impose liability upon him for compliance by them with European Union legislation concerning the management of waste and fertilisers.

80 In this connection it should be noted, first of all, that once a holder of waste has it handled under Article 8 of Directive 75/442, the undertaking that possesses a permit pursuant to Article 10 of the directive or is exempted from the requirement for such a permit in accordance with Article 11 becomes the 'holder' of the waste in question. It follows from the very wording of Article 8 of Directive 75/442 that it is the 'holder of waste' who has the task, as the case may be, of recovering such waste in accordance with the provisions of the directive.

81 Next, it follows from Article 8 in conjunction with Article 10 of Directive 75/442 and from the broad logic of those provisions that, where a holder of waste has it handled by an undertaking which possesses a permit issued under the second of those provisions authorising it to recover that waste, it is exclusively that undertaking, 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 both the applicable legislation and the terms of the permit.

82 Finally, it can likewise be inferred from Article 8 in conjunction with Article 11 of Directive 75/442 and from their broad logic that, where a holder of waste has it handled by an undertaking which is exempted, in accordance with Article 11, from the requirement for a permit in order to recover that waste, it is exclusively that undertaking, and not the earlier holder of the waste, that is responsible for carrying out the recovery operations while complying, in this regard, with the general rules and the requirements to which Article 11 refers and with any other provision of European Union law governing those operations.

83 In light of all the foregoing, the answer to Question 2 is that, 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:

— 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 European Union law concerning the management of waste and fertilisers.

Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **The first subparagraph of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Commission Decision 96/350/EC of 24 May 1996, 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. It is for the national courts to determine, taking account of all the relevant circumstances obtaining in the situations before them, whether those various criteria are satisfied.**

2. **European Union law does not preclude the burden of proving that the criteria for finding that a substance such as the slurry produced, stored and transferred in circumstances such as those of the main proceedings constitutes a by-product are met from resting on the producer of that slurry, provided that this does not result in the effectiveness of European Union law, and in particular of Directive 75/442, as amended by Decision 96/350, being undermined and that compliance with the obligations flowing from European Union 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, under the Court's case-law, be regarded as by-products to which the directive does not apply.**

3. **Article 2(1)(b)(iii) of Directive 75/442, as amended by Decision 96/350, must be interpreted as meaning that, where Council Directive 91/676/EEC of 12 December 1991 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.**

4. **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, 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 European Union law concerning the management of waste and fertilisers.

[Signatures]