Case C-1/03

Paul Van de Walle and Others

v

Texaco Belgium SA

(Reference for a preliminary ruling from the Cour d'appel de Bruxelles)

(Environment – Waste – Directives 75/442/EEC and 91/156/EEC – Meaning of 'waste', 'producer of waste' and 'holder of waste' – Soil infiltrated by leaked hydrocarbons – Independent operation of a service station belonging to a petroleum company)

Summary of the Judgment

1. *Environment – Waste – Directive 75/442, amended by Directive 91/156 – Concept – Hydrocarbons which are spilled unintentionally – Contaminated soil and groundwater – Included*

   (Council Directive 75/442, as amended by Directive 91/156, Art. 1(a))

2. *Environment – Waste – Directive 75/442, amended by Directive 91/156 – Holder of waste – Concept – Spilled hydrocarbons – Manager of a service station and petroleum undertaking supplying it – Included – Conditions*

   (Council Directive 75/442, as amended by Directive 91/156, Art. 1(c))

1. Hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of Article 1(a) of Council Directive 75/442 on waste, as amended by Council Directive 91/156, in so far as those substances are a production residue which the holder cannot re-use without prior processing and which he discards, albeit involuntarily, at the time of the production or distribution operations which relate to them.

   The same is true for soil contaminated by hydrocarbons, since they cannot be separated from the land which they have contaminated and cannot be recovered or disposed of unless that land is also subject to the necessary decontamination. In addition, the fact that soil is not excavated has no bearing on its classification as waste.

   (see paras 46-47, 50, 52-53, operative part)

2. Directive 75/442 on waste, as amended by Directive 91/156, distinguishes between practical recovery or disposal operations or the elimination of waste, which it makes the responsibility of any 'holder of waste', whether producer or possessor, and the financial burden of those operations, which, in accordance with the principle of polluter pays, it imposes on the persons who cause the waste, whether

they are holders or former holders of the waste or even producers of the product from which the waste came.

Hydrocarbons spilled by accident as the result of a leak from a service station's storage facilities which were bought by that service station to meet its operating needs, are in the possession of the service station's manager. Moreover, it is the manager who, for the purpose of his operations, has them in stock when they became waste and who may be considered to be the person who 'produced' them within the meaning of Article 1(b) of Directive 75/442. Under those conditions, since he is at once the possessor and the producer of that waste, the service station manager must be considered to be their holder within the meaning of Article 1(c).

Nevertheless, if the poor condition of the service station's storage facilities and the leak of hydrocarbons can be attributed to a disregard of contractual obligations by the petroleum undertaking which supplies that service station, or to any actions which could render that undertaking liable, that petroleum undertaking could be considered, as a result of its activities, to have 'produced waste' within the meaning of Article 1(b) of Directive 75/442 and it may accordingly be regarded as the holder of the waste.

(see paras 58-61, operative part)

JUDGMENT OF THE COURT (Second Chamber)
7 September 2004(1)

(Environment – Waste – Directives 75/442/EEC and 91/156/EEC – Meaning of 'waste', 'producer of waste' and 'holder of waste' – Soil infiltrated by leaked hydrocarbons – Independent operation of a service station belonging to a petroleum company)

In Case C-1/03,REFERENCE for a preliminary ruling under Article 234 ECfrom the Cour d'appel de Bruxelles (Belgium), made by decision of 3 December 2002, registered at the Court on 3 January 2003, in the criminal proceedings before that court against
Paul Van de Walle,Daniel Laurent,**Thierry Mersch** and**Texaco Belgium SA**, intervener:**Région de Bruxelles-Capitale,**

THE COURT (Second Chamber),,

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet (Rapporteur), R. Schintgen, F. Macken and N. Colneric, Judges,
Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,after considering the observations submitted on behalf of:

–

P. Van de Walle, D. Laurent and Texaco Belgium SA, by M. Mahieu, avocat,

–

T. Mersch, by O. Klees, avocat,

–

Région de Bruxelles-Capitale, by E. Gillet, L. Levi and P. Boucquey, avocats,

–

the Commission of the European Communities, by F. Simonetti and M. Konstantinidis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2004,

gives the following

Judgment

1

The reference for a preliminary ruling concerns the interpretation of Article 1(a), (b) and (c) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32), (hereinafter 'Directive 75/442').

2

The reference was made in the course of proceedings brought against Mr Van de Walle, Mr Laurent and Mr Mersch, senior staff of Texaco Belgium SA ('Texaco'), and against Texaco itself (together 'Mr Van de Walle and Others'), who, as the result of an accidental leak of hydrocarbons from a service station under that company's sign, are charged with the offence of abandoning waste.

Legal framework

Community legislation

3

Article 1 of Directive 75/442 provides:

'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.

…

(b)

“producer” shall mean anyone whose activities produce waste (“original producer”) and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste;

(c)

“holder” shall mean the producer of the waste or the natural or legal person who is in possession of it;

…’

4 Annex I to Directive 75/442, entitled ‘Categories of waste’, refers in heading Q4 to ‘materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap’; in heading Q7 to ‘substances which no longer perform satisfactorily (e.g. contaminated acids, contaminated solvents, exhausted tempering salts, etc.)’; in heading Q14 to ‘products for which the holder has no further use (e.g. agricultural, household, office, commercial and shop discards, etc.)’ and, in heading Q15, to ‘contaminated materials, substances or products resulting from remedial action with respect to land’.

5 The second paragraph of Article 4 of Directive 75/442 states: ‘Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste’.

6 Article 8 of Directive 75/442 provides that Member States are to 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 disposal or recovery operations or that that holder carries out those operations himself.

7 Article 15 of Directive 75/442 states:

‘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.’

National legislation

8 Article 2(1) of the Order of 7 March 1991 of the Council of the Brussels-Capital Region (*Moniteur belge* of 23 April 1991) (‘the Order of 7 March 1991’) defines waste as ‘a substance or object which the holder discards or intends or is required to discard’.

9 Annex I to the Order, which lists several categories of waste, refers in heading Q4 to ‘materials spilled, lost or having undergone other mishap, including any

materials, equipment, etc., contaminated as a result of the accident', in heading Q7 to 'substances which no longer perform satisfactorily', and in heading Q12 to 'contaminated materials'.

10 Annex III to the Order, entitled 'constituents which render waste hazardous', includes a heading C51, which refers to 'hydrocarbons and their oxygen, nitrogen or sulphur compounds not otherwise taken into account in this annex'.

11 Article 8 of the Order states:
'It is prohibited to abandon waste in a public or private area outside the sites authorised for that purpose by the competent public authority or without complying with the legislative provisions relating to the disposal of waste'.

12 Article 10 of the Order of 7 March 1991 provides:
'Anyone producing or holding waste shall be required to dispose of it or have it disposed of in accordance with the provisions of this Order, under conditions which restrict harmful effects on soil, flora, fauna, air and water and, in general, without adversely affecting the environment or human health.
The Executive [of the Brussels-Capital Region] shall ensure that the cost of disposing of waste is borne by the holder who has waste handled by a disposal undertaking or, failing that, by the previous holders or the producer of the product from which the waste came'.

13 Article 22 of the Order of 7 March 1991 subjects to a penalty anyone who abandons his own waste or that of others in breach of Article 8 of that Order.

The main action and the questions referred

14 The Brussels-Capital Region owns a building at 132 avenue du Pont de Luttre in Brussels (Belgium). The renovation of that building which it had undertaken in order to set up a social assistance centre had to be halted on 18 January 1993 as the result of the discovery that water saturated with hydrocarbons was leaking into the cellar of the building from the wall which separates that building from the adjacent building at 134 avenue du Pont de Luttre, where a Texaco service station was at that time located.

15 The service station was covered by a commercial lease between Texaco and the owner of the premises. Since 1988 it had been operated by a manager under an 'operating agreement' which provided that the land, building, equipment and movable property for the operation were made available to the manager by Texaco. The manager operated the service station on his own behalf but did not have the right to make changes to the premises without prior written permission from Texaco, which supplied the service station with petroleum products and, in addition, retained control over bookkeeping and supplies.

16

Following the discovery of the hydrocarbon leak, which was the result of defects in the service station's storage facilities, Texaco took the view that the station could no longer continue to operate and decided to terminate the management contract in April 1993, alleging serious negligence on the part of the manager. It subsequently terminated the commercial lease in June 1993.

17 Although disclaiming liability, Texaco proceeded to decontaminate the soil and replaced part of the storage facilities which gave rise to the hydrocarbon leak. It carried out no further activities on the site after May 1994. The Brussels-Capital Region took the view that decontamination had not been completed and paid for other remedial measures which it considered necessary in order to carry out its building plan.

18 Since Texaco's actions appeared to constitute infringements of the Order of 7 March 1991, and in particular Articles 8, 10 and 22 thereof, proceedings were brought against Mr Van de Walle, Texaco's managing director, Mr Laurent and Mr Mersch, officers of the company, and Texaco as a legal entity before the Tribunal correctionnel (Criminal Court) of Brussels. The Brussels-Capital Region claimed damages in those proceedings. By judgment of 20 June 2001, that court acquitted the defendants, exonerated Texaco and stated that it was not competent to rule on the application by the party claiming damages.

19 The Ministère public (Public Prosecutor) and the party claiming damages appealed against that judgment before the court which has made the reference.

20 That court took the view that Article 22 of the Order of 7 March 1991 imposed penalties for failure to comply with the obligations set out in Article 8 thereof and not for failure to comply with the requirements of Article 10. It therefore considered that in order to be subject to criminal sanctions under Article 22, the actions of the accused must constitute abandonment of waste within the meaning of Article 8. It observed that Texaco had not rid itself of its waste by supplying it to the service station and that neither the petrol delivered nor the tanks which remained buried in the ground after the decontamination activities carried out by that undertaking could constitute waste within the meaning of Article 2(1) of the Order, that is to say, 'a substance or object which the holder discards or intends or is required to discard'.

21 The court was in doubt, however, as to whether subsoil contaminated as the result of an accidental spill of hydrocarbons could be considered waste and stated that it doubted that that classification was possible, since the land in question had not been excavated and treated. It also pointed out that legal opinion differs as to whether the accidental spill of a product which contaminates soil is comparable to the abandonment of waste.

22 Having noted that the definition of 'waste' in Article 2(1) of the Order of 7 March 1991 reproduces literally that in Directive 75/442 and that the Annex to the Order

which lists categories of waste reproduces the terms used in Annex I to the Directive, the Cour d'appel of Brussels decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1)

Are Article 1(a) of Council Directive 75/442/EEC …, which defines waste as "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force", and Article 1(b) and (c) of the Directive, which defines "producer of waste" as "anyone whose activities produce waste ('original producer') and/or anyone who carried out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste" and "holder" as "the producer of the waste or the natural or legal person who is in possession of it", to be interpreted as being applicable to a petroleum company which produces hydrocarbons and sells them to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to the company, if such hydrocarbons seep into the ground, thus contaminating the soil and groundwater?

(2)

Or must it be considered that the classification as waste within the meaning of the abovementioned provisions applies only if the contaminated soil has been excavated?'

The questions referred

23 By those two questions, which it is appropriate to consider together, the national court asks, first, whether hydrocarbons which are spilled unintentionally and cause soil and groundwater contamination may be considered to be waste within the meaning of Article 1(a) of Directive 75/442 and whether the soil thus contaminated may also be classified as waste within the meaning of that provision even when it has not been excavated, and secondly whether, in circumstances such as those in the main action, the petroleum undertaking which supplies the service station may be considered to be the producer or holder of such waste within the meaning of Article 1(b) and (c) of the Directive.

Observations submitted to the Court

24 The Brussels-Capital Region takes the view that Texaco satisfies the definition of 'holder of waste' inasmuch as it held the hydrocarbons at the outset, delivered them to the service station, closely controlled the station's operations and pumped water from the aquifer in order to clean the contaminated soil.

25 The hydrocarbons fall outside the classification as waste only until the service station discards them for some reason, at which point they become waste, including for the undertaking, such as Texaco, which produced and delivered them.

26 A petroleum undertaking which produced and sold products which have become waste must therefore be considered to be the holder of waste within the meaning

of Directive 75/442 if it had access to the site where that waste was situated or had the right to take a decision as to how its client carried out its operations or to inspect the product's storage facilities which are the source of spills to land and groundwater. The petroleum undertaking which in fact dealt with some of that waste is the holder of waste.

27 As for the hydrocarbons in question in the main proceedings, which leaked from the service station's tanks, their producer or their holder discarded them. The hydrocarbons are specifically covered by heading Q4 of Annex I to Directive 75/442 and are, moreover, hazardous waste. They must therefore be considered to be waste within the meaning of the Directive.

28 Soil contaminated by hydrocarbons must also be classified as waste. That is clear from the terms of headings Q5, Q12 and Q13 of the Annex and from the obligation for the holder of those substances to discard them.

29 That obligation derives, inter alia, from the aim of Directive 75/442 to protect human health and the environment, which could not be achieved if the holder or producer of waste was not required to discard contaminated soil or if he merely buried contaminated material in the soil.

30 Mr Van de Walle and Others argue that Texaco delivered petroleum products which were sound at the time they were sold to the service station, an operation which cannot be regarded as the production of waste or as indicative of an intention to get rid of waste.

31 Mr Van de Walle and Others take the view that the Community legislature defined waste as any substance which the holder 'discards or intends or is required to discard' in order to include a subjective element beyond the objective element (registration of a waste in a catalogue on the basis of its characteristics or its degree of toxicity), confining the scope to situations where there is action, intention or obligation on the part of the holder to discard waste, by either disposal or recovery.

32 The particularity of the main action lies in the fact that neither Texaco nor the manager of the service station knew or was aware that hydrocarbons had leaked from the tanks and had permeated the surrounding water and land. It is thus not possible to identify any action, intention or obligation to discard those substances.

33 Furthermore, Texaco was not ordered to decontaminate the site until January 1993, after the discovery that hydrocarbons were being leaked. That order, which they maintain was arbitrary, should have been addressed to the operator of the service station who, as an independent manager, should have been considered the only person required to discard those substances. Moreover, Texaco has

always insisted that the soil decontamination work it carried out was ‘without prejudice’.

34 As regards the meaning of ‘producer’ and ‘holder’ of waste for the purposes of Community law, Mr Van de Walle and Others maintain that the wording of the question referred for a preliminary ruling and the statement of grounds in the judgment making the reference suggest that the Cour d’appel of Brussels takes the view that Texaco is neither the producer nor the holder of the waste at issue and that that court is concerned not with those definitions but solely to have the Court define what constitutes waste.

35 It is therefore only in the alternative, if the Court deems it necessary to consider what is meant by ‘producer’ and ‘holder’, that Mr Van de Walle and Others contend that Texaco merely delivered sound products to the service station and therefore did not cause to exist, create or produce waste. In the event that products are not used, it is the person who no longer uses those products who is the producer of the waste, not the person who delivered them at the outset. Therefore, it is only the manager of the service station who must, where relevant, be considered the producer of the waste and, moreover, its holder.

36 In that regard, several provisions in the service station’s operating agreement, in particular Article 6(10) thereof, make clear that the manager was fully liable as an operator and independent trader and that he was solely liable for damage caused to third parties as the result of his operations. Article 2 of the agreement provided that responsibility for the operation of the service station was ‘conferred’ on the manager by Texaco. Under Article 6(2) of that agreement, the manager was required to ‘maintain in perfect condition and at his own expense the property [conferred]’ and to ascertain on a daily basis that the pumps and other equipment were functioning properly and immediately to advise Texaco of repairs envisaged. According to Article 5 of the agreement, stocks were the ‘exclusive property [of the manager]’, who was required to assume ‘full responsibility’ for them.

37 The Commission observes that it follows from heading Q4 of Annex I to Directive 75/442, which refers to ‘materials spilled, lost or having undergone other mishap’, that the Community legislature expressly opted for the Directive to cover the case where the holder of waste discards it accidentally. That is not incompatible with Article 1 of the Directive, which does not specify whether the action of ‘discarding’ must be ‘intentional’ or not. The holder may even, as in the main proceedings, not be aware that he has discarded a product.

38 Similarly, the wording of heading Q4, which likewise refers to ‘any materials, equipment, etc., contaminated as a result of the mishap’, shows that Directive 75/442 treats materials contaminated by waste in the same way as waste, so as to ensure that where materials which constitute waste are spilled by accident, the

holder of those materials does not abandon the contaminated substances or objects but becomes responsible for disposing of them.

39 By contrast, soil contaminated by an accidental spillage of hydrocarbons, which like water and air forms part of the environment, does not lend itself to the recovery and disposal operations provided for under the Directive and can only be subjected to decontamination. As a general rule, therefore, soil contaminated by waste should not itself be considered to be waste.

40 However, a different conclusion is necessary when soil must be excavated for the purpose of decontamination. In that case, once it is excavated the soil is no longer an element of the environment but rather movable property which, because it is mixed with accidentally spilled materials that are classified as waste, must be treated in the same way as waste.

41 Finally, the person who had hydrocarbons spilled by accident in his possession at the time when they became waste, in this case the manager of the service station who bought them from Texaco, must be considered to be the 'holder'. The substances became waste when they leaked from the tanks. The petroleum undertaking is the producer of the hydrocarbons, but only the retailer, through his operations, 'produced' waste by accident.

The Court's reply

42 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 … to discard'. The annex clarifies and illustrates that definition by providing lists of substances and objects which can be classified as waste. However, the lists are only intended as guidance, and the classification of waste is to be inferred primarily from the holder's actions and the meaning of the term 'discard' (see to that effect Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26, and Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraph 22).

43 The fact that Annex I to Directive 75/442, entitled 'Categories of waste', refers in heading Q4 to 'materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap' merely indicates that such materials may fall within the scope of 'waste'. It cannot suffice to classify as waste hydrocarbons which are spilled by accident and which contaminate soil and groundwater.

44 In those circumstances, it is necessary to consider whether that accidental spill of hydrocarbons is an act by which the holder 'discards' them.

45 First, as the Court has held, the verb 'to discard' must be interpreted in the light of the aim of Directive 75/442, which, in the wording of the third recital in the preamble, is the protection of human health and the environment against harmful

effects caused by the collection, transport, treatment, storage and tipping of waste, and that of Article 174(2) EC, which states that Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. The verb 'to discard', which determines the scope of 'waste', therefore cannot be interpreted restrictively (see to that effect Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraphs 36 to 40).

46 Secondly, when the substance or object in question is a production residue, that is to say, a product which is not itself wanted for subsequent use and which the holder cannot economically re-use without prior processing, it must be considered to be a burden which the holder seeks to 'discard' (see to that effect *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, cited above, paragraphs 32 to 37).

47 It is clear that accidentally spilled hydrocarbons which cause soil and groundwater contamination are not a product which can be re-used without processing. Their marketing is very uncertain and, even if it were possible, implies preliminary operations would be uneconomical for their holder. Those hydrocarbons are therefore substances which the holder did not intend to produce and which he 'discards', albeit involuntarily, at the time of the production or distribution operations which relate to them.

48 Finally, Directive 75/442 would be made redundant in part if hydrocarbons which cause contamination were not considered waste on the sole ground that they were spilled by accident. Article 4 of the Directive provides, inter alia, that Member States are to take the measures necessary to ensure that waste is recovered or disposed of without endangering human health and 'without risk to water, air, soil and plants and animals' and are to 'prohibit the abandonment, dumping or uncontrolled disposal of waste'. Pursuant to Article 8 of the Directive, Member States are to take the measures necessary to ensure that any holder of waste has it handled by an operator responsible for its recovery or disposal or ensures those operations himself. Article 15 of the Directive designates the operator who must bear the cost of disposing of waste 'in accordance with the "polluter pays" principle'.

49 If hydrocarbons which cause contamination are not considered to be waste on the ground that they were spilled by accident, their holder would be excluded from the obligations which Directive 75/442 requires Member States to impose on him, in contradiction to the prohibition on the abandonment, dumping or uncontrolled disposal of waste.

50 It follows that the holder of hydrocarbons which are accidentally spilled and which contaminate soil and groundwater 'discards' those substances, which must as a result be classified as waste within the meaning of Directive 75/442.

51

It should be pointed out that hydrocarbons spilled by accident are, moreover, considered to be hazardous waste under Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) and Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689 (OJ 1994 L 356, p. 14).

52

The same classification as 'waste' within the meaning of Directive 75/442 applies to soil contaminated as the result of an accidental spill of hydrocarbons. In that case, the hydrocarbons cannot be separated from the land which they have contaminated and cannot be recovered or disposed of unless that land is also subject to the necessary decontamination. That is the only interpretation which ensures compliance with the aims of protecting the natural environment and prohibiting the abandonment of waste pursued by the Directive. It is fully in accord with the aim of the Directive and heading Q4 of Annex I thereto, which, as pointed out, mentions 'any materials, equipment, etc., contaminated as a result of [materials spilled, lost or having undergone other mishap]' among the substances or objects which may be regarded as waste. The classification as waste in the case of land contaminated by hydrocarbons does indeed therefore depend on the obligation on the person who causes the accidental spill of those substances to discard them. It cannot result from the implementation of national laws governing the conditions of use, protection or decontamination of the land where the spill occurred.

53

Since contaminated soil is considered to be waste by the mere fact of its accidental contamination by hydrocarbons, its classification as waste is not dependent on other operations being carried out which are the responsibility of its owner or which the latter decides to undertake. The fact that soil is not excavated therefore has no bearing on its classification as waste.

54

As regards whether, in the circumstances of the main action, the petroleum undertaking supplying the service station can be considered to be the producer or holder of waste within the meaning of Article 1(b) and (c) of the Directive, under the division of functions provided for by Article 234 EC it is for the national court to apply to the individual case before it the rules of Community law as interpreted by the Court (Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11).

55

Article 1(c) of Directive 75/442 provides that the holder is 'the producer of the waste or the natural or legal person who is in possession of it'. The Directive therefore defines 'holder' broadly, without specifying whether the obligation to dispose of or recover waste is as a general rule a matter for the producer or the possessor of the waste, that is to say, the owner or the holder.

56

Article 8 of Directive 75/442 states that those obligations, which are the corollary to the prohibition on the abandonment, dumping or uncontrolled disposal of

waste laid down in Article 4 of the Directive, are the responsibility of ‘any holder of waste’.

57 In addition, Article 15 of Directive 75/442 provides that, in accordance with the principle of polluter pays, the cost of disposing of waste must be borne by the holder who has waste handled by an operator responsible for disposing of it and/or previous holders or the producer of the product from which the waste came. The Directive therefore does not preclude the possibility that, in certain cases, the cost of disposing of waste is to be borne by one or several previous holders, that is to say, one or more natural or legal persons who are neither the producers nor the possessors of the waste.

58 It follows from the provisions cited in the three preceding paragraphs that Directive 75/442 distinguishes between practical recovery or disposal operations, which it makes the responsibility of any ‘holder of waste’, whether producer or possessor, and the financial burden of those operations, which, in accordance with the principle of polluter pays, it imposes on the persons who cause the waste, whether they are holders or former holders of the waste or even producers of the product from which the waste came.

59 The hydrocarbons spilled by accident as the result of a leak from a service station’s storage facilities had been bought by that service station to meet its operating needs. They are therefore in the possession of the service station’s manager. Moreover, it is the manager who, for the purpose of his operations, had them in stock when they became waste and who may therefore be considered to be the person who ‘produced’ them within the meaning of Article 1(b) of Directive 75/442. Under those conditions, since he is at once the possessor and the producer of that waste, the service station manager must be considered to be its holder within the meaning of Article 1(c) of Directive 75/442.

60 Nevertheless, if in the main action, in the light of information which only the national court is in a position to assess, it appears that the poor condition of the service station’s storage facilities and the leak of hydrocarbons can be attributed to a disregard of contractual obligations by the petroleum undertaking which supplies that service station, or to any actions which could render that undertaking liable, the activities of that undertaking could be considered to ‘have produced waste’ within the meaning of Article 1(b) of Directive 75/442 and it may accordingly be regarded as the holder of the waste.

61 In the light of all the foregoing considerations, the answer to the question referred by the national court must be that hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of Article 1(a) of Directive 75/442. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of

Article 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) rules as follows:

Hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of Article 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking.

Signatures.

---

1 – Language of the case: French.

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 January 2004(1)

Case C-1/03

Ministère public
v
Paul van de Walle and Others

(Reference for a preliminary ruling from the Cour d'appel de Bruxelles (Belgium))

(Directive 75/442/EEC on waste – Meaning of 'waste', 'producer of waste' and 'holder of waste' – Soil contaminated by leaked fuel)

I – Introduction

1. This case concerns the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste, (2) as amended by Council Directive 91/156/EEC of 18 March 1991, (3) ('the framework waste directive') with respect to fuel which leaked from a storage tank and contaminated the surrounding soil. The Cour d'appel (Court of Appeal), Brussels, wishes to know whether the fuel and the contaminated soil constitute waste and whether the petroleum company which leased the service station, signed an operating agreement with the operator and supplied her with the fuel can be regarded as the producer or holder of the waste.

II – Applicable legislation

2. Article 1 of the framework waste directive contains the following definitions:

'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.

…

(b) 'producer' shall mean anyone whose activities produce waste ('original producer') and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste;

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

(d) …'

3. Annex I defines various categories of waste, including the following two categories:

‘Q4 Materials spilled, lost or having undergone other mishap, including any materials, equipment, etc. contaminated as a result of the mishap’
and
‘Q15 Contaminated materials, substances or products resulting from remedial action with respect to land.’

4. Article 15 of the framework waste directive establishes liability for the cost of disposing of waste:

‘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.’

5. The relevant provisions of Belgian law incorporate Article 1(a) and Annex I of the framework waste directive.

III – Facts, procedure and questions referred for a preliminary ruling

6. Mr Van de Walle, Mr Laurent and Mr Mersch (‘the defendants’) are officers of the company Texaco SA (‘Texaco’). In the main proceedings they are charged with criminal offences under certain provisions of the law on waste. Texaco participated in the proceedings as the civil party liable.

7. Texaco leased the service station at issue in 1981 and in 1988 signed an operating agreement with the operator. In January 1993, it was found that fuel had leaked from the service station’s storage tanks. It had contaminated the earth around the tanks and infiltrated the cellars of the adjacent building.

8. Tests showed that there had been leakage from the pipes of the diesel tank and the tank containing unleaded 98 Ron petrol, which had holes in it. A stock check showed that about some 800 litres of unleaded 98 Ron petrol had been lost since the beginning of October 1992.

9. In February 1993, the service station was taken out of use, following the termination of both the operating agreement with the operator and the lease with the owner of the property, and after the summer of 1993 Texaco paid no more rent.

10. Texaco – without admitting liability – had various work done to decontaminate the soil up to May 1994. However, subsequent analyses of groundwater samples showed that it was still contaminated with fuel.

11. Since Texaco did not pursue decontamination after May 1994, on 10 September 1998 the Public Prosecutor brought charges against the three accused, in their capacity as officers of Texaco, and against the company, in its capacity as the civil party liable, for having infringed the regulations on waste. The Brussels-Capital Region participated in the proceedings as joint plaintiff. At first instance, the accused were acquitted and the civil claim against Texaco was struck out on the grounds that, in view of the acquittal, the court had no jurisdiction.

12. The Public Prosecutor and the Brussels-Capital Region appealed to the Cour d’appel. That court is uncertain as to whether the contaminated soil can be regarded as

waste and notes in this connection that there is disagreement concerning the scope of the concept of 'abandonment of waste'.

13. It has therefore referred the following questions to the Court of Justice for a preliminary ruling:

Are Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, which 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*', and Article 1(b) and (c) of that directive, which defines 'producer of waste' as '*anyone whose activities produce waste ('original producer') and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste*', and 'holder' as '*the producer of the waste or the natural or legal person who is in possession of it*', to be interpreted as being applicable to a petroleum company which produces fuel and sells them to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to that company, if such fuel seeps into the ground, thus contaminating the soil and groundwater?

Or must it be considered that classification as waste within the meaning of the abovementioned provisions applies only if the contaminated soil has been excavated?

IV – Legal analysis

14. The Cour d'appel's questions seek to know whether soil contaminated by leaked fuel can be regarded as waste and whether Texaco can be regarded as the producer or holder of any such waste.

A – *Meaning of waste*

1. Arguments of the parties

15. The parties all agree that the leaked fuel and contaminated soil can only be regarded as waste if the holder discards or intends or is required to discard them.

16. The Brussels-Capital Region takes the view that the holder of the fuel discarded it when it leaked. This, it argues, is precisely the situation covered by waste category Q4. Categories Q5, Q12 and Q13 (4) indicate that contaminated soil is also waste. Irrespective of whether the holder discarded or intended to discard the soil, the property of being waste can follow from the obligation to discard it. Such an obligation is consistent with the objective of the waste directive to protect health and the environment and with the high level of environmental protection called for in Article 174(2) EC. It would prevent the obligations under the waste regulations from being evaded by mixing waste with soil. If contaminated soil were not waste, the obligations to protect health and safeguard the environment under Article 4 of the waste directive would be ineffective.

17. It continues by arguing that an obligation to discard the contaminated soil can also be derived from national law. In the Brussels-Capital Region there is no specific obligation to clean up contaminated soil, but one can be derived from civil law. Such an obligation is also assumed by some authors to exist when there is no possible lawful and technically permissible use for the material in question. This, it is claimed, applies in particular to leaked fuel.

18. The accused and Texaco consider the question of whether the contaminated soil constitutes waste to be irrelevant in the main proceedings, since in any event they were not the holder or producer of any waste there might be.

19. They stress that, like the operator, they were unaware that fuel was leaking, whereas a thing can only knowingly be discarded. This, they say, is not inconsistent with the judgment in *Vessoso and Zanetti*, (5) according to which the term 'waste' does not presume that the holder disposing of a substance or an object intended to exclude all economic reutilisation of the substance or object by others. Ignorance of the fact that fuel has leaked is not comparable with this situation. Where fuel has leaked, therefore, there cannot yet be any question of waste.

20. The accused and Texaco concede that waste would be present as soon as a holder, aware of the pollution of the soil, began to discard it. In the present case, this could be assumed to be the moment at which the pollution of the soil was discovered and the initial clean-up measures were taken. However, in this respect, they insist that they were not the holder or producer of this waste.

21. The Commission observes that the definition of waste follows from Article 1 of the framework waste directive, while Annex I to the directive and the European Waste Catalogue illustrate this definition. Leaked fuel would fall in waste category Q4, the wording of which shows that the legislature intended to include mishaps within the scope of the term 'discard'. Leaked fuel is therefore waste.

22. According to the Commission, waste category Q4, as defined, can also include contaminated soil. However, it doubts whether natural elements such as soil, water and air can be regarded as waste merely because they are contaminated, the aim of the framework waste directive being rather to protect them. The Commission finds it hard to imagine the concepts of disposal and recovery being applied to these elements. In the event of contamination, they ought rather to be subjected to remedial action or otherwise treated to avoid any adverse effects. They cannot therefore be regarded as waste.

23. However, according to the Commission, as soon as contaminated soil is excavated, it is no longer to be regarded as a natural element but rather as a movable, a product or a substance contaminated in a mishap within the meaning of category Q4. The obligation to dispose of the leaked fuel – definable as waste – meant that the contaminated soil had to be excavated.

2. Assessment

24. At the time the leak occurred and afterwards, the fuel mingled with the surrounding soil. It must be assumed that, at least in part, the mixture cannot be separated without special measures. Therefore, whether the leaked fuel should be regarded as waste is not something that can be separately verified. The question is rather whether the contaminated soil as a whole should be classified as waste.

25. According to the third recital, the objective of the framework waste directive is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. According to Article 174(2) EC, Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. From this the Court has concluded that the concept of waste cannot be interpreted restrictively. (6)

26. Article 1(a) of the framework waste directive 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. The annex in question and the European Waste Catalogue clarify

and illustrate that definition by providing lists of substances and objects which may be classified as waste. However, in the view of the Court, these lists are only intended as guidance. (7)

27. The crux of the matter is whether the holder discards or intends or is required to discard a thing. According to the *ARCO* judgment, this must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined. (8)

(a) Waste category Q4

28. It follows from waste category Q4 that contaminated earth is waste. This category covers materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap. The concept of 'material' is already very broad and could include earth as forming part of the soil. Moreover, the list is not exhaustive.

29. To some extent, however, it may be inferred from waste category Q15, which, in particular, covers excavated soil, that as yet unexcavated contaminated soil is not waste. (9) At the same time, there is no reason to believe that waste category Q15 would conclusively define the circumstances in which soil can be waste. The inclusion of unexcavated soil is also suggested by subsection 17 05 of the European Waste Catalogue, (10) which is headed 'soil (including excavated soil from contaminated sites), stones and dredging spoil' and includes the items 17 05 03 'soil and stones containing dangerous substances' and 17 05 04 'soil and stones other than those mentioned in 17 05 03'. In principle, these categories could also cover unexcavated soil.

30. The view that unexcavated soil cannot be waste may be attributed to the fact that various Member States restrict the concept of waste to movables. (11) However, the regulatory traditions of some Member States cannot be the deciding factor where the interpretation of concepts of Community law is concerned.

31. The Commission's argument that natural elements as such cannot be waste is based on the aim of Article 4 of the framework waste directive which, among other things, calls for protection of the soil from the risks of waste. However, in the present case it is not a question of the indeterminate natural element 'soil' but of a precisely determinable quantity of earth, which is endangering the surrounding soil. Contrary to the view expressed by the Commission, this earth may be the subject of disposal or recovery operations.

32. Bearing in mind the aim of a high level of protection set out in Article 174(2) EC, the treatment of unexcavated contaminated soil as waste leads to perfectly reasonable results. From Article 3 of the framework waste directive it follows that priority should be given to preventing or reducing the production of such waste and its harmfulness. According to Article 4, such waste must be recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. The rest of the legal framework for organising the disposal of waste, described in Article 5 et seq., is also largely applicable to the treatment of contaminated soil and could help to achieve a high level of environmental protection.

33. Accordingly, preference should be given to the view that unexcavated contaminated soil can fall within the scope of category Q4.

(b) The notion of 'discarding'

34. However, the decisive factor in determining the presence of waste is not assignment to a category of waste but rather whether the holder discards or intends or is required to discard the soil.

35. An intent to discard must be ruled out as long as the holder is unaware of the contamination of the soil. On the other hand, once the holder has become aware of a pollution incident that precludes further appropriate use of the soil, a (rebuttable) intent to discard may be presumed. Thus, for example, pollution of farmland may adversely affect the crop, while pollution of building land may harm or inconvenience the users of the building. This loss of utility creates the risk, typical of waste, that the holder will neither use nor properly dispose of the material in question, allowing it to pollute the environment. In the case of contaminated soil, this risk will be realised if no clean-up measures are taken, so that the pollution spreads. However, the presumption of an intent to discard can be rebutted if the holder, rather than discarding the soil, takes concrete measures to make it usable again.

36. Apart from the intent to discard, in the case of contaminated soil there may also be an obligation to discard which presupposes neither knowledge of the pollution nor an intention to discard. This obligation may arise from the risks associated with the pollution of the soil.

37. However, it is not possible to conclude from the general waste-law clause of Article 4 of the framework waste directive that there is an obligation to discard contaminated soil. Although a general obligation to deal with contaminated soil in such a way as to protect health and the environment is to be welcomed, this obligation is only a legal consequence of the property of being waste and cannot be used to show that something possesses that property. For this reason the argument of the Brussels-Capital Region that contaminated soil must always be regarded as waste to prevent the framework waste directive from being circumvented also fails.

38. In the case of an obligation to discard, the property of being waste derives rather from the interplay between waste law and the specialised law regulating the relevant risks. The latter may be determined wholly or in part by Community law or be exclusively national. Thus, Article 6(2) of the Habitats Directive (12) requires the Member States to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. For example, it may be necessary to remove contaminated soil that threatens the quality of the water in a protected wetlands area. An obligation to remove contaminated soil may also arise from the law on water, special soil conservation regulations or general regulations on accident prevention. According to the case-law, even the regulations on waste disposal can form the basis of an obligation to clean up the soil, (13) which, depending on the circumstances, may also require the removal of contaminated soil. As the Brussels-Capital Region explains, such an obligation can also be founded in civil law. (14) In all these cases, the holder must discard the soil, regardless of whether it can still fulfil the intended purpose.

39. By contrast, an obligation to discard cannot be based on a risk created by pollution if that risk still allows the soil to be left *in situ*, perhaps because adequate protective measures can be taken without the need for excavation. In this case the holder does not have to discard the soil.

40. Whether in the present case an obligation to excavate the contaminated soil exists and to what extent it can still be put to lawful use cannot be determined on the basis of the information submitted to the Court. This is a matter for the competent national court.

41. From this analysis it follows that the question whether contaminated soil is classifiable as waste only after it has been excavated can be answered in the negative. Such soil may already be waste even before excavation.

(c) Interim finding concerning classification as waste

42. Thus, to sum up, contaminated soil is to be regarded as waste if, because of the pollution, the holder is obliged to excavate it. Subject to rebuttal, the soil may be presumed to be waste if, because of the pollution, it is no longer fit for proper use.

B – *Texaco's liability*

43. It is now necessary to determine whether Texaco can be regarded as a producer or holder of waste, on the assumption that in the present case the contaminated soil is waste.

1. Arguments of the parties

44. The Brussels-Capital Region has supplemented the account of the facts given by the Cour d'appel. It maintains that even after the discovery of the pollution Texaco delivered fuel to the service station. Moreover, the damage to the tank is attributable to a filling mistake made by Texaco in the 1980s, that is to say, before the latest operator of the service station took over. According to the Brussels-Capital Region, in the operating agreement Texaco reserved the right to check the fuel stocks at any time. A representative of Texaco checked the quantities sold on a monthly basis and the operator was allowed to use the service station to sell fuel, but was not entitled to change the installations without first obtaining Texaco's consent. When the service station was handed over the condition of the underground tanks was not documented, contrary to the operating agreement.

45. In the view of the Brussels-Capital Region, the term 'holder of waste' should be interpreted broadly. It maintains that in the present case it covers Texaco, since Texaco leased the service station, effectively controlled its operation and at least partially cleaned up the contaminated soil. It was also a producer of waste since the leaked fuel could no longer be put to any lawful use.

46. In the opinion of the accused and Texaco, the request for a preliminary ruling does not extend to the question of whether Texaco can be regarded as a holder or producer of waste.

47. Texaco, they argue, clearly produced not waste but products, namely fuel. The operator of the service station alone was responsible for the fuel's having become waste. The original producer of a product cannot be held responsible if subsequently the product is not used properly but converted into waste.

48. In their view, possession is characterised by actual physical control and Texaco had no such control over the tanks or the fuel in storage. The restriction on the operator's power of disposal with respect to the tank installations was primarily the result of the fact that the operator neither owned nor leased those installations. However, the operating agreement expressly provides for the operator to be responsible for maintaining and checking them. Moreover, it was agreed that the operator alone should be liable for damage traceable to the installations. The operator was the sole

owner of and fully responsible for the stored fuel. The checking of the fuel stocks by Texaco provided for in the agreement should not be equated with a technical inspection of the installations. It was intended solely to prevent fraud.

49. The Commission takes the view that the holder of the waste may be determined in this case by establishing who held the fuel when it became waste. On purchasing the fuel the operator of the service station became the owner. Moreover, the fact that the fuel had been produced by Texaco cannot affect the outcome, since the waste accrued in the context of the service station operator's activities.

2. Assessment

50. In the present case, Texaco can incur obligations under the waste legislation only if it can be regarded as the producer or holder of waste. According to Article 8 of the framework waste directive, any holder of waste must have it handled by an authorised waste disposal undertaking or duly dispose of it himself. Article 15 of the same directive provides that, 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 disposal undertaking. According to Article 1(c) of the directive, 'holder' means not only the actual holder of the waste but also the producer of the waste, as defined in Article 1(b).

(a) The meaning of 'producer of waste'

51. Article 1(b) of the framework waste directive defines 'producer' as anyone whose activities produce waste ('original producer') and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste.

52. Texaco cannot be regarded as the producer of waste simply because it produced fuel which became waste as a result of a mishap. The notion of producer of waste is more closely linked with bringing about the state of being waste. When properly used, fuel burns without leaving any waste. (15) In the present case it became waste not as a result of Texaco's production activities but through being stored in defective tanks.

53. In principle, therefore, the producer of the waste is whoever was operating the tank installations when the fuel leaked. Prima facie, that person was the operator of the service station. Whether, contrary to that impression, Texaco was responsible for the storage of the fuel – as the operator ran the service station for Texaco, not as part of her own business – can ultimately be decided only by the competent national court. In reaching its decision it will have to consider who, in law and in fact, controlled the storage operations and the state of the installations. Pointers may be found in the operating agreement and any other relevant provisions. Another important factor will be how Texaco actually behaved. Of course, Texaco cannot divest itself of legal obligations to provide supervision simply by not discharging them in practice. However, if Texaco on the basis of its position of economic strength relative to the service station operator went beyond the confines of its legal position and actually controlled the operation of the storage tanks, then it will also have to accept the ensuing liability.

54. Moreover, Texaco might be considered to be the producer of waste if the damage to the tanks could be traced back to its actions. In this respect, the mistake in filling the tanks mentioned by the Brussels-Capital Region may be relevant. It is also possible that when it handed over the service station to the operator Texaco ought to

have known about and made good any defects which later led to the fuel leak. However, in this respect also, the necessary findings will have to be made by the competent court itself.

(b) The meaning of 'holder of waste'

55. According to Article 1(c) of the framework waste directive, the producer of the waste or the natural or legal person who is in possession of it is to be regarded as the holder. If Texaco is not the producer of waste, then it can only be the holder if it has waste in its possession.

56. The notion of possession is not defined either in the directive or in Community law in general. In the usual sense of the word, possession means actual physical control of an object, but does not presuppose ownership or a legal power of disposal. However, the obligations under Article 8 of the framework waste directive can only be met if there is not only actual possession of the waste but also an entitlement to dispose of it. For the purposes of Article 1(c) of the framework waste directive, the notion of possession must therefore go beyond the narrow sense of the word (16) to include a legal power of disposal over the waste, in addition to actual (direct or indirect) physical control.

57. Who had actual physical control over the waste and at what point is a matter for the national court. Here again, it appears at first sight that the operator had physical control, at any event until the service station was taken out of use. Whether this first impression is justified will have to be determined essentially on the basis of the same criteria as those used to determine who was the producer of the waste. However, it might be that even under the operating agreement the operator was exercising physical control over the tank installations and the surrounding soil not for herself but for Texaco. There would be grounds for reaching this conclusion if, as the Brussels-Capital Region and Texaco submit, the operator was prevented from making changes to the site without Texaco's consent.

58. There are strong indications that after the service station was taken out of use Texaco took actual physical control. It seems unlikely that following termination of the operating agreement the operator still exercised physical control over the service station. Texaco, by contrast, continued to pay rent until the summer of 1993 and, up to May 1994, had clean-up works carried out, which presupposes physical control of the site.

59. Who was authorised to have the contaminated soil disposed of can also be determined only by the competent court. From the information to hand, it seems unlikely that the operator had this authority. Whether Texaco should have had the contaminated soil disposed of, on the basis of the lease agreement with the property owner, or whether this lay solely within the authority of the latter, cannot be determined from the information available to the Court.

(c) Interim finding concerning the concepts of producer and holder of waste

60. To sum up, under Article 1(c) of the framework waste directive a petroleum company which produces fuel and sells it to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to that company is to be regarded as the holder of waste in the form of soil contaminated by leaked fuel:

–

– if, taking all the legal and factual circumstances into account, the manager operated the service station not as part of his own business but for the petroleum company (Article 1(c), first alternative – producer of the waste),

– if the damage to the tanks can be traced to the conduct of the petroleum company (Article 1(c), first alternative – producer of the waste), or

– if, taking all the legal and factual circumstances into account, the petroleum company has actual physical control and is entitled to dispose of the waste (Article 1(c), second alternative – holder of the waste).

V – Conclusion

61. It is therefore proposed that the questions referred by the Cour d'appel be answered as follows:

1. Contaminated soil is to be regarded as waste if as a result of the pollution the holder is obliged to excavate it. Subject to rebuttal, the soil may be presumed to be waste if as a result of the contamination it is no longer fit for proper use.

2. A petroleum company which produces fuel and sells it to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to that company is to be regarded as the holder of waste in the form of soil contaminated by leaked fuel:

– if, taking all the legal and factual circumstances into account, the manager operated the service station not as part of his own business but for the petroleum company (Article 1(c), first alternative – producer of the waste),

– if the damage to the tanks can be traced to the conduct of the petroleum company (Article 1(c), first alternative – producer of the waste), or

– if, taking all the legal and factual circumstances into account, the petroleum company has actual physical control and is entitled to dispose of the waste (Article 1(c), second alternative – holder of the waste).

---

1 – Original language: German.

2 – OJ 1975 L 194, p. 39.

3 – OJ 1991 L 78, p. 32.

4 – Q5 and Q12 concern contaminated materials, Q13 concerns 'any materials, substances or products whose use has been banned by law'.

5 – Joined Cases C-206/88 and C-207/88 [1990] ECR I-1461.

6 – Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraph 38 et seq. and Case C-9/00 *Palin Granit and*

Vehmassalon kansanterveystyön kuntayhtymän hallitus [2002] ECR I-3533, paragraph 23.

7 – See judgment in *Palin Granit*, cited in footnote 6, paragraph 22.

8 – .*ARCO* judgment, cited in footnote 6, paragraph 73.

9 – Ludger-Anselm Versteyl, 'Der Abfallbegriff im Europäischen Recht – Eine unendliche Geschichte', *Europäische Zeitschrift für Wirtschaftsrecht* 2000, 585 (586); Martin Dieckmann, *Das Abfallrecht der Europäischen Gemeinschaft*, Baden-Baden 1994, p. 152 et seq.

10 – Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste, OJ 2000 L 226, p. 3, as amended by Council Decision 2001/573/EC of 23 July 2001 amending Decision 2000/532/EC as regards the list of wastes, OJ 2001 L 203, p. 18.

11 – In particular, Germany and France; in Italy the restriction is based on a judgment of the Corte suprema di cassazione of 18 September 2002, No. 31011. Austria, on the other hand, expressly extends the concept of waste to movables that have entered into environmentally harmful association with the soil (Paragraph 2(2) of the Abfallwirtschaftsgesetz, the Law on Waste Management).

12 – Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206, p. 7.

13 – Case C-365/97 *Commission* v *Italy* ('*San Rocco*') [1999] ECR I-7773, paragraph 108 et seq.

14 – See also the *ARCO* judgment, cited in footnote 6, paragraph 86, where the example of an agreement is mentioned.

15 – Cf. the *ARCO* judgment, cited in footnote 6, paragraph 66.

16 – Cf. the Opinion of Advocate General Mischo of 20 November 2001 in Case C-179/00 *Weidacher* [2002] ECR I-501, I-505, paragraph 76 et seq., in which he illustrates the imprecise use of the notion of holder.