Case C-114/01

Proceedings against
AvestaPolarit Chrome Oy, formerly Outokumpu Chrome Oy

(Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland))

«(Approximation of laws – Directives 75/442/EEC and 91/156/EEC – Meaning of waste – Production residue – Mine – Use – Storage – Article 2(1)(b) – Meaning of other legislation – National legislation outside the framework of Directives 75/442/EEC and 91/156/EEC)»

Opinion of Advocate General Jacobs delivered on 10 April 2003

Judgment of the Court (Sixth Chamber), 11 September 2003

Summary of the Judgment

1..

Environment – Waste – Directive 75/442, as amended by Directive 91/156 – Definition – Substance which has been discarded – Exception – Actual use of that substance for the principal activity
(Council Directive 75/442, as amended by Directive 91/156)

2..

Environment – Waste – Directive 75/442, as amended by Directive 91/156 – Other legislation within the meaning of Article 2(1)(b) – National legislation not constituting a measure of application of the directive – Included – Conditions
(Council Directive 75/442, as amended by Directive 91/156, Arts 1(d), 2(1)(b) and 11)

1. Leftover rock and residual sand from ore-dressing operations from the operation of a mine may not be classified as waste within the meaning of Directive 75/442 on waste, as amended by Directive 91/156, if the holder uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose. see para. 43, operative part 1

2. In so far as it does not constitute a measure of application of Directive 75/442, as amended by Directive 91/156, and in particular Article 11 of that directive, national legislation must be regarded as other legislation within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force. see para. 61, operative part 2

JUDGMENT OF THE COURT (Sixth Chamber)
11 September 2003 (1)

((Approximation of laws – Directives 75/442/EEC and 91/156/EEC – Meaning of waste – Production residue – Mine – Use – Storage – Article 2(1)(b) – Meaning of other legislation – National legislation outside the framework of Directives 75/442/EEC and 91/156/EEC))

In Case C-114/01,
REFERENCE to the Court under Article 234 EC by the Korkein hallinto-oikeus (Finland) for a preliminary ruling in the proceedings brought before that court by **AvestaPolarit Chrome Oy,** formerly Outokumpu Chrome Oy,
on the interpretation of Articles 1(a) and 2(1)(b) 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),

THE COURT (Sixth Chamber),,

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber,
R. Schintgen, V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,
Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

–
AvestaPolarit Chrome Oy, by A. Kukkonen, asianajaja,
–
the Finnish Government, by T. Pynnä, acting as Agent,
–
the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,
–
the Austrian Government, by C. Pesendorfer, acting as Agent,
–
the United Kingdom Government, by G. Amodeo, acting as Agent, and C. Vajda QC,
–
the Commission of the European Communities, by R. Wainwright, I. Koskinen and P. Panayotopoulos, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of AvestaPolarit Chrome Oy, represented by A. Kukkonen; the Finnish Government, represented by T. Pynnä; the Netherlands Government, represented by N.A.J. Bel, acting as Agent; the United Kingdom Government, represented by C. Vajda; and the Commission, represented by R. Wainwright and I. Koskinen, at the hearing on 23 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1 By order of 5 March 2001, received at the Court on 14 March 2001, the Korkein hallinto-oikeus (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 1(a) and 2(1)(b) 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) (Directive 75/442).

2 Those questions arose in proceedings brought by Outokumpu Chrome Oy, now AvestaPolarit Chrome Oy (AvestaPolarit), which operates a mine whose principal product is chromium, against the conditions of operation of that mine imposed on it by Lapin ympäristökeskus (Lapland Environment Centre, the Environment Centre).

Community legislation

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

4 Article 1(c) of that directive defines the holder as the producer of the waste or the natural or legal person who is in possession of it.

5 Article 1(d) of the directive defines management as the collection, transport, recovery and disposal of waste, including the supervision of such operations and after-care of disposal sites.

6

Annex I to Directive 75/422, headed Categories of waste, includes, in point Q11, [r]esidues from raw materials extraction and processing (e.g. mining residues, oil field slops, etc.) and, in point Q16, [a]ny materials, substances or products which are not contained in the above categories.

7 The second subparagraph of Article 1(a) of Directive 75/442 gave the Commission the task of drawing up a list of wastes belonging to the categories listed in Annex I. Pursuant to that provision, the Commission, by Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442 (OJ 1994 L 5, p. 15), adopted a European Waste Catalogue (the EWC), which includes *inter alia*[w]aste resulting from exploration, mining, dressing and further treatment of minerals and quarrying. The introductory note to the EWC explains that the catalogue applies to all wastes, irrespective of whether they are destined for disposal or for recovery operations and that it is a harmonised, non-exhaustive list of wastes, that is to say, a list which will be periodically reviewed, but, however, the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances and [t]he entry [in the list] is only relevant when the definition of waste has been satisfied.

8 Article 2 of Directive 75/442 provides:

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

(a) gaseous effluents emitted into the atmosphere;

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

(i) radioactive waste;

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

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

(iv) waste waters, with the exception of waste in liquid form;

(v) decommissioned explosives.

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

9 In its original version, before the amendments introduced by Directive 91/156, Article 2 of Directive 75/442 read as follows:

1.

Without prejudice to this Directive, Member States may adopt specific rules for particular categories of waste.

2.

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

(a)

radioactive waste;

(b)

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

(c)

animal carcases and the following agricultural waste: faecal matter and other substances used in farming;

(d)

waste waters, with the exception of waste in liquid form;

(e)

gaseous effluents emitted into the atmosphere;

(f)

waste covered by specific Community rules.

10

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

11

Articles 9 and 10 of Directive 75/442 provide that any establishment or undertaking which carries out the waste disposal operations specified in Annex II A to that directive or the operations which may lead to recovery specified in Annex II B to that directive must obtain a permit from the competent authority. Those annexes were adapted to scientific and technical progress by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32).

12

Among the disposal operations listed in Annex II A are, in point D1, [d]eposit into or onto land (e.g. landfill, etc.), in point D12, [p]ermanent storage (e.g. emplacement of containers in a mine, etc.), and, in point D15, [s]torage pending any of the operations [mentioned in the annex] (excluding temporary storage, pending collection, on the site where it is produced).

13

Among the recovery operations listed in Annex II B are, in point R4, [r]ecycling/reclamation of metals and metal compounds, in point R5, [r]ecycling/reclamation of other inorganic materials, and, in point R13, [s]torage of

wastes pending any of the operations [mentioned in the annex] (excluding temporary storage, pending collection, on the site where it is produced).

14 Exemption from the permit requirement is, however, provided for in Article 11 of Directive 75/442, the first paragraph of which reads as follows: Without prejudice to Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste [(OJ 1978 L 84, p. 43)] ... the following may be exempted from the permit requirement imposed in Article 9 or Article 10:

(a) establishments or undertakings carrying out their own waste disposal at the place of production; and

(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 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 disposal or recovery are such that the conditions imposed in Article 4 are complied with.

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

National legislation

15 The principal elements of the national legislation applicable at the time of the dispute in the main proceedings are described below.

16 Directive 75/442 was transposed into Finnish law by the Law on waste (1072/1993), whose aim is to prevent the production of waste, reduce its hazardous properties, and promote its recovery.

17 Point 1 of the first subparagraph of Paragraph 3 of that law defines waste as a substance or object which its holder has discarded or intends or is obliged to discard. That definition is complemented by a list of the substances or objects classified as waste in Annex I to the Regulation on waste (1390/1993). Among the 16 categories in that list, category Q11 contains residues resulting from the separation and processing of raw materials, such as mining residues and oilfield slops, and category Q16 relates to [o]ther materials, substances or products which their holder has discarded or intends or is obliged to discard.

18 Points 10 and 11 of the first subparagraph of Paragraph 3 of Law 1072/1993 define recovery as activity intended to recover and use the material or the energy

contained in the waste and treatment as activity intended to neutralise or permanently deposit the waste.

19 Decision 867/1996 of the Ministry of the Environment, which was adopted pursuant to Law 1072/1993 and lists the most common types of waste and hazardous waste, includes waste resulting from the exploration, extraction, dressing and other treatment of minerals, from stone processing, and from gravel production. According to the introduction to that list, the terminology used is based on the EWC and the list is only intended as guidance. An object or substance included in the list is waste only if it exhibits the characteristics referred to in point 1 of the first subparagraph of Paragraph 3 of Law 1072/1993.

20 Under the first subparagraph of Paragraph 42 of Law 1072/1993, a licence, called a waste licence, is required for the industrial or commercial recovery or treatment of waste, the commercial collection of dangerous waste, and other waste management activities defined by regulations. Under the transitional provisions in the third subparagraph of Paragraph 78 of Law 1072/1993, a waste licence is also required for old mines and ore-dressing plants which started operation before 1 January 1994, when that law entered into force, as is the case of the mine at issue in the main proceedings.

21 Mining is the subject of specific legislation, Law 503/1965 as amended by Law 208/1995 (the Law on mines). Mining operations are subject to authorisation. Under point 3 of the first subparagraph of Paragraph 23 of the Law on mines, a plan for the use of the mining area and its ancillary site, containing a study *inter alia* of the depositing of the products and by-products on the mining area and ancillary site, must be annexed to the application so that account may be taken not only of the requirements of the mining operation but also of the aspects concerning safety of the surrounding area and adverse effects.

22 Under the second subparagraph of Paragraph 40 of the Law on mines, a holder of mining rights may exploit, besides minerals, also other materials in the rock and soil of the mining area, if that is necessary for the proper operation of the mining works or the associated ore-dressing works or if those materials are obtained as by-products or waste in the extraction or dressing of minerals. Excavated soil, leftover rock and sand resulting from mining operations which is stored in the mining area or the ancillary site and which has a use in the mining operation or may be further processed is regarded as a by-product of mining operations.

23 The national court states that it follows from point 2 of the first subparagraph of Paragraph 1 of the Regulation on waste (294/1997) that the treatment or recovery by the operator on the spot or elsewhere of non-hazardous soil or rock waste resulting from mining operations does not require a waste licence, if the recovery or treatment procedure has been approved pursuant to the Law on mines.

24 A more general law, the Law on environmental licensing procedure (735/1991) in the version of Law 1712/1995, subjects to a licence called an environmental licence any plan concerning certain activities, *inter alia* where they contain aspects themselves subject to a waste licence. The environmental licence is then subject to the grant of a waste licence.

The main proceedings and the questions referred for a preliminary ruling

25 AvestaPolarit applied to the Environment Centre for an environmental licence, in order to be able to continue its mining and processing activity on the site at issue in the main proceedings, which had been operated for about 30 years and was due to change gradually from open-cast to underground mining from 2002.

26 The activity of the mine consists in extracting the raw product by boring and blasting and processing it by crushing, rough dressing and fine dressing. The annual capacity of the mine is 300 000 tonnes of rough-concentrate chromium, 450 000 tonnes of fine chromium products and 500 000 tonnes of other minerals. In one year's activity, leftover rock is about 8 000 000 tonnes on average and ore extracted about 1 100 000 tonnes.

27 The area around the mine is not the subject of a plan. It is surrounded by woodland and marshland. An area included in the national marshland conservation programme is partly within the mining site. The nearest dwelling house is 1.5 km from the mine. There are several settling ponds for the residual sand from ore-dressing. The surrounding land is part of the ancillary site, the definitive landscaping of which will be decided on when operation has ceased. About 100 million tonnes of leftover rock is already stored around the mine. It is envisaged that after 70 to 100 years part will be used to fill in the underground parts of the mine, but that the stacks will be landscaped before that. Part of the stacks could remain on the site indefinitely. Only a small proportion of the leftover rock, about 20%, will be processed into aggregates. The stacks already stored cannot be used for aggregates but may possibly be used as filling material in constructing breakwaters and embankments.

28 By decision of 16 June 1999, the Environment Centre granted the environmental licence sought, subject however to certain conditions connected with the fact that it regarded the leftover rock and ore-dressing sand as waste to which the procedures laid down by Law 1072/1993 applied. The Environment Centre considered in particular, in the grounds of its decision: Since the residues and by-products resulting from the mine are not as such immediately reused or consumed, they are to be regarded as waste within the meaning of the Law on waste. In so far as the residues and by-products to be discarded are recovered immediately as such (*inter alia* by returning them to the mine), they are not regarded as waste.Since the above waste is not treated or recovered in accordance with a plan approved under the Law on mines, the approval procedure under the Law on waste is applicable to it.

29 AvestaPolarit appealed to the Korkein hallinto-oikeus against that decision, seeking deletion on the ground of lack of legal basis of all the conditions attached to the licence concerning leftover rock and ore-dressing sand based on the classification of those materials as waste and of the places where they were stored as landfill sites. It submits that leftover rock and ore-dressing sand do not constitute waste within the meaning of point 1 of the first subparagraph of Paragraph 3 of Law 1072/1993, and puts forward a number of arguments to that effect.

30 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Are leftover rock resulting from the extraction of ore and/or ore-dressing sand resulting from the dressing of ore in mining operations to be regarded as 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, having regard to points (a) to (d) below?

(a) What relevance, in deciding the above question, does it have that the leftover rock and ore-dressing sand is stored in the mining area or on the ancillary site? Is it relevant generally, with respect to falling within the definition of waste, whether the said by-products of mining operations are stored in the mining area, on the ancillary site or further away?

(b) What relevance does it have, in assessing the matter, that the leftover rock is the same as regards its composition as the basic rock from which it is quarried, and that it does not change its composition regardless of how long it is kept and how it is kept? Should ore-dressing sand which results from the ore-dressing process perhaps be assessed differently from leftover rock in this respect?

(c) What relevance does it have, in assessing the matter, that leftover rock is harmless to human health and the environment, but that, according to the view of the environmental licence authorities, substances harmful to health and the environment dissolve from ore-dressing sand? To what extent generally is importance to be attached to the possible effect of leftover rock and ore-dressing sand on health and the environment in assessing whether they are waste?

(d) What relevance does it have, in assessing the matter, that leftover rock and ore-dressing sand are not intended to be discarded? Leftover rock and ore-dressing sand may be re-used without special processing measures, for example for supporting mine galleries, and leftover rock also for landscaping the mine after it has ceased operation. Minerals may in future with the development of technology be recovered from ore-dressing sand for utilisation. To what extent should attention be paid to how definite plans the person carrying on mining operations

has for such utilisation and to how soon after the leftover rock and ore-dressing sand has been tipped on the mining area or the ancillary site the utilisation would take place?

(2) If the answer to the first question is that leftover rock and/or ore-dressing sand is to be regarded as waste within the meaning of Article 1(a) of the Council Directive on waste, it is further necessary to obtain an answer to the following supplementary questions:

(a) Does other legislation within the meaning of Article 2(1)(b) of the Waste Directive (91/156/EEC), waste covered by which is excluded from the scope of the directive, and which under point (ii) concerns *inter alia* waste resulting from prospecting, extraction, treatment and storage of mineral resources, mean exclusively the European Community's own legislation? Or may national legislation too, such as certain provisions of the Law on mines and the Regulation on waste in force in Finland, be other legislation within the meaning of the Waste Directive?

(b) If other legislation means also national legislation, does that mean exclusively national legislation which was already in force at the time of entry into force of the Waste Directive 91/156/EEC or also that enacted only afterwards?

(c) If other legislation means also national legislation, do fundamental European Community provisions relating to environmental protection or the principles of the Waste Directive set requirements for national legislation concerning the level of environmental protection as a condition for disapplying the rules of the Waste Directive? What sort of requirements could those be?

The first question

31 With respect to the first question, the Korkein hallinto-oikeus previously referred a largely similar question in Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533 (*Palin Granit*).

32 In that judgment, which concerned not leftover rock and ore-dressing sand from a mining operation but leftover stone from a granite quarry, the Court held that:

—

the holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Directive 75/442;

the holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Directive 75/442;

—

the place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste.

the place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste.

33 The Court reached those conclusions on the basis of the following considerations in particular:

22 ... the scope of the term waste turns on the meaning of the term discard (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26).

...

27 ... The application of an operation listed in Annex II A or II B to Directive 75/442 ... does not, of itself, justify the classification of that substance as waste.

...

29 ... In its judgment in *Vessoso and Zanetti* (Joined Cases C-206/88 and C-207/88 [1990] ECR I-1461, paragraph 9), the Court held that the concept of waste does not exclude substances and objects which are capable of economic reutilisation. In Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 52, the Court also stated that 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.

30 Neither the fact that the leftover stone has undergone a treatment operation referred to in Directive 75/442 nor the fact that it can be reused thus suffices to show whether that stone is waste for the purposes of Directive 75/442.

31 There are other considerations which are more decisive.

32 At paragraphs 83 to 87 of the judgment in [Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475], the Court pointed out the importance of determining whether the substance is a production residue, that is to say, a product not in itself sought for a subsequent use. As the Commission observes, in the case at issue in the main proceedings the production of leftover stone is not Palin Granit's primary objective. The leftover stone is only a secondary product and the undertaking seeks to limit the quantity produced. According to its ordinary meaning, waste is what falls away when one

processes a material or an object and is not the end-product which the manufacturing process directly seeks to produce.

33 Therefore, it appears that leftover stone from extraction processes which is not the product primarily sought by the operator of a granite quarry falls, in principle, into the category of [r]esidues from raw materials extraction and processing under head Q 11 of Annex I to Directive 75/442.

34 One counter-argument to challenge that analysis is that goods, materials or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking does not wish to discard, within the meaning of the first paragraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse.

35 Such an interpretation would not be incompatible with the aims of Directive 75/442. There is no reason to hold that the provisions of Directive 75/442 which are intended to regulate the disposal or recovery of waste apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products.

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

37 It therefore appears that, in addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not that substance is waste for the purposes of Directive 75/442 is the degree of likelihood that that substance will be reused, without any further processing prior to its reuse. If, in addition to the mere possibility of reusing the substance, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to discard, but as a genuine product.

38 In the case at issue ... the only foreseeable reuses of leftover stone in its existing state, for example in embankment work or in the construction of harbours and breakwaters, necessitate, in most cases, potentially long-term storage operations which constitute a burden to the holder and are also potentially the cause of precisely the environmental pollution which Directive 75/442 seeks to reduce. The reuse is therefore not certain and is only foreseeable in the longer term, with

the result that the leftover stone can only be regarded as extraction residue which its holder intends or is required to discard within the meaning of Directive 75/442, and thus falls within the scope of head Q 11 of Annex I to that directive.

34 In the light of those considerations, it is clear that leftover rock and residual sand from ore-dressing, such as that from the mine operated by AvestaPolarit, constitute [r]esidues from raw materials extraction and processing under head Q 11 of Annex I to Directive 75/442 (see *Palin Granit*, paragraphs 32 and 33).

35 It remains to examine whether such residues are to be classified as waste on the ground that their holder discards or intends or is obliged to discard them, within the meaning of the first subparagraph of Article 1(a) of Directive 75/442. If not, those residues could, as AvestaPolarit submits, be classified as by-products which do not fall within the scope of that directive.

36 In this respect, a distinction must be drawn between residues which are used without first being processed in the production process for the necessary filling in of the underground galleries, on the one hand, and other residues, on the other.

37 The former are being used in that case as a material in the industrial mining process proper and cannot be regarded as substances which the holder discards or intends to discard, since, on the contrary, he needs them for his principal activity.

38 Only if such use of those residues were prohibited, in particular for reasons of safety or protection of the environment, and the galleries had to be sealed and supported by some other process, would it have to be considered that the holder is obliged to discard those residues and that they constitute waste.

39 Outside such a case, if a mining operator can identify physically the residues which will actually be used in the galleries and provides the competent authority with sufficient guarantees of that use, those residues may not be regarded as waste. In this respect, it is for the competent authority to assess whether the period during which the residues will be stored before being returned to the mine is so long that those guarantees cannot in fact be provided.

40 As regards the residues whose use is not necessary in the production process for filling in the galleries, they must in any event be regarded in their entirety as waste.

41 That is true not only for the leftover rock and ore-dressing sand whose use for construction operations or other purposes is uncertain (see *Palin Granit*, paragraphs 37 and 38), but also for the leftover rock which will be processed into aggregates, since, even if such use is probable, it requires precisely an operation for recovery of a substance which is not used as such either in the process of mining production or for the final use envisaged (see *Palin Granit*, paragraph 36).

42

That is also true for the leftover rock accumulated in the form of stacks which will remain on the site indefinitely, and for the ore-dressing sand which will remain in the old settling ponds. Those residues will not be used for the production process, and cannot be used or marketed in any other way without prior processing. They are therefore waste which the holder discards. If they are landscaped, that constitutes merely an environment-friendly manner of dealing with them, not a stage in the production process.

43

The answer to the national court's first question must therefore be that, in a situation such as that at issue in the main proceedings, the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine discards or intends to discard those substances, which must consequently be classified as waste within the meaning of Directive 75/442, unless he uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose.

The second question

44

By part (a) of its second question, the national court essentially asks whether the term other legislation in Article 2(1)(b) of Directive 75/442 refers solely to Community legislation, or to national legislation such as certain provisions of the Law on mines and the Regulation on waste (294/1997).

45

In view of the account of national law and the facts in the main proceedings, the question could appear purely theoretical. As noted in paragraph 21 above, the Law on mines makes mining operations subject to authorisation and an application must include *inter alia* a study of the depositing of the products and by-products on the mining area and ancillary site, so that when the application is treated account may be taken not only of the requirements of the mining operation but also of the aspects concerning safety of the surrounding area and adverse effects. Moreover, as described in paragraphs 20 and 23 above, the treatment of waste from the mining operation specifically requires a waste licence, consistently with the provisions of Articles 9 and 10 of Directive 75/442, with the exception of non-hazardous soil or rock waste which is treated by the operator in accordance with a procedure which has been approved pursuant to the Law on mines. Such a procedure of exemption from authorisation is itself provided for in Article 11 of Directive 75/442 in the cases and under the conditions noted in paragraph 14 above. Consequently, if the procedures approved pursuant to the Law on mines are applied in those cases and under those conditions, the relevant provisions of the Law on mines and the Regulation on waste (294/1997) cannot be other legislation within the meaning of Article 2(1)(b) of Directive 75/442, but measures of application of that directive.

46

It appears possible that that is so in the case in the main proceedings. However, on the hypothesis that the exemption from a waste licence takes place in a

different context from that provided for in Article 11 of Directive 75/442, the Court will examine the question below.

47 Article 2(2) of Directive 75/442 expressly provides that individual directives may regulate the management of certain categories of waste. It says that those directives may contain specific rules for particular instances or supplementing those in Directive 75/442. That means that the Community expressly reserved the possibility of enacting specific rules or more detailed ones than those in Directive 75/442 for certain categories of waste not defined in advance. That was the basis on which Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances (OJ 1991 L 78, p. 38) and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20), for example, were adopted.

48 However, in contrast to what is expressly laid down in respect of the categories of waste listed in Article 2(1) of Directive 75/442, the categories of waste which are the subject of individual directives under Article 2(2) remain subject overall to Directive 75/442, even if individual rules derogating from its provisions may be adopted on certain aspects and supplementary rules may be adopted with a view to more extensive harmonisation of the management of the waste in question. Consequently, the scope of the legislation referred to in paragraph 1(b) and the rules referred to in paragraph 2 of Article 2 of Directive 75/442 differs: the former excludes altogether the categories of waste in question, which are defined in advance, from the scope of Directive 75/442, while the latter leave the categories of waste in question subject in principle to that directive. The argument of the German, Austrian and United Kingdom Governments that paragraphs 1(b) and 2 of Article 2 of Directive 75/442 would be redundant if it were considered that the former may refer to Community legislation is thus unfounded. It should be observed, moreover, that several items of Community legislation organising the management of categories of waste since referred to in paragraph 1(b), mentioned by the Advocate General in point 66 of his Opinion, existed even before the adoption of Directive 91/156.

49 That conclusion does not, however, exclude the possibility that the expression other legislation in Article 2(1)(b) of Directive 75/442 may also refer, under certain conditions (see paragraphs 52 and 58 to 60 below), to national legislation. It should be observed on this point that where the Community legislature intended to refer in this field to a particular type of legislation, Community or national, it did so in precise terms. Thus Article 2(2) of Directive 75/442 refers precisely to directives, Article 2(1) of that directive, in the original version prior to the amendments made by Directive 91/156, referred to specific rules adopted by the Member States, and Article 2(2)(f) of that version referred to specific Community rules.

50 Such an interpretation is not contrary in any way to the purpose of Directive 75/442. In its original version, most of the categories of waste now referred to in

Article 2(1)(b) were purely and simply excluded from the scope of the directive. That was also the case in the Commission proposals which eventually resulted in Directive 91/156, presented by the Commission on 16 August 1988 and 23 November 1989 (OJ 1988 C 295, p. 3, and OJ 1989 C 326, p. 6). Having regard to the very special characteristics of the waste in question, the Community legislature could prefer, when adopting Directive 91/156 and pending the enactment of new Community legislation to meet the specific features of the management of that waste, to let national legislation apply which was itself suited to those features, rather than to subject the waste in question to the general scheme of Directive 75/442. However, to avoid the management of that waste not being subject to any legislation in certain situations, as previously, it adopted a rule that, in the absence of specific Community legislation and, alternatively, specific national legislation, Directive 75/442 applies.

51 The arguments put forward against that interpretation by the Finnish and Netherlands Governments and the Commission cannot be accepted. Thus, while the fifth recital in the preamble to Directive 91/156 states that any disparity between Member States' laws on waste disposal and recovery can affect the quality of the environment and interfere which the functioning of the internal market, such an observation does not mean that the Community legislature could not consider that, while harmonisation of the management of most categories of waste was necessary, for certain particular categories (simply excluded from the scope of Directive 75/442 in its original version) the national authorities could, pending the adoption of specific Community legislation, retain the possibility of regulating that management outside the framework laid down by the directive, but in the absence of such action by a Member State it then had to organise that management within that framework.

52 However, to be regarded as other legislation within the meaning of Article 2(1)(b) of Directive 75/442 covering a category of waste listed in that provision, national legislation must not merely relate to the substances or objects in question from — for instance — an industrial point of view, but must contain precise provisions organising their management as waste within the meaning of Article 1(d) of the directive. Otherwise, the management of that waste would be organised neither on the basis of Directive 75/442 nor on the basis of national legislation independent of the directive, which would be contrary both to the wording of Article 2(1)(b) of the directive, which requires that the national legislation in question should cover the waste as such, and to the consideration expressed in the fourth recital in the preamble to Directive 91/156, which states that in order to achieve a high level of environmental protection, the Member States must, in addition to taking action to ensure the responsible removal and recovery of waste, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and reused, taking into consideration existing or potential market opportunities for recovered waste.

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So, in the main proceedings, it will be for the national court to make sure if necessary, if it considers disapplying the national provisions adopted in application of Directive 75/442, that the alternative provisions of the Law on mines relied on for that purpose concern the management of mining waste and apply to the waste from the mine operated by AvestaPolarit. In the light of the documents in the case, the Court understands that that may be the case, with respect to non-hazardous soil and rock waste, if AvestaPolarit uses a procedure approved pursuant to that law.

54 By part (b) of its second question, the national court asks essentially whether Article 2(1)(b) of Directive 75/442 must be interpreted as meaning that other legislation within the meaning of that provision must have entered into force before 1 April 1993, the date of entry into force of Directive 91/156, or whether it may also have entered into force after that date.

55 It does not follow expressly from the wording of the provision in question that it refers only to national legislation existing on the date of entry into force of Directive 91/156. The words already covered by other legislation in that provision may just as well have a material as a temporal meaning. Furthermore, the term already is not used in all the language versions of Directive 75/442.

56 In accordance with Article 5 EC, first, in areas which do not fall within its exclusive competence, which is the case at this stage as regards the environment, the Community is to take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community and, second, action by the Community must not go beyond what is necessary to achieve the objectives of the Treaty.

57 Consequently, since when adopting Directive 91/156 the Community legislature considered it appropriate that, until specific Community rules were adopted on the management of certain individual categories of waste, the authorities of the Member States should retain the option of ensuring that management outside the framework laid down by Directive 75/442, and since it neither expressly excluded the possibility of that option being used on the basis of national legislation subsequent to the entry into force of Directive 91/156 nor set out considerations enabling a distinction to be drawn between such national legislation and legislation prior to that entry into force, Article 2(1)(b) of Directive 75/442 must be interpreted as meaning that other legislation within the meaning of that provision may have entered into force either before or after 1 April 1993, the date of entry into force of Directive 91/156.

58 By part (c) of its second question, the national court essentially asks whether Article 2(1)(b) of Directive 75/442 must be interpreted as meaning that other

legislation within the meaning of that provision must comply with particular requirements as to the level of protection of the environment.

59 As stated in paragraph 52 above, for national legislation to be regarded as other legislation within the meaning of Article 2(1)(b) of Directive 75/442, it must contain precise provisions organising the management of the waste in question within the meaning of Article 1(d) of that directive. Moreover, the second paragraph of Article 10 EC imposes an obligation on Member States to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. With respect to the management of waste of the same type, a level of protection of the environment which differed noticeably because some was managed within the framework of Directive 75/442 and some outside that framework could jeopardise the objectives of the Community in the field of the environment as defined in Article 174 EC, and more particularly the objectives of Directive 75/442 itself. Such national legislation must therefore pursue the same objectives as that directive and result in a level of protection of the environment which is at least equivalent to that resulting from the measures taken in application of the directive, even if the detailed terms of that national legislation diverge from those of the directive.

60 In the main proceedings, it will thus be for the national court if need be, if it considers disapplying the national provisions taken in application of Directive 95/442, to make sure that the alternative provisions of the Law on mines relied on for that purpose result, as regards the management of mining waste, in a level of protection of the environment which is equivalent at least. Account must be taken here of the fourth recital in the preamble to Directive 91/156, which states that in order to achieve a high level of environmental protection, the Member States must, in addition to taking action to ensure the responsible removal and recovery of waste, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and reused, taking into consideration existing or potential market opportunities for recovered waste, and more particularly of the objectives defined in Articles 3(1) and 4 of Directive 75/442.

61 The answer to the second question must therefore be that, in so far as it does not constitute a measure of application of Directive 75/442, in particular Article 11 of that directive, national legislation must be regarded as other legislation within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force.

Costs

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The costs incurred by the Finnish, German, Netherlands, Austrian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Korkein hallinto-oikeus by order of 5 March 2001, hereby rules:

1.

In a situation such as that at issue in the main proceedings, the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine discards or intends to discard those substances, which must consequently be classified as waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, unless he uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose.

2.

In so far as it does not constitute a measure of application of Directive 75/442, as amended by Directive 91/156, and in particular Article 11 of that directive, national legislation must be regarded as other legislation within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass — Registrar

J.-P. Puissochet — President of the Sixth Chamber

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Language of the case: Finnish.

OPINION OF ADVOCATE GENERAL
JACOBS
delivered on 10 April 2003(1)

Case C-114/01

AvestaPolarit Chrome Oy

(())

1. In this case the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) has asked the Court for guidance as to the criteria which are relevant for determining whether in a series of defined circumstances leftover rock resulting from the extraction of ore and/or ore-dressing (2) sand resulting from the dressing of ore in mining operations is to be regarded as waste within the meaning of Directive 75/442 on waste as amended (3) ('the Waste Directive' or 'the Directive').

2. Since the reference in the present case was made, those questions have largely been resolved by the judgment of the Court in *Palin Granit*. (4) The Korkein hallinto-oikeus has also however put a series of questions concerning the correct interpretation of Article 2(1)(b) of the Waste Directive. That article states that 'waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries' is to be excluded from the scope of the Directive where it is 'already covered by other legislation'. The referring court asks in particular whether 'other legislation' includes national legislation, and, if so, whether such legislation must (i) already have been in force when the Directive entered into force and/or (ii) comply with any substantive requirements concerning the level of environmental protection.

The Waste Directive

3. The third recital in the preamble to Directive 75/442 (‘the original directive’) states that ‘the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste’.
4. The first recital in the preamble to Directive 91/156 (‘the amending directive’), (5) which amends the original directive and replaces its substantive provisions, states that ‘the amendments take as a base a high level of environmental protection’.
5. Article 1(a) of the 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’.
6. Article 1(c) defines ‘holder’ as ‘the producer of the waste or the natural or legal person who is in possession of it’.
7. Article 2 provides:‘1. The following shall be excluded from the scope of this Directive:
(a) gaseous effluents emitted into the atmosphere;
(b) where they are already covered by other legislation:
(i) radioactive waste;
(ii) waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;
(iii) animal carcases and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming;
(iv) waste waters, with the exception of waste in liquid form;
(v) decommissioned explosives.
2. Specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of individual Directives.’
8. Annex I to the Directive, headed ‘Categories of waste’, includes under head Q11 ‘Residues from raw materials extraction and processing (e.g. mining residues, oil field slops, etc.)’. The final head, Q16, mentions ‘Any materials, substances or products which are not contained in the above categories’.
The relevant national legislation
9. In Finland, the Waste Directive is implemented by Jätelaki (Law on waste). (6) That law defines waste in essentially the same terms as the Directive, namely as a ‘substance or object which its holder has discarded or intends or is obliged to discard’.
10. Section 42(1) of the Jätelaki provides that a licence (waste licence) is required for the industrial or commercial recovery or treatment of waste, the commercial collection of problem waste, and other significant activity with respect to waste disposal to be more closely defined by regulation.
11. Section 11(2) of the Jäteasetus (Regulation on waste) (7) lists other significant activities with respect to waste disposal. That list includes mines and ore-dressing plants and, under transitional provisions, old mines and ore-dressing plants which started operation before the entry into force of the Jätelaki on 1 January 1994. The mine at issue in the present case is a mine and ore-dressing plant subject to those transitional provisions.
12. Under Section 1(1)(2) of the Jäteasetus, (8) however, the provisions of the Jätelaki concerning the licence do not apply to non-hazardous soil and mineral waste resulting from mining operations and recovered or treated whether on site or elsewhere if the

waste is recovered or treated in accordance with a plan approved under the Kaivoslaki (Law on mines). (9) Section 1(1)(2) came into force in 1997.
13. Under Section 3 of the Jäteasetus, the substances and objects listed in Annex 1 to that regulation are classified as waste within the meaning of the Jätelaki. Annex 1, which substantially reproduces Annex I to the Directive, lists 16 categories, of which category Q11 contains residues resulting from the separation and processing of raw materials, such as residues of mining operations. The final category, category Q16, reads as follows: 'Other materials, substances or products which their holder has discarded or intends or is obliged to discard'.
14. The Kaivoslaki contains special provisions on by-products of mining operations. In particular, Section 40(2) provides that excavated soil, excavated leftover rock and ore-dressing sand resulting from mining operations which is stored in the area of the mining concession or its ancillary site and which has a use in the mining operation or which may be further processed is regarded as a by-product of mining operations in accordance with that law. According to the order for reference, it is apparent from the grounds of the Government Proposal (10) concerning that provision, although not expressly stated in the provision, that by defining leftover rock and ore-dressing sand as 'by-products of mining operations' the intention was to exclude those materials from the waste licence procedure, provided that they do not cause a danger to the environment and that they have a use in the mining operation or may be further processed into saleable products. Section 40(2) came into force in 1995.
The main proceedings and the questions referred
15. Under Finnish legislation an environmental licence is required for certain projects. AvestaPolarit Chrome Oy (formerly Outokumpu Chrome Oy), a Finnish company, applied in 1996 to Lapin ympäristökeskus (Lapland Environment Centre, hereinafter 'the Ympäristökeskus') for an environmental licence to continue mining and ore-dressing operations on the site of Kemi mine. Such operations had then been carried on in that mine for about 30 years.
16. According to the application, the mine was to be converted in stages to underground extraction from 2002. The mining operations involve extraction by boring and blasting, crushing, rough dressing and fine dressing. Annual extraction of ore averages some 1 100 000 tonnes, entailing an annual production of some 8 000 000 tonnes of leftover rock.
17. Leftover ore-dressing sand is stored in settling ponds, of which there are six: one was at the time of the application already full, two ponds risked becoming full in 2000 and three would still be in use for a long time. Those areas are part of the mining concession's ancillary sites, the definitive landscaping of which will be decided when the mining concession is terminated.
18. About 100 million tonnes of leftover rock is stored on the mine's tipping areas. The mine has an annually revised tipping plan for leftover rock, which provides for the fact that leftover rock will be needed after approximately 70 to 100 years for filling in the underground parts of the mine; before the end of that period stacks of leftover rock will, however, be landscaped. Part of the stacks of leftover rock may remain on the site permanently. Only a small part of the leftover rock, perhaps about 20%, is usable as raw material for aggregates. The stacks of leftover rock already stored cannot be used

for producing aggregates, but they may possibly be used as filling material in breakwaters and embankments.

19. The Ympäristökeskus granted an environmental licence for the Kemi mine subject to a number of conditions reflecting its assessment that the leftover rock and ore-dressing sand resulting from the mine were waste under the Jätelaki.

20. AvestaPolarit appealed to the Korkein hallinto-oikeus against the decision of the Ympäristökeskus, seeking the deletion from the licence decision of *inter alia* all the conditions concerning leftover rock and ore-dressing sand in which those by-products of mining operations were defined as waste. It argued that those conditions had no legal basis and that on a number of grounds the leftover rock and ore-dressing sand did not constitute waste. Those grounds are apparent from the questions referred, which are set out below. (11)

21. The question before the Korkein hallinto-oikeus was accordingly whether the leftover rock and ore-dressing sand were to be regarded as waste within the meaning of the Jätelaki, which uses the same definition of waste as the Waste Directive which it implements.

22. That court also considered that, if the above question were answered in the affirmative, Article 2(1)(b) of the Waste Directive might be relevant. According to that provision, the Waste Directive does not apply to the kinds of waste listed in points (i) to (iv) 'where they are already covered by other legislation'. Point (ii) mentions waste resulting from the prospecting, extraction and storage of mineral resources, that is, various kinds of waste from mining operations, as waste which would be excluded from the scope of the Waste Directive if covered by 'other legislation'. The referring court considered that it was not clear however whether 'other legislation' encompassed national legislation, such as, in the present case, the Kaivoslaki and the Jäteasesus.

23. The Korkein hallinto-oikeus noted that the language versions of Article 2(1)(b) were not consistent in that the Finnish version contained no temporal qualification whereas the other language versions available to that court included the word 'already' or an equivalent expression. Even if it were assumed that the Finnish version was erroneous, it would still be debatable whether Article 2(1)(b) referred only to national legislation which was in force at the time of entry into force of the Directive. (12) The point is relevant to the present case because, of the provisions of national legislation relied on by AvestaPolarit, Section 40(2) of the Kaivoslaki was enacted on 17 February 1995 and Section 1(1)(2) of the Jäteasetus on 4 April 1997.

24. Finally, if Article 2(1)(b) of the Directive refers to national legislation, the question arises whether fundamental European Community provisions relating to protection of the environment or possibly the Waste Directive itself requires that such national legislation guarantees a particular level of environmental protection.

25. The Korkein hallinto-oikeus accordingly decided to stay the proceedings and seek a preliminary ruling from the Court of Justice of the European Communities on the following questions:'(1) Are leftover rock resulting from the extraction of ore and/or ore-dressing sand resulting from the dressing of ore in mining operations to be regarded as 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, having regard to points (a) to (d) below?

(a) What relevance, in deciding the above question, does it have that the leftover rock and ore-dressing sand is stored on the area of the mining concession or its ancillary site? Is it relevant generally, with respect to falling within the definition of waste, whether the said by-products of mining operations are stored on the area of the mining concession, its ancillary site or further away?
(b) What relevance does it have, in assessing the matter, that the leftover rock is the same as regards its composition as the basic rock from which it is quarried, and that it does not change its composition regardless of how long it is kept and how it is kept? Should ore-dressing sand which results from the ore-dressing process perhaps be assessed differently from leftover stone in this respect?
(c) What relevance does it have, in assessing the matter, that leftover rock is harmless to human health and the environment, but that, according to the view of the environmental licence authorities, substances harmful to health and the environment dissolve from ore-dressing sand? To what extent generally is importance to be attached to the possible effect of leftover rock and ore-dressing sand on health and the environment in assessing whether they are waste?
(d) What relevance does it have, in assessing the matter, that leftover rock and ore-dressing sand are not intended to be discarded? Leftover rock and ore-dressing sand may be re-used without special processing measures, for example for supporting mine galleries, and leftover rock also for landscaping the mine after it has ceased operation. Minerals may in future with the development of technology be recovered from ore-dressing sand for utilisation. To what extent should attention be paid to how definite plans the person carrying on mining operations has for such utilisation and to how soon after the leftover rock and ore-dressing sand has been tipped on the mining concession or its ancillary site the utilisation would take place?
(2) If the answer to the first question is that leftover rock and/or ore-dressing sand is to be regarded as waste within the meaning of Article 1(a) of the Council Directive on waste, it is further necessary to obtain an answer to the following supplementary questions:
(a) Does “other legislation” within the meaning of Article 2(1)(b) of the Waste Directive (91/156/EEC), waste covered by which is excluded from the scope of the directive, and which under point (ii) concerns *inter alia* waste resulting from prospecting, extraction, treatment and storage of mineral resources, mean exclusively the European Community's own legislation? Or may national legislation too, such as certain provisions of the Kaivoslaki and the Jäteasetus in force in Finland, be “other legislation” within the meaning of the Waste Directive?
(b) If “other legislation” means also national legislation, does that mean exclusively national legislation which was already in force at the time of entry into force of the Waste Directive 91/156/EEC or also that enacted only afterwards?
(c) If “other legislation” means also national legislation, do fundamental European Community provisions relating to environmental protection or the principles of the Waste Directive set requirements for national legislation concerning the level of environmental protection as a condition for disapplying the rules of the Waste Directive? What sort of requirements could those be?′
26. Written observations were submitted by AvestaPolarit, the Austrian, Finnish, German, and United Kingdom Governments and the Commission. AvestaPolarit, the

Finnish, Netherlands and United Kingdom Governments and the Commission were represented at the hearing.

The first question referred

27. The referring court's first question concerns the criteria which are relevant for determining whether leftover rock resulting from the extraction of ore and/or ore-dressing sand resulting from the dressing of ore in mining operations is to be regarded as waste within the meaning of the Waste Directive.

28. The Finnish Government states in its written observations that several proceedings are pending before the Finnish courts concerning the classification of minerals as waste. In January 2000 in the case of *Palin Granit* (13) the Korkein hallinto-oikeus referred to the Court a series of questions concerning the relevant criteria for determining whether leftover stone resulting from granite quarrying is to be regarded as waste within the meaning of the Waste Directive having regard to the following points:'(a) What relevance, in deciding the above question, does it have that the leftover stone is stored on a site adjoining the place of quarrying to await subsequent use? Is it relevant generally whether it is stored on the quarrying site, a site next to it or further away?

(b) What relevance does it have that the leftover stone is the same as regards its composition as the basic rock from which it has been quarried, and that it does not change its composition regardless of how long it is kept or how it is kept?

(c) What relevance does it have that the leftover stone is harmless to human health and the environment? To what extent generally is importance to be attached to its possible effect on health and the environment in assessing whether it is waste?

(d) What relevance does it have that the intention is to transfer the leftover stone in whole or in part away from the storage site for use, for example for landfill or breakwaters, and that it could be recovered as such without processing or similar measures? To what extent in this connection should attention be paid to how definite plans the holder of the leftover stone has for such use and to how soon after the leftover stone has been deposited on the storage site the use takes place?'

29. At the hearing in the present case, which took place in January 2003, it was accepted by those present that in so far as concerned the first question referred the written observations had been largely overtaken by the judgment in *Palin Granit*, delivered on 18 April 2002. I will accordingly first consider the extent to which that judgment has indeed answered the first question.

30. Reviewing the Court's earlier case-law concerning the definition of waste under the Directive, the Court in *Palin Granit* made the following points.

31. The term 'waste', the scope of which turns on the meaning of the term 'discard', (14) cannot be interpreted restrictively. (15) Neither the fact that the leftover stone has undergone a treatment operation referred to in the Directive nor the fact that it can be reused suffices to establish whether that stone is waste for the purposes of the Directive. (16) Leftover stone from extraction processes which is not the product primarily sought by the operator of a granite quarry falls, in principle, into the category of '[r]esidues from raw materials extraction and processing' under head Q11 of Annex I to the Directive. (17) Goods, materials or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may none the less be regarded not as a residue but as a by-product which the undertaking does

not wish to ‘discard’, within the meaning of the first paragraph of Article 1(a) of the Directive, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse. However, since the concept of waste is to be interpreted widely, that reasoning should be confined to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process. If, in addition to the mere possibility of reuse, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to ‘discard’, but as a genuine product. (18)

32. The Court in *Palin Granit* concluded that since in the case before it the only foreseeable reuses of leftover stone in its existing state, for example in embankment work or in the construction of harbours and breakwaters, necessitated, in most cases, potentially long-term storage operations which constituted a burden to the holder and were also potentially the cause of precisely the environmental pollution which the Directive sought to reduce, the reuse was not certain and was only contemplated in the longer term. The leftover stone could therefore be regarded only as ‘extraction residue’ which its holder ‘intends or is required to discard’ within the meaning of the Directive, and thus fell within the scope of head Q11 of Annex I thereto. (19)

33. The Court then turned to the factors raised by the referring court in sub-questions (a) to (d), none of which it considered relevant to classifying the leftover stone as waste.

34. With regard to sub-question (a), the Court observed that it followed from the analysis of the principal question that the place of storage of the leftover stone was not relevant to its classification as waste. Similarly, the conditions under which and the length of time for which the materials were kept did not, of themselves, provide any indication of either their value to the undertaking or the advantages which that undertaking could derive from them, or show whether the holder intended to discard the materials. (20)

35. With regard to sub-question (b), the Court accepted that the fact that the leftover stone had the same composition as the blocks of stone extracted from the quarry and that its physical state did not change could render it suitable for the uses which could be made of it. However, that argument would be decisive only if all the leftover stone were reused. The commercial value of blocks of stone depended on their size, shape and potential uses in the construction sector, qualities which leftover stone, despite having an identical composition, did not possess. That leftover stone was therefore still production residue. Moreover, the risk of environmental pollution posed by unused leftover stone was not mitigated by the fact that its mineral composition was identical to the blocks of stone, since that fact did not preclude storage of the leftover material which affected the environment. In any event, even where a substance underwent a full recovery operation and thereby acquired the same properties and characteristics as a raw material, it could nevertheless be regarded as waste if, in accordance with the definition in Article 1(a) of the Directive, its holder discarded it, or intended or was required to discard it. (21)

36. With regard to sub-question (c), the Court observed first that the Directive was supplemented by the Hazardous Waste Directive, (22) which implied that the concept of waste did not turn on the hazardous nature of a substance. It stated next that, even

assuming that the leftover stone did not, by virtue of its composition, pose any risk to human health or the environment, stockpiling such stone was necessarily a source of harm to, and pollution of, the environment, since full reuse of the stone was neither immediate nor even always contemplated. Finally, the harmlessness of the substance in question was not a decisive criterion for determining what its holder intended to do with it. (23)

37. With regard to sub-question (d), the Court considered that that question had already been answered in the context of the main question. It stated that the uncertainty surrounding the proposed uses of the leftover stone and the impossibility of reusing it in its entirety supported the conclusion that all that stone, and not merely the stone which would not be reused, was to be regarded as waste. It added that in any event, under Article 11 of the Directive, it remained possible for national authorities to lay down rules providing for exemptions from the permit requirement and to grant such exemptions in respect of disposal and recovery operations for certain waste, and for national courts to ensure that those rules were observed in accordance with the aims of the Directive. (24)

38. It remains to apply the above principles to the present case.

39. The Finnish Government explains in its written observations that the principal difference between *Palin Granit* and the present case is that the present case concerns mining rather than quarrying operations and that those operations generate not merely leftover rock but also leftover sand. AvestaPolarit sought further to distinguish *Palin Granit* at the hearing on the ground principally that in the present case it did not discard the by-products but used them without further processing: the rock supported the galleries of the underground mine being developed while the ore-dressing sand was stored.

40. Before the Korkein hallinto-oikeus AvestaPolarit had argued that the by-products could not be recovered or used immediately and must therefore be heaped up in the mining concession or its ancillary site. It was possible to use part of the by-products in the mining operation and part in other operations depending on the location of the mine. Leftover rock, as non-hazardous inert stone material, could be recovered, depending on the occasion and the place, but that could not be planned in advance. It was not always known beforehand for how long a mine would operate. Ore-dressing sand might later with the development of technology prove to be a valuable raw material and its usability must not be jeopardised.

41. If those statements of fact are correct (and that of course is a matter for the referring court to evaluate), the answer to the questions referred appears to follow directly from the judgment of the Court in *Palin Granit*. The holder of waste cannot restrict the scope of Community waste legislation by defining in his own terms the scope of the term ‘discard’. It is clear from the case-law of the Court that the meaning of that term depends on a series of factors dictated in particular by the overriding requirement of environmental protection enshrined in the Directive. The Court has stressed that the degree of likelihood of re-using a by-product is a relevant criterion for determining whether it is waste within the meaning of the Directive. In the present case, the re-use of the leftover rock is, as in *Palin Granit*, not certain and only contemplated in the longer term; the reuse of the ore-dressing sand appears, by AvestaPolarit’s own admission, to be wholly speculative. The by-products must therefore in principle be regarded as

‘extraction residue’ which its holder ‘intends or is required to discard’ within the meaning of the Directive, and thus fall within the scope of head Q11 of Annex I to that directive.
42. With regard to sub-questions (a) to (d), it follows from the above analysis that the specific factors mentioned in (d) are not relevant to classifying the leftover rock as waste in circumstances such as those of the present case. It follows moreover from the judgment of the Court in *Palin Granit* that the factors mentioned in sub-questions (a) to (c) are similarly not relevant, for the reasons given in that judgment. The referring court asks in sub-question (b) whether ore-dressing sand should be assessed differently from leftover stone: to my mind, the analysis of the Court of the equivalent question in *Palin Granit*, which is drawn in general terms, suggests no reason for drawing a distinction.
43. I accordingly conclude on the first question that (i) leftover rock resulting from the extraction of ore and sand resulting from the dressing of ore in mining operations which is stored for an indefinite length of time to await possible use are to be classified as waste within the meaning of the Directive, and (ii) the place of storage of leftover rock and sand, their composition and the fact, even if proven, that they do not pose any real risk to human health or the environment are not relevant criteria for determining whether the rock and sand are to be regarded as waste.
The second question
44. By its second question the referring court asks for guidance on the correct interpretation of Article 2(1)(b) of the Waste Directive. That article states that specified categories of waste, including ‘waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries’, is to be excluded from the scope of the Directive where it is ‘already covered by other legislation’. The referring court asks in particular whether ‘other legislation’ includes national legislation, and, if so, whether such legislation must (i) already have been in force when the Directive entered into force and/or (ii) comply with any substantive requirements concerning the level of environmental protection.
45. Several of those submitting written observations refer to the differences between the original and the amended versions of that provision.
46. Article 2 of the original directive provided as follows:‘1. Without prejudice to this Directive, Member States may adopt specific rules for particular categories of waste.
2. The following shall be excluded from the scope of this Directive:
(a) radioactive waste;
(b) waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;
(c) animal carcases and the following agricultural waste: faecal matter and other substances used in farming;
(d) waste waters, with the exception of waste in liquid form;
(e) gaseous effluents emitted into the atmosphere;
(f) waste covered by specific Community rules.’
47. Article 2 of the Directive as amended provides:‘1. The following shall be excluded from the scope of this Directive:
(a) gaseous effluents emitted into the atmosphere;
(b) where they are already covered by other legislation:
(i) radioactive waste;

(ii) waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;
(iii) animal carcases and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming;
(iv) waste waters, with the exception of waste in liquid form;
(v) decommissioned explosives.
2. Specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of individual Directives.'
48. AvestaPolarit and the Austrian, German and United Kingdom Governments consider that the reference to 'other legislation' in Article 2(1)(b) includes national legislation while the Finnish and Netherlands Governments and the Commission consider that it is limited to Community legislation.
49. AvestaPolarit and the Austrian, German and United Kingdom Governments variously support their argument by reference to the history, wording and scheme of the Directive.
50. They point out, first, that there was no Community legislation on the categories of waste referred to in Article 2(1)(b)(ii) (mining waste), (iii) (animal carcases and certain agricultural waste) and (v) (decommissioned explosives) at the time the amending Directive was adopted. If 'other legislation' meant solely Community legislation, the exclusion would thus have been meaningless.
51. The German Government adds that it is clear from the original directive that the legislature assumed that disposal of the categories of waste listed in Article 2(2)(a) to (e) could be ensured by national legislation. When amending the Directive in 1991, the legislature drafted a much narrower list of exceptions which apply only for waste covered by other legislation guaranteeing their disposal in compliance with environmental law. Nothing suggests that the amendments were intended to change the rule in the original directive and exclude the possibility that disposal complying with environmental law could also be ensured on the basis of national law. The United Kingdom adduces a similar argument.
52. Next, AvestaPolarit and the Austrian, German and United Kingdom Governments submit that both the original directive and the Directive as amended use different formulations such as 'specific Community rules' and 'individual directives' when they intend to refer exclusively to Community provisions.
53. With regard to the scheme of the Directive, AvestaPolarit submits that the Waste Directive contains other references which must be to national law, such as category Q13 in Annex I, 'Any materials, substances or products whose use has been banned *by law*' and the definition of waste in Article 1(a) as 'any substance or object … which the holder discards or intends or *is required* to discard'. (25) Moreover Article 11 provides for exemptions from the requirement for a permit for certain undertakings. Since the exemptions are available where the competent authorities have adopted general rules for the activities concerned, the Directive cannot in any event achieve identical results in the different Member States.
54. Austria and Germany submit that if 'other legislation' referred solely to Community legislation, the list of excluded waste in Article 2(1)(b) would be redundant, since by

virtue of the principle of *lex specialis* specific Community rules in any event override general Community law; it would accordingly be unnecessary to say so.
55. Germany adds that the Directive seeks to ensure a high level of environmental protection. Certain waste, however, such as radioactive waste, must be processed in accordance with specific rules. In general, directives are not appropriate instruments for laying down such specific requirements. It is therefore logical that such waste should be excluded from the scope of the Directive and governed instead by other specific legislation – even if such legislation initially existed only at national level.
56. I am not convinced by the arguments adduced by AvestaPolarit and the Austrian, German and United Kingdom Governments. At least at first sight it seems more plausible that a harmonising measure should allow for more specific Community legislation in certain fields within its scope than that it should permit Member States to derogate from it at will by national legislation. The former interpretation to my mind follows from the objectives, scheme and history of the Directive. Before turning to those aspects of the legislation, however, I will briefly consider the wording of the provision at issue, which has been invoked by all the abovementioned parties in support of their approach.
57. I am not persuaded by the arguments of those parties that much weight should be given to the fact that references in the Directive which relate unequivocally to Community legislation use formulations which are different from, and more specific than, 'other legislation'. In an ideal world, of course, the draftsman of legislation would always be precise, consistent and coherent. Inevitably however that ideal is not universally attained. In the present case, the wording appears to be ambiguous; it certainly cannot in my view be construed as necessarily having the meaning contended for by AvestaPolarit and the Austrian, German and United Kingdom Governments.
58. It may be moreover that the legislature deliberately chose different terms to distinguish between the different intended effects of 'other legislation' in Article 2(1)(b) and 'individual directives' in Article 2(2). In the original directive, 'waste covered by specific Community rules' was simply excluded from its scope. The amended directive is more subtle. Certain specified categories of waste are excluded 'where they are already covered by other legislation'; specific rules on the management of particular categories of waste which are necessary to deal with particular cases or to supplement the Directive – which will none the less continue to apply – may additionally be enacted 'by means of individual directives'. (26) Thus 'specific Community rules' in the original directive has in effect been subdivided into two classes of legislation with different objectives and effects: 'other legislation' covering waste within the categories listed in Article 2(1)(b) and removing it from the scope of the Directive and 'individual directives' supplementing the rules of the Directive for other categories of waste.
59. I do not consider furthermore that much can be inferred from the differences of detail between Article 2 of the original directive and Article 2 as amended, although the United Kingdom seeks to derive support for its interpretation from a meticulous comparison of such differences. It is however useful to consider the amendments made in 1991 in their broader context.
60. The preamble to the amending directive states:'…Directive 75/442/EEC established a set of Community rules on waste disposal; … these must be amended to take account of experience gained in the implementation of this Directive by the Member States; …

the amendments take as a base a high level of environmental protection;… the Council undertook to amend Directive 75/442 in its resolution of 7 May 1990 on waste policy;… common terminology and a definition of waste are needed in order to improve the efficiency of waste management in the Community;…… any disparity between Member States' laws on waste disposal and recovery can affect the quality of the environment and interfere with the functioning of the internal market'. (27)

61. The first recital in the preamble to the Council's resolution of 7 May 1990 on waste policy (28) states:'in the interests of environmental protection, there is a need for a comprehensive waste policy in the Community which deals with all waste, regardless of whether it is to be recycled, reused or disposed of'.

62. Thus it is clear that the general tenor of the amending directive is inclusive: the definition of 'waste' is extensive with a view to promoting the uniform implementation by Member States of Community waste legislation. That view is moreover borne out by the Explanatory Memorandum to the Proposal for the amending directive, (29) which states:'The framework character of this Directive is underscored and formalised. It is a general Directive which will apply to all waste. Its provisions will no longer be repeated in the individual Directives applying to specific categories of waste.'

63. The amendments to Article 2 of the original directive consist of:

(i) the removal of the original Article 2(1) ('Without prejudice to this Directive, Member States may adopt specific rules for particular categories of waste');

(ii) the addition of the qualification 'where they are already covered by other legislation' to the original categories (a), (b), (c), and (d) in Article 2(2) (renumbered (b)(i) to (iv) of Article 2(1)), to which was added a new category (b)(v) 'decommissioned explosives';

(iii) the removal of the original category (f) in Article 2(2) ('waste covered by specific Community rules');

(iv) the addition of a new Article 2(2) ('Specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of individual Directives.') and

(v) the re-enactment of the original category (e) in Article 2(2) ('gaseous effluents emitted into the atmosphere') as Article 2(a), such effluents remaining excluded from the scope of the Directive without qualification.

64. It seems clear that the first amendment was intended to preclude Member States from any longer adopting specific rules for particular categories of waste, in line with the overall aim of establishing a uniform Community definition of waste. The argument adduced by Germany to the effect that the 1991 amendments were not designed to exclude the possibility that environmentally sound waste management could continue to be ensured on the basis of national law is not in my view borne out by the scheme of the amending directive.

65. The third amendment is consistent with the conversion of the original directive into a framework directive. The category 'waste covered by specific Community rules' which it removes is replaced by the new Article 2(2) pursuant to the fourth amendment. That amendment was intended to make clear that the Community legislature could continue to adopt 'individual Directives applying to specific categories of waste' notwithstanding the fact that Directive 75/442 as amended was to be a framework directive in principle applicable to all waste. That amendment does not envisage the adoption of further directives laying down general provisions for the management of general categories of

waste, which will thereby be excluded from the scope of the Waste Directive, but rather the enactment of category-specific provisions for the management of particular categories of waste to supplement the provisions of the Directive. Such legislation sets out specific objectives, targets, criteria or procedures in relation to a specified category of waste for which provisions supplementing those of the Waste Directive are deemed appropriate without however excluding such waste from the general scope of the Waste Directive. A good example (although there are many others (30)) is the Hazardous Waste Directive, (31) the preamble to which states:'… the general rules applying to waste management which are laid down by Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC, also apply to the management of hazardous waste;… the correct management of hazardous waste necessitates additional, more stringent rules to take account of the special nature of such waste'. (32)
66. There remains the amendment at issue in the present case, namely the second amendment, which adds the words 'where they are already covered by other legislation' to preface the categories of waste listed in Article 2(1)(b)(i) to (v). The effect of those words is in my view to exclude those categories of waste from the scope of the Directive where they are covered by Community legislation. At the time the amending directive was adopted, Community legislation regulated radioactive waste, (33) animal carcases (34) and faecal matter used in farming. (35) It is clear that those directives lay down a complete code for the treatment of the waste in question. The Animal Waste Directive, for example, includes a general definition of 'animal waste' and establishes detailed procedures for the processing of such waste. The Sewage Sludge Directive similarly gives a broad definition of 'sludge' and regulates in detail its use in agriculture. I do not accept the German Government's argument that the categories of waste listed in Article 2(2)(b) of the Directive as amended should logically be governed by national legislation since directives are not appropriate instruments for laying down specific and detailed requirements.
67. Nor am I persuaded by the argument that the exclusion would have been meaningless if 'other legislation' meant solely Community legislation because there was no Community legislation on the categories of waste referred to in Article 2(1)(b)(ii) (mining waste), (iii) (animal carcases and certain agricultural waste) and (v) (decommissioned explosives) at the time the amending directive was adopted. On the contrary, the juxtaposition of categories of waste subject to existing Community legislation with categories not then regulated at Community level suggests to me that the legislature was envisaging the possibility of future Community legislation governing those categories; in the meantime, however, given the explicitly extensive and inclusive nature of the intended scope of the Directive as amended, those categories of waste were intended to remain within that scope.
68. That pattern also suggests that the word 'already' in Article 2(1)(b) of the Directive as amended was not intended to limit the category to waste covered by other legislation adopted before the Directive but to include waste covered by other (Community) legislation at whatever time the question arises, regardless of when that legislation was adopted. That interpretation is also borne out by the situation with regard to waste waters, excluded by Article 2(1)(b)(iv) 'where they are already covered by other legislation'. The Waste Water Directive (36) was adopted only two months after the 1991 amending directive on the basis of a Commission proposal published in January 1990,

five days after publication of the amended proposal for the amending directive. The two directives therefore progressed through the legislative stages together for part of the time, so that it is inconceivable that the legislature when adopting the one was unaware of the other. The word 'already' cannot therefore have the limited meaning described above – it would be absurd to suggest that waste waters remain within the scope of the Waste Directive even after adoption of the Waste Water Directive simply because that directive was adopted two months later.

69. It is instructive in my view to consider the consequences which would flow from the interpretation supported by AvestaPolarit and the Austrian, German and United Kingdom Governments.

70. First, it would be extremely difficult to determine with any degree of confidence the scope of the Waste Directive at any given moment. There is no provision in the Directive requiring Member States which enact legislation governing waste in the categories listed in Article 2(1)(b) to notify the Commission of such legislation.

71. That omission in itself is in my view telling: the Directive in contrast imposes specific obligations on Member States to notify the Commission of (i) measures they intend to take to achieve the aims set out in Article 3(1) of the Directive, (37) (ii) waste management plans drawn up in accordance with Article 7(1), (38) (iii) any measures necessary to prevent movements of waste which are not in accordance with their waste management plans, (39) and (iv) any general rules regulating waste disposal or recovery activities exempted pursuant to Article 11 of the Directive from the permit requirement imposed by Article 9 or 10. (40)

72. Moreover Member States are required to send the Commission every three years information on the implementation of the Directive in the form of a sectoral report drawn up on the basis of a questionnaire drafted by the Commission. (41) That questionnaire (42) repeats the requirements of the Directive in soliciting information concerning waste management plans and measures taken pursuant to Articles 3(1), 7(3) and 11(1).

73. Thus while it is true that, as Austria and Germany submit, the Directive cannot achieve identical results in the different Member States, the Commission must be kept informed of national patterns of implementation. It seems inconceivable that, in the context of a detailed framework for the provision of information to the Commission on national measures taken pursuant to the Directive, Member States would not also be required to inform the Commission of any national legislation adopted in the areas listed in Article 2(1)(b), the effect of which would be – on the interpretation put forward by the Austrian, German and United Kingdom Governments – wholly to exclude such areas from the scope of the Directive.

74. Furthermore the interpretation proposed by AvestaPolarit and those Governments would mean that the scope of the Directive would vary from one moment to another as individual Member States enacted, amended or repealed legislation covering the categories of waste listed in Article 2(1)(b). Even though AvestaPolarit and the United Kingdom consider that only legislation in force when the amending directive was adopted is covered, both those parties submit that subsequent amendments to or consolidation of such legislation does not remove it from the definition. That proviso, however, may equally prejudice legal certainty.

75. The 'patchwork' definition of waste within the scope of the Directive which would result would not only, as discussed above, undermine legal certainty; it would also

clearly run directly counter to the objectives of the amending directive, namely to reduce disparities between Member States' waste legislation by enacting a comprehensive Community waste policy taking as a base a high level of environmental protection. (43)

76. Finally, at the hearing counsel for AvestaPolarit produced a copy of a letter written in December 1992 by the then Head of the Waste Management Unit in DG XI (now the Environment Directorate-General) to McKenna & Co., solicitors in London. The letter reads as follows:'As explained on the telephone, the wording of Article 2(1)(b)(ii) was adopted with the understanding that it would cover other EC-legislation and where there is no EC-legislation, other national legislation.In the understanding of the Commission, the national legislation would have to cover the management of the materials concerned.What extent of equivalence would be considered, has not yet been established.'

77. Admittedly, that letter states that 'other legislation' within the meaning of Article 2(1)(b) could include national legislation. The letter, however, simply indicates the view of one representative of the Commission at a particular time. It is not a view that has been consistently held. In 2000, for example, the Commission took the opposite view in two separate communications, in which it states 'Directive 75/442/EEC on waste as amended by Directive 91/156/EEC applies to waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries, since the latter are so far not covered by other Community legislation' (44) and 'Article 2 of Directive 75/442/EEC on waste as amended by Directive 91/156/EEC establishes that waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries shall be excluded from the scope of Directive 75/442/EEC where they are already covered by other Community legislation'. (45)

78. It does not seem to me therefore that much weight should be given to the letter produced by AvestaPolarit's counsel.

79. I accordingly conclude that, on the basis of the scheme and objectives of the Directive, the words 'already covered by other legislation' in Article 2(1)(b) refer to Community legislation whether adopted before or after adoption of that directive. Since question 2(b) and question 2(c) referred by the Korkein hallinto-oikeus are put only in the event that 'other legislation' in Article 2(1)(b) includes national legislation, I do not propose to consider them.

Conclusion

80. I am accordingly of the opinion that the questions referred by the Korkein hallinto-oikeus should be answered as follows:

(1) Leftover rock resulting from the extraction of ore and/or ore-dressing sand resulting from the dressing of ore in mining operations which is stored for an indefinite length of time to await possible use are to be classified as 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.

(2) The place of storage of leftover rock and sand, their composition and the fact, even if proven, that they do not pose any real risk to human health or the environment are not relevant criteria for determining whether such rock and sand are to be regarded as waste.

(3) The words ‘already covered by other legislation’ in Article 2(1)(b) of Directive 75/442 as amended refer to Community legislation whether adopted before or after adoption of that directive.

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