Case C-116/01

SITA EcoService Nederland BV, formerly Verol Recycling Limburg BV
v
Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer

(Reference for a preliminary rulingfrom the Raad van State (Netherlands))

«(Environment – Waste – Regulation (EEC) No 259/93 – Directive 75/442/EEC – Treatment of waste in several stages – Use of waste as fuel in the cement industry and use of incineration residues as raw material in cement manufacture – Classification as a recovery operation or as a disposal operation – Concept of the use of waste principally as a fuel or other means to generate energy)»

Summary of the Judgment

1..

Environment – Waste – Directive 75/442 on waste – Regulation No 259/93 on the shipment of waste – Classification of an operation as either disposal or recovery – Dual classification not permissible
(Council Regulation No 259/93; Council Directive 75/442)

2..

Environment – Waste – Directive 75/442 on waste – Regulation No 259/93 on the shipment of waste – Classification of an operation as either disposal or recovery – Treatment of waste in several stages – First operation after shipment taken into account
(Council Regulation No 259/93; Council Directive 75/442)

3..

Environment – Waste – Directive 75/442 on waste – Combustion of waste – Classification of an operation as either disposal or recovery – Criteria – Calorific value not relevant
(Council Directive 75/442, Annex IIA, point D10 and Annex IIB, point R1)

4..

Environment – Waste – Directive 75/442 on waste – Regulation No 259/93 on the shipment of waste – Classification of an operation as either disposal or recovery – Definition by Member States of distinguishing criteria – Whether permissible – Condition
(Council Regulation No 259/93; Council Directive 75/442)

1.

For the purpose of applying Directive 75/442 on waste, as amended by Directive 91/156 and Decision 96/350, and Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Regulation No 120/97, it must be possible to classify any waste treatment operation as either disposal or recovery, and a single operation may not be classified simultaneously as both a disposal and a recovery operation. see para. 40

2. It follows from Directive 75/442 on waste, as amended by Directive 91/156 and Decision 96/350, and from Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Regulation No 120/97, that where a waste treatment process comprises several distinct stages of recovery or disposal, the process as a whole is not to be assessed as a single operation, but each phase must be classified separately for the purpose of implementing the Regulation when it constitutes a distinct operation in itself. Accordingly, where a waste treatment process comprises several distinct stages, it must be classified as a disposal operation or a recovery operation, within the meaning of Directive 75/442, for the purpose of implementing Regulation No 259/93, taking into account only the first operation that the waste is to undergo subsequent to shipment. see paras 41-42, operative part 1

3. The calorific value of waste which is to be combusted is not a relevant criterion for the purpose of determining whether that operation constitutes a disposal operation as referred to in point D10 of Annex IIA to Directive 75/442 on waste, as amended by Directive 91/156 and by Decision 96/350, or a recovery operation as referred to in point R1 of Annex IIB thereof. In order to be considered as use principally as a fuel or other means to generate energy within the meaning of that point, it is both necessary and sufficient that the combustion of waste meet the three following conditions: first, the main purpose of the operation concerned must be to enable the waste to be used as a means of generating energy; secondly, the conditions in which that operation is to take place must give reason to believe that it is indeed a means to generate energy; and thirdly, the waste must be used principally as a fuel or other means of generating energy. see paras 53, 56, operative part 2

4. Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Regulation No 120/97, does not preclude Member States from laying down, in acts having general scope, criteria for distinguishing between a recovery operation and a disposal operation, provided that the criteria comply with those laid down in Directive 75/442 on waste, as amended by Directive 91/156 and Decision 96/350. see paras 55-56, operative part 2

JUDGMENT OF THE COURT (Fifth Chamber)
3 April 2003 (1)

((Environment – Waste – Regulation (EEC) No 259/93 – Directive 75/442/EEC – Treatment of waste in several stages – Use of waste as fuel in the cement industry and use of incineration residues as raw material in cement manufacture – Classification as a recovery operation or as a disposal operation – Concept of the use of waste principally as a fuel or other means to generate energy))

In Case C-116/01,
REFERENCE to the Court under Article 234 EC by the Raad van State (Netherlands) for a preliminary ruling in the proceedings pending before that court between
SITA EcoService Nederland BV , formerly Verol Recycling Limburg BV

and

Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer ,
on the interpretation 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) and Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32),

THE COURT (Fifth Chamber),,

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, A. La Pergola (Rapporteur), P. Jann and A. Rosas, Judges,
Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

–
SITA EcoService Nederland BV, by R.G.J. Laan and B. Liefting-Voogd, advocaten,
–
the Netherlands Government, by H.G. Sevenster, acting as Agent,
–
the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,
–

the United Kingdom Government, by G. Amodeo, acting as Agent, and by D. Wyatt QC,

—

the Commission of the European Communities, by G. zur Hausen and H. van Vliet, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by N.A.J. Bel, acting as Agent; the United Kingdom Government, represented by D. Wyatt; and the Commission, represented by H. van Vliet, at the hearing on 19 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2002,

gives the following

Judgment

1

By judgment of 13 March 2001, received at the Court on 15 March 2001, the Raad van State (Netherlands Council of State) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation 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) and Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32), hereinafter the Directive.

2

Those questions were raised in the context of a dispute between SITA EcoService Nederland BV (SITA) and the Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Minister for Housing, Spatial Planning and the Environment, hereinafter the Minister) concerning the lawfulness of two decisions by which the latter subjected waste shipments which had been notified by SITA to certain conditions.

Legal framework

Community legislation

The Directive

3

The essential objective of the Directive is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. In particular, the fourth recital of the

Directive states that the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources.

4

In Article 1(e) of the Directive, disposal is defined as any of the operations provided for in Annex IIA, and in Article 1(f) recovery is defined as any of the operations provided for in Annex IIB.

5

Annex IIA of the Directive, headed Disposal operations, states: *NB:* This annex is intended to list disposal operations such as they occur in practice.....

D10

Incineration on land

...

6

Annex IIB, headed Recovery operations, states: *NB:* This annex is intended to list recovery operations as they occur in practice....

R1

Use principally as a fuel or other means to generate energy

...

R3

Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes)

...

R5

Recycling/reclamation of other inorganic materials

...

R11

Use of wastes obtained from any of the operations numbered R1 to R10

...

7

Article 3(1) of the Directive states: Member States shall take appropriate measures to encourage:

(a)

firstly, the prevention or reduction of waste production and its harmfulness ...

(b)

secondly:

(i)

the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or

(ii)

the use of waste as a source of energy.

8

Article 7 of the Directive provides:

1.

In order to attain the objectives referred to in Articles 3, 4 and 5, the competent authority or authorities referred to in Article 6 shall be required to draw up as

soon as possible one or more waste management plans. Such plans shall relate in particular to:

— the type, quantity and origin of waste to be recovered or disposed of,

— general technical requirements,

— any special arrangements for particular wastes,

— suitable disposal sites or installations.

Such plans may, for example, cover:

— the natural or legal persons empowered to carry out the management of waste,

— the estimated costs of the recovery and disposal operations,

— appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste.

2. Member States shall collaborate as appropriate with the other Member States concerned and the Commission to draw up such plans. They shall notify the Commission thereof.

3. Member States may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans. They shall inform the Commission and the Member States of any such measures.

Regulation (EEC) No 259/93

9 Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1), as amended by Council Regulation (EC) No 120/97 of 20 January 1997 (OJ 1997 L 22, p. 14, hereinafter the Regulation), lays down rules governing *inter alia* the monitoring and control of shipments of waste between Member States.

10 According to Article 2(i) of the Regulation, disposal is as defined in Article 1(e) of Directive 75/442/EEC and, according to Article 2(k), recovery is as defined in Article 1(f) of Directive 75/442/EEC.

11 Title II of the Regulation, entitled Shipments of waste between Member States, contains two separate chapters, one of which (Articles 3 to 5) concerns the procedure applicable to shipments of waste for disposal and the other (Articles 6 to 11) the procedure applicable to shipments of waste for recovery.

12 Under Article 6(1) of the Regulation, when a waste producer or holder intends to ship waste for recovery listed in Annex III to the Regulation (amber list of waste)

from one Member State to another Member State and/or pass it in transit through one or several other Member States, he is to notify the competent authority of destination and send copies of the notification to the competent authorities of dispatch and transit and to the consignee.

13 According to Article 6(3) of the Regulation, notification is to be effected by means of the consignment note which is issued by the competent authority of dispatch. Article 6(5) specifies the information which the notifier is to supply on the consignment note, which includes *inter alia* information relating to the recovery operations set out in Annex IIB to the Directive (fifth indent of Article 6(5)) and the planned method of disposal for the residual waste after recycling has taken place (sixth indent of Article 6(5)).

14 Article 7(2) of the Regulation lays down the time-limits, conditions and procedures which must be observed by the competent authorities of destination, dispatch and transit when raising an objection to a notified, planned shipment of waste for recovery. That provision provides in particular that objections are to be based on Article 7(4).

15 Article 7(4)(a) of the Regulation provides: The competent authorities of destination and dispatch may raise reasoned objections to the planned shipment:

— in accordance with Directive 75/442/EEC, in particular Article 7 thereof, or

— if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection, or

— if the notifier or the consignee has previously been guilty of illegal trafficking. In this case, the competent authority of dispatch may refuse all shipments involving the person in question in accordance with national legislation, or

— if the shipment conflicts with obligations resulting from international conventions concluded by the Member State or Member States concerned, or

— if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non recoverable fraction do not justify the recovery under economic and environmental considerations.

National legislation

16 The Meerjarenplan Gevaarlijke Afvalstoffen II (second Multi-Year Plan for Hazardous Waste, hereinafter MJP GA II) is a hazardous waste management plan within the meaning of Article 7 of the Directive, which was adopted by the Netherlands authorities in June 1997 for the period 1997 to 2007.

17

Sectoral Plan 18 of the MJP GA II, entitled Incineration of hazardous waste, states that a distinction can be made between recovery by means of recycling, recovery by use principally as a fuel and final disposal by incineration.

18 Recovery by means of recycling may consist of the processing of waste or its use in a production process, such as the use of combustible waste with a high inorganic content in the production of cement clinker.

19 According to the MJP GA II, since it is not possible to develop reliable general criteria as regards the distinction between recovery by means of recycling and final disposal of hazardous waste by incineration, a case-by-case assessment must be carried out, on the basis of the characteristics of the batch and the planned means of processing.

20 As regards recovery with use principally as a fuel, the MJP GA II uses calorific value in conjunction with chlorine content as a criterion. In order for there to be recovery, the MJP GA II requires a minimum calorific value of 11 500 kJ/kg for hazardous waste with a chlorine content of 1% or less and a minimum calorific value of 15 000 kJ/kg for hazardous waste with a chlorine content of over 1%.

21 Section 18 of the MJP GA II also states that, when assessing a waste shipment notification, it will first be considered whether recovery of the waste is possible. When sufficient disposal capacity is available in the Netherlands, it is possible under the Plan to raise reasoned objections to a planned shipment of waste for disposal, in accordance with Article 4(3)(b) of the Regulation. The maintenance of national elimination capacity is considered extremely important in the light of the principle of self-sufficiency.

Main proceedings and the questions referred for a preliminary ruling

22 SITA is a company governed by Netherlands law established in Maastricht (Netherlands), which carries out the collection and processing of hazardous and non-hazardous waste.

23 On 23 December 1997 and on 6 January 1998, SITA notified the Minister, as the competent authority of dispatch within the meaning of the Regulation, of two planned shipments of waste.

24 The first notification (NL 90201) concerned a plan to ship 2 000 tonnes of a compact mixture of waste glue, sealant, resin and paint, as well as waste containing silicon mixed with sawdust, to the undertaking STPI, established in Engis (Belgium), between 1 February 1998 and 31 January 1999.

25 The second notification (NL 90204) concerned a plan to ship 1 000 tonnes of organic and inorganic sediments with a low halogen content, mixed with sawdust, to the same undertaking, during that same period.

26

Following shipment, the waste at issue was to be used by the Belgian cement industry as fuel in cement kilns and as raw material in the production of clinker by cement factories. In that treatment process, known as a combined process, the energy produced from the waste replaces energy produced by raw materials, and ash from incinerated waste in turn replaces raw materials.

27 By two decisions adopted on 28 January and 13 February 1998 (the contested decisions), the Minister, in accordance with Article 7(2) of the Regulation, gave written consent to the waste shipments planned by SITA. The Minister nevertheless made authorisation of those shipments subject to certain conditions.

28 The Minister considered that, in the light of the form of processing envisaged, that is, use for the purpose of producing cement clinker, the proportion of the waste re-used as a material for the manufacture of cement ─ 25 to 40% and 30%, respectively ─ could not be considered recovery by recycling within the meaning of the MJP GA II.

29 The Minister acknowledged, however, that the purpose of the shipments could be considered to be a recovery operation with use principally as a fuel, subject to the condition that, for each planned movement of waste with a chlorine content of 1% or less the waste to be exported was to have a calorific value of over 11 500 kJ/kg and that for each planned movement of waste with a chlorine content of over 1% the calorific value was to be over 15 000 kJ/kg. The Minister based that condition on the MJP GA II.

30 SITA challenged the decisions in question in so far as they subjected the authorisation to ship the waste concerned to such conditions, by means of, first, an application for interim measures made to the President of the legal section of the Raad van State and, secondly, a complaint to the Minister.

31 By order of 18 June 1998, the President of the Administrative Appeal Section of the Raad van State rejected the application for interim measures.

32 By two decisions of 2 December 1998, the Minister rejected the complaints submitted by SITA against the decisions in question. On 11 January 1999, SITA brought an action against each of those decisions before the national court.

33 In the circumstances, the Raad van State, considering that the solution to the dispute before it depends on an interpretation of Community law, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Must the Directive ... be interpreted as permitting a process for treating waste in which more than one operation is performed, as described above, to be assessed as a whole?

(2)

If so, does the process concerned constitute recovery within the meaning of R1, R3 and R5 of Annex IIB to the Directive if it results in the complete use of the waste employed therein?

(3)

(a)

If the answer to question 1 is in the negative, is the extent (expressed as calorific value) to which the waste contributes to the incineration process or the extent (expressed as the level of material reused) to which the ash residues from that waste contribute to the production process relevant as regards the classification of each individual operation as recovery or disposal (R1, R3 and R5, and D10, respectively)?

(b)

If so, on the basis of which criteria is it necessary to assess whether or not the contribution is sufficient for classification as recovery? In the absence of Community criteria in this respect, is it possible to apply national criteria?

(4)

If one operation must be classified as recovery and another operation as disposal, how must the process as a whole be regarded?

The first question

34

By its first question, the national court essentially asks whether, in the case where a waste treatment process includes several distinct stages, its classification as a disposal operation or recovery operation within the meaning of the Directive must, for the purpose of implementing the Regulation, be considered comprehensively, as constituting a single operation, or rather by examining each of the stages separately, as distinct operations.

Arguments of the parties

35

SITA claims that the Directive should be interpreted to mean that, for the purpose of classification, a waste treatment process involving more than one operation can be assessed as a whole. In that regard, it states that the treatment process at issue in the main proceedings constitutes a single technical process and must therefore be subject to a global assessment, which leads to the conclusion that it constitutes a single recovery operation.

36

The Netherlands Government considers that the answer to the first question must be that the Directive allows a waste treatment process such as that at issue in the main proceedings, which involves more than one material operation (that is, the incineration of waste and the use of the ash in the production of cement clinker) to be considered a single operation within the meaning of Annexes IIA and IIB to that directive.

37

The United Kingdom Government states that, where it is claimed that the waste at issue will be used in a cement kiln both as fuel and as a raw material for the production of cement clinker, each of those elements must be taken into account

and a conclusion drawn on the basis of the overall contribution of the waste to the process as a whole.

38 According to the Commission, the Directive should be interpreted to mean that, in the case where waste undergoes a treatment process involving several successive operations, it must be established for each of those operations whether the treatment in question is a recovery operation or a disposal operation within the meaning of Annexes IIA and IIB of that directive.

39 The Commission points out that, in the case in the main proceedings, the national court observes that, in a first stage, the waste is to be used as fuel in cement kilns, where the energy generated by that waste will replace energy normally generated by raw materials. In a second stage, after the waste has served as an energy source, the ash from that waste will partially replace the raw materials needed to produce clinker in cement works. The fact that the use of waste ash is itself classified as disposal or recovery has no effect on the classification of the first treatment which the waste undergoes, which would be relevant only if it was necessary to determine the purpose of a waste shipment with a view to implementing the Regulation.

Findings of the Court

40 In that regard, it must first be recalled that, for the purpose of applying the Directive and the Regulation, it must be possible to classify any waste treatment operation as either disposal or recovery, and a single operation may not be classified simultaneously as both a disposal and a recovery operation (Case C-6/00 *ASA* [2002] ECR I-1961, paragraph 63).

41 Nevertheless, while a single operation must be given a single classification in the light of the distinction between a recovery operation and a disposal operation, a waste treatment process can in practice include several successive stages of recovery or disposal.

42 It follows from the Directive and the Regulation that, in such a case, the treatment process as a whole is not to be assessed as a single operation, but each phase must be classified separately for the purpose of implementing the Regulation when it constitutes a distinct operation in itself.

43 As is clear from the sixth indent of Article 6(5) and the fifth indent of Article 7(4)(a) of the Regulation, an operation classified as waste recovery may be followed by a disposal operation of the non-recoverable fraction of that waste. In such a case, the classification of the first operation as a recovery operation is not affected by the fact that it is followed by an operation to dispose of the residual waste.

44 Moreover, point R11 of Annex IIB to the Directive makes clear that the use of residual waste obtained from any of the operations listed in that annex, in points

R1 to R10, itself constitutes a recovery operation distinct from the recovery operation which precedes it. In accordance with the distinction thus laid down in the Annex, it must therefore be determined whether an operation falls under operations R1 to R10 in that annex independently, without taking into account the possible subsequent use of the residual wastes obtained from any of those operations — a use which is itself covered by a separate operation.

45 As the Commission rightly points out, and as made clear by the Advocate General in paragraph 51 of his Opinion, when the question of the classification of a waste treatment operation arises for the purpose of implementing the Regulation, only the classification of the first operation which that waste must undergo subsequent to its shipment is relevant in determining the purpose of that shipment.

46 When the Regulation refers to the shipment of waste and distinguishes between shipments of waste destined for disposal and those destined for recovery, it is directed at the treatment which that waste must undergo when it arrives at its destination, not the possible subsequent processing of waste which has been thus treated or to its residues. Moreover, that processing may take place in a different treatment plant and following further shipment.

47 In the case in the main proceedings, it appears from the order for reference that the national court is of the view that the processing which the waste at issue must undergo comprises two distinct operations, consisting, first, of the combustion of that waste and, secondly, of the use of its ash as a raw material in the production of cement clinker.

48 In the light of the foregoing considerations, only the first of the two operations mentioned above should be subject to classification with a view to establishing the purpose of the waste shipment in question.

49 The answer to the first question must therefore be that, where a waste treatment process comprises several distinct stages, it must be classified as a disposal operation or a recovery operation within the meaning of the Directive, for the purpose of implementing the Regulation, taking into account only the first operation that the waste is to undergo subsequent to shipment.

The second question

50 In the light of the reply to the first question, it is not necessary to deal with the second question.

The third question

51 In the light of the reply to the first question, the third question must be understood to mean that the national court is essentially asking whether the calorific value of the waste which is to be combusted is a relevant criterion for the purpose of determining whether that operation constitutes a disposal operation as referred to

in point D10 of Annex IIA to the Directive or a recovery operation as referred to in point R1 of Annex IIB to the Directive and, in addition, whether the Member States may define distinguishing criteria to that end.

52 First of all, as regards the first part of that question, the Court has already held, in C-228/00 *Commission* v *Germany* [2003] ECR I-1439, paragraph 47, that the criterion of the calorific value of waste is not relevant for the purpose of establishing whether an operation involving the combustion of waste is a recovery operation as referred to in point R1 of Annex IIB to the Directive.

53 It is clear from paragraph 47 of that judgment that, in order to be considered use principally as a fuel or other means to generate energy, within the meaning of point R1 of Annex IIB to the Directive, it is both necessary and sufficient that the combustion of waste meet the three conditions set out in paragraphs 41 to 43 of that judgment. First, the main purpose of the operation concerned must be to enable the waste to be used as a means of generating energy. Secondly, the conditions in which that operation is to take place must give reason to believe that it is indeed a means to generate energy. Thirdly, the waste must be used principally as a fuel or other means of generating energy.

54 It is for the national court to establish whether, in the case in the main proceedings, those conditions are satisfied for the purpose of classifying the combustion of the waste at issue in cement kilns as a disposal operation or a recovery operation.

55 As regards the second part of the third question, it should also be recalled that the Regulation does not preclude Member States from laying down, in acts having general scope, criteria for distinguishing between a recovery operation and a disposal operation, provided that the criteria comply with those laid down in the Directive (see, to that effect, *Commission* v *Germany* , cited above, paragraphs 35 and 36).

56 In the light of the foregoing considerations, the answer to the third question must be that the calorific value of waste which is to be combusted is not a relevant criterion for the purpose of determining whether that operation constitutes a disposal operation as referred to in point D10 of Annex IIA to the Directive or a recovery operation as referred to in point R1 of Annex IIB thereof. Member States may establish distinguishing criteria for that purpose, provided that the criteria comply with those laid down in the Directive.

The fourth question

57 In view of the answer to the first question, from which it follows that a waste treatment process should not be classified as a whole for the purpose of implementing the Regulation, there is no need to reply to the fourth question.

Costs

58 The costs incurred by the Netherlands, German 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Raad van State by judgment of 13 March 2001, hereby rules:

1. Where a waste treatment process comprises several distinct stages, it must be classified as a disposal operation or a recovery operation 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 and by Commission Decision 96/350/EC of 24 May 1996, for the purpose of implementing Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Council Regulation (EC) No 120/97 of 20 January 1997, taking into account only the first operation that the waste is to undergo subsequent to shipment;

2. The calorific value of waste which is to be combusted is not a relevant criterion for the purpose of determining whether that operation constitutes a disposal operation as referred to in point D10 of Annex IIA to Directive 75/442, as amended by Directive 91/156 and by Decision 96/350, or a recovery operation as referred to in point R1 of Annex IIB thereof. Member States may establish distinguishing criteria for that purpose, provided that those criteria comply with those laid down in the Directive.

Wathelet Timmermans La Pergola

Jann Rosas

Delivered in open court in Luxembourg on 3 April 2003.

R. Grass — Registrar

M. Wathelet — President of the Fifth Chamber

1 – Language of the case: Dutch.

OPINION OF ADVOCATE GENERAL
JACOBS
delivered on 14 November 2002(1)

Case C-116/01

Verol Recycling Limburg BV
v
Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer

(())

1. In this case the Court is asked by the Netherlands Raad van State (Council of State) for a preliminary ruling on the correct criteria for distinguishing between operations for the disposal of waste and operations for its recovery for the purpose of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (the Regulation). (2)
2. It may be noted that since the Raad van State made its reference in the present case the Court has in its judgment in *ASA* (3) given some guidance on that distinction.
3. The Regulation lays down procedures to be followed where waste for recovery or disposal is transported from one Member State to another. The procedures vary depending on whether the waste is for recovery or for disposal.
4. The present case concerns the correct classification for the purpose of the Regulation of waste intended to be shipped from the Netherlands to Belgium for use as fuel in cement kilns and as a raw material in the process for producing clinker in cement factories. The referring court asks in particular whether it is permissible to use a global assessment when classifying such a process, involving two distinct operations, as recovery or disposal.
The relevant Community legislation
The Waste Directive
5. Article 3(1) of Council Directive 75/442/EEC of 15 July 1975 on waste as amended (4) (the Waste Directive or the Directive) requires Member States to take appropriate measures to encourage (a) firstly, the prevention or reduction of waste production and its harmfulness and (b) secondly: (i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or (ii) the use of waste as a source of energy.
6. Article 5 of the Directive enshrines the principles of self-sufficiency and proximity. It provides as follows:

1. Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to become self sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste.
2. The network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.
7. The Directive defines disposal as any of the operations provided for in Annex IIA (5) and recovery as any of the operations provided for in Annex IIB. (6)
8. Annexes IIA and IIB to the Directive (7) are headed Disposal operations and Recovery operations respectively. Each annex is prefaced by a note to the effect that it is intended to list the operations as they occur in practice and that in accordance with Article 4 (8) waste must be [disposed of/recovered] without endangering human health and without the use of processes or methods likely to harm the environment.
9. Annex IIA includes among the listed disposal operations:D10 Incineration on land.
10. Annex IIB includes among the listed recovery operations:

R1

Use principally as a fuel or other means to generate energy

R3

Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes)

R5

Recycling/reclamation of other inorganic materials [i.e. other than metals or metal compounds]

R11

Use of wastes obtained from any of the operations numbered R1 to R10.

11. Article 7 of the Directive provides:

1. In order to attain the objectives referred to in Articles 3, 4 and 5, the competent authority or authorities referred to in Article 6 shall be required to draw up as soon as possible one or more waste management plans. Such plans shall relate in particular to:

- the type, quantity and origin of waste to be recovered or disposed of,
- general technical requirements,
- any special arrangements for particular wastes,
- suitable disposal sites or installations.

...

3. Member States may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans. They shall inform the Commission and the Member States of any such measures.

The Regulation

12. The Regulation is based on Article 130s of the EC Treaty (now, after amendment, Article 175 EC). Its aim is to provide a harmonised set of

procedures whereby movements of waste can be limited in order to secure protection of the environment. (9)
13. Title II of the Regulation is entitled Shipments of waste between Member States. Chapters A and B of Title II lay down the procedures to be followed for the shipment of waste for disposal and of waste for recovery respectively.
14. The Regulation adopts the definitions of disposal and recovery used in the Directive. (10)
15. The procedure for shipments of waste for recovery varies according to the type of waste. Annexes II to IV to the Regulation classify specific waste in one of three lists. (11) Annex II contains the Green list of wastes, which should not normally present a risk to the environment if properly recovered in the country of destination. (12) Annex III contains the Amber list of wastes and Annex IV the Red list of wastes, regarded as particularly hazardous. Shipments for recovery of the wastes listed in Annex II are simply to be accompanied by a document containing prescribed information. (13) Shipments of other waste (including the waste the shipment of which gave rise to the present proceedings) for recovery and shipments of waste for disposal are subject to the following procedure.
16. Where the producer or holder of waste, generally referred to as the notifier, (14) intends to ship such waste from one Member State to another, he must notify the competent authority of destination and send a copy of the notification to the competent authority of dispatch (15) and to the consignee. (16)
17. Notification is to be effected by means of the consignment note to be issued by the authority of dispatch. (17) The notifier is to complete the consignment note and, if requested by the competent authorities, supply additional information and documentation. (18) He is to supply on the consignment note information with particular regard to a number of factors including (i) the source, composition and quantity of the waste and (ii) the operations involving disposal or recovery as referred to in Annex IIA or IIB to the Directive. (19)
18. In the case of shipments of waste for recovery, the consignment note must also include details of (i) the planned method of disposal for the residual waste after recycling has taken place; (ii) the amount of the recycled material in relation to the residual waste and (iii) the estimated value of the recycled material. (20)
19. In the case of waste for disposal, the Member State of destination is responsible for granting authorisation for shipment. The Member State of dispatch (21) has the right to raise objections and the Member State of destination may issue the authorisation only in the absence of any such objections. (22) In the case of waste for recovery, the Member States of dispatch and destination (23) have the right to object to a shipment but, as a general rule, (24) no express authorisation is required. (25)
20. The most significant difference between the procedures applying to the shipments of waste for recovery and for disposal lies in the grounds on which the various competent authorities concerned may oppose the proposed shipment.
21. In the case of waste for disposal, the objections must be based on Article 4(3). (26) Under that article, in particular, (i) Member States may prohibit generally or partially or object systematically to shipments of waste in order to implement the principles of proximity, priority for recovery and self-sufficiency at

Community and national levels in accordance with the Directive (27) and (ii) the competent authorities of dispatch and destination may raise reasoned objections to planned shipments if they are not in accordance with the Directive in order to implement the principle of self-sufficiency at Community and national levels. (28)
22. In the case of waste for recovery, the objections are to be based on Article 7(4). (29) Article 7(4)(a) (30) lists five grounds on which the competent authorities of destination and dispatch may raise reasoned objections of which only the first and fifth are of relevance in the present case. Those grounds - set out in the first and fifth indents of Article 7(4)(a) - are as follows:
- in accordance with Directive 75/442, in particular Article 7 thereof, or...--if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.
23. Article 28(1) of the Regulation provides that the notifier may use a general notification procedure where waste for disposal or recovery having the same physical and chemical characteristics is shipped periodically to the same consignee following the same route. Article 28(2) provides that under a general notification procedure, a single notification may cover several shipments of waste over a maximum period of one year.
The case-law of the Court
24. Two decisions of the Court are of particular interest in the context of the present case.
25. First, the Court ruled in *Dusseldorp* (31) that the principles of self-sufficiency and proximity do not apply to waste for recovery; such waste should therefore be able to move freely between Member States for processing, provided that transport poses no threat to the environment.
26. Second, the Court ruled in *ASA* (32) that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources.
27. The Court also ruled in *ASA* that Articles 4(3) and 7(4) exhaustively list the cases in which Member States may object to a shipment of waste between Member States. (33)
The facts and the proceedings
28. It may be helpful to preface the summary of the facts underlying the main proceedings by explaining that cement is manufactured by heating raw materials (lime, sand/silica, a small proportion of alumina and generally iron oxide). When burned those materials produce cement clinker which consists mainly of calcium silicates and aluminates. The clinker is then milled to produce cement.
29. The main proceedings arise out of two notifications by Verol Recycling Limburg BV of its intention to ship waste from the Netherlands to Belgium. The first notification concerned 2 000 tonnes of a compact mixture of waste glue, sealant, resin and paint and waste containing silicon, with sawdust. The second notification concerned 1 000 tonnes of sediment with a low halogen content, with sawdust. In both cases the waste was to be used as fuel in cement kilns and as a

raw material in the process for producing clinker in cement factories. In that process, the national court explains that the energy obtained from burning the waste is a substitute for energy obtained from burning primary raw materials, namely other fuel, and the ash residues from the incinerated waste are a substitute for primary raw materials, namely sand. More precisely, the organic component of the mixtures of waste at issue is incinerated and the residue of the inorganic component is used for the production of clinker. Thereafter nothing remains of the waste.

30. Verol notified the Netherlands competent authority, the Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Minister for Housing, Planning and the Environment), of the proposed shipments, using the general notification procedure provided under Article 28 of the Regulation and indicating that the waste was intended to be recovered. The consignment notes refer in each case to operations R1, R3 and R5 of Annex IIB to the Directive. The waste was to be shipped over a period of one year.

31. In his decisions made pursuant to Article 7(2) of the Regulation, the Minister referred, under the heading The Test which precedes the operative part of the decision, to the Meerjarenplan Gevaarlijke Afvalstoffen II of June 1997 (MJP GA II - Long-term Plan for Hazardous Waste II) and in particular to the following text: **Recovery by material reuse** Recovery by material reuse is possible for a number of waste streams to be incinerated, by means of treatment or use in a production process (for example wastes to be incinerated with a high inorganic fraction in the manufacture of cement clinker). ... Since it is not possible to develop well-founded generic criteria for the distinction between recovery by material reuse or disposal by incineration for hazardous waste to be incinerated, this will be reviewed from case to case on the basis of the details of the relevant waste stream and the proposed method of processing.

32. The decision then stated that the fraction of the waste intended for material reuse, namely 30% in the case of one notification and 25-40% in the case of the other, did not justify categorisation of the proposed process as recovery by material reuse. The Minister appears by that statement to have decided that the proposed use of the incineration residue in clinker manufacture did not constitute recovery within the meaning of head R5 of Annex IIB. According to the order for reference, that decision was made on the basis of the Minister's understanding that an operation constitutes recovery by re-use only where material re-use amounts to 50% or more.

33. The Minister concluded the decisions by consenting to the planned shipments subject to the conditions that for each planned movement of waste with a chlorine content of 1% or less the waste to be exported had to have a calorific value of over 11 500 kJ/kg and that for each planned movement of waste with a chlorine content of over 1% the waste to be exported had to have a calorific value of over 15 000 kJ/kg. The Minister based those conditions also on the MJP GA II, which as regards recovery with use principally as a fuel takes the calorific value linked to the chlorine content of the waste as the relevant criterion. For an operation to constitute recovery, hazardous waste with a chlorine content of 1% or less must have a minimum calorific value of 11 500 kJ/kg. For an

operation to constitute recovery, hazardous waste with a chlorine content of over 1% must have a minimum calorific value of 15 000 kJ/kg. (34)

34. It appears from the documents before the Court that the average calorific value of the waste in question was 16 000 kJ/kg, with a range from 800 to 30 000 kJ/kg, and the average chlorine content was less than 1%, with a range from 0 to 2%. Certain consignments presumably therefore did not satisfy the conditions imposed by the Minister and hence their export was unauthorised. In that context Verol states that, of the original consignments totalling 3 000 tonnes, it was able to export less than 1 400 tonnes. Of the remainder, some was processed in the Netherlands while the rest was not processed at all, but stored at some cost to Verol.

35. Verol unsuccessfully lodged objections against the decisions and subsequently appealed to the Raad van State (Council of State), Administrative Appeal Section.

36. Verol contended before the national court that the Minister was wrong to attach the abovementioned conditions to its consent. In its view, the use in question of the waste in the cement industry in Belgium must be regarded unconditionally as recovery within the meaning of Article 1(f) of the Directive read in conjunction with Annex IIB thereto. It considers that the operation concerned is an operation R1 Use principally as a fuel or other means to generate energy, R3 Recycling/reclamation of organic substances which are not used as solvents and R5 Recycling/reclamation of other inorganic materials within the meaning of that annex. Verol argues that the processing of the waste in the combined procedure results in the complete use of the waste and that in adopting his decision the Minister wrongly failed to take account of the efficiency of the combined procedure as a whole and instead took as a basis the nature and composition of the waste.

37. According to the national court however the Minister argued that such an assessment of the combined effect of the incineration of the waste and the processing of the ash residues into cement clinker was not possible in the light of the provisions of Annex IIB to the Directive.

38. In order to answer the question whether the Minister was authorised to raise an objection to the planned shipment of the waste if it did not satisfy the conditions laid down, the referring court considers that it will have to determine whether the process concerned must be regarded as a disposal or recovery operation within the meaning of Article 1(e) and (f) of the Directive read in conjunction with Annexes IIA and IIB thereto. The parties disagree *inter alia* as to whether this processing method must be regarded as a recovery operation within the meaning of R1, R3 and R5 of Annex IIB or as a disposal operation within the meaning of D10 of Annex IIA. The referring court considers that neither the Directive nor the case-law of the Court of Justice makes clear the distinction between R1, R3 and R5, on the one hand, and D10, on the other.

39. The national court adds that the parties do not dispute that in the process in question, in which no residual product remains, the waste is used completely as a fuel for cement kilns and as a raw material for the manufacture of cement clinker. In view of the wording of Article 1(f) of the Directive, under which

recovery means any of the operations provided for in Annex IIB, (35) it would not seem possible to rule out a combined assessment of (the efficiency of) operations in a process as a whole. Consequently, the question arises whether that process must be regarded as a recovery operation within the meaning of R1, R3 and R5 of Annex IIB to the Directive on account of the complete use of the waste employed therein.

40. In view of the foregoing the Council of State considers that it must refer the following questions to the Court of Justice for a preliminary ruling:

1. Must Directive 75/442/EEC of 15 July 1975 on waste (the Framework Directive) be interpreted as permitting a process for treating waste in which more than one operation is performed, as described above, to be assessed as a whole?

2. If so, does the process concerned constitute recovery within the meaning of R1, R3 and R5 of Annex IIB to the Framework Directive if it results in the complete use of the waste employed therein?

41. The national court considers that, if the answer to question 1 is in the negative, it is necessary to assess whether the process concerned results in recovery or disposal on the basis of each operation involved therein. That raises the question whether the extent to which the waste contributes to the incineration process in the cement kilns and to the process for producing cement clinker is decisive in respect of the distinction between R1, R3 and R5, on the one hand, and D10, on the other. The extent to which the waste contributes to the incineration process can be measured on the basis of the calorific value linked to the chlorine content of the waste. The extent to which the (ash residues of the) waste contribute(s) to the production process can be measured on the basis of the inorganic content. It cannot be ruled out that an operation involving waste which makes a positive contribution both to the incineration process, that is to say that the waste has a calorific value of over 0 kJ/kg, and also to the manufacture of cement clinkers, that is to say that the inorganic content is over 0%, must be regarded as a recovery operation within the meaning of R1, R3 and R5 of Annex IIB to the Directive. Where, in a process, one operation must be regarded as recovery and another must be regarded as disposal, the question arises whether the process must be regarded as a whole as recovery or disposal.

42. In the light of the foregoing the Council of State considers that it must refer the following further questions to the Court of Justice for a preliminary ruling:

3.a. If the answer to question 1 is in the negative, is the extent (expressed as calorific values) to which the waste contributes to the incineration process or the extent (expressed as the level of material re-used) to which the ash residues from that waste contribute to the production process relevant as regards the classification of each individual operation as recovery or disposal (R1, R3 and R5 and D10 respectively)?

3.b. If so, on the basis of which criteria is it necessary to assess whether or not the contribution is sufficient for classification as recovery? In the absence of Community criteria in this respect is it possible to apply national criteria?

4. If one operation must be classified as recovery and another operation as disposal, how must the process as a whole be regarded?

43. Written observations have been lodged by Verol, the German, Netherlands and United Kingdom Governments and the Commission. The Netherlands and United Kingdom Governments and the Commission were represented at the hearing. The German Government's observations concern question 3b alone; those of the United Kingdom do not consider the questions referred individually and suggest a single composite answer thereto.

The first question -the correct approach to a combined procedure for treating waste

44. By its first question the referring court asks whether the Directive permits a process for treating waste in which more than one operation is performed to be assessed as a whole.

45. That question was prompted by the fact that the process to which the waste at issue was to be subject is a combined procedure involving incineration with energy recovery followed by use of the incineration residue. Verol notified that procedure as a combination of (i) use principally as a fuel or other means to generate energy under head R1 of Annex IIB, (ii) recycling/reclamation of organic substances which are not used as solvents under head R3 and (iii) recycling/reclamation of non-metallic inorganic materials under head R5 (the latter two categories reflecting the fact that the waste contained both types of substance). The Minister appears to have assessed each of the two steps (incineration and use of residue) separately for the purpose of consenting to the proposed shipment, first deciding that the extent of re-use proposed was not sufficient to constitute recovery by material reuse and second imposing a condition as to minimum calorific value to be satisfied in order for the waste to be shipped for recovery by use principally as a fuel or other means to generate energy. The referring court's first question appears to be asking whether that approach to classifying a combined procedure such as that at issue was correct or whether, as Verol claims, the Minister should have made a global assessment of both steps which would have led to the conclusion that there was recovery of 100% of the waste.

46. The question is thus raised by the referring court in a relatively narrow context which arises only because national law or practice imposes a percentage threshold in order for an operation involving material reuse to be classified as recovery for the purpose of the Regulation.

47. Both Verol and the Netherlands Government submit that a combined process such as that at issue is to be assessed as a whole, while the Commission reaches the opposite conclusion.

48. Verol submits that what is at issue is a single technical process and hence a single recovery operation. That conclusion is not undermined by the fact that the operation as a whole is not described in Annex IIB: the annexes to the Directive are not exhaustive, as is clear from the note introducing them. The scheme of the annexes requires a global assessment of a process involving more than one operation.

49. The Netherlands Government in contrast considers that the lists in Annexes IIA and IIB are exhaustive. A process as described by the national court is a single operation within the meaning of Annex IIA or IIB provided that one of the

actual operations involved in the process corresponds to one of the operations listed in Annex IIA or IIB. The Netherlands Government added at the hearing that in its view the national court's description of the process at issue is misleading: the incineration and the use of the residue in the clinker are simultaneous and not, as suggested in the order for reference, successive steps.

50. The Commission submits that it is the first operation to which waste is to be subjected which determines whether the waste should be notified as intended for disposal or recovery for the purposes of the Regulation. In the present case, the national court states that the waste is to be used first as a fuel in cement kilns, where the energy generated will replace energy normally generated by raw materials. The Commission considers that that process is Use principally as a fuel and hence recovery. It is possible that, as in the present case, that process will produce further, second generation waste. Whether the use of that waste is recovery or disposal has no effect on the correct classification of the first process, although in accordance with Article 4 of the Directive Member States must ensure that waste is recovered or disposed of without ... using processes or methods which could harm the environment.

51. The Directive defines disposal and recovery as any of the operations provided for in Annex II [A/B]. It seems clear therefore that a composite process will not constitute disposal or recovery within the meaning of the Directive unless that process accords with one of the descriptions under the heads of those annexes. In the case of a composite process which - as in the present case - cannot be accurately described as one of those listed operations, I concur with the Commission that it is the assessment of the first operation in the process which determines whether a shipment of waste intended to be subjected to the process requires notification under the Regulation as waste for disposal or waste for recovery. I consider that that approach is correct for the following reasons.

52. As the United Kingdom submits, many recovery operations result in a residue of waste which must in turn be dealt with, whether by a further recovery operation or by disposal. The question how such a multi-step process should be classified for the purpose of the Regulation is consequently of some practical importance. It is perhaps not surprising therefore that the legislation itself envisages such processes.

53. The Directive, for example, anticipates that a recovery operation within the meaning of Annex IIB may be followed by a further recovery operation; indeed Annex IIB includes a category specifically tailored to such a situation, since head R11 provides as a separate category of recovery operation Use of wastes obtained from any of the operations numbered R1 to R10.

54. The legislation also envisages that waste may correctly be regarded as destined for recovery even where an initial recovery operation is to be followed by a disposal operation. That follows from the third indent of Article 3(1)(a) of the Directive, which requires Member States to take appropriate measures to encourage ... the development of appropriate techniques for the final disposal of dangerous substances contained in waste destined for recovery.

55. The Regulation also echoes that assumption, requiring in the case of waste intended for recovery that the notifier include on the consignment note

information with regard to the planned method of disposal for the residual waste after recycling has taken place, the amount of the recycled material in relation to the residual waste and the estimated value of the recycled material. (36)

56. The scheme of both the Directive and the Regulation thus suggests that whether waste is to be correctly classified as intended for disposal or recovery for the purposes of the Regulation is determined, as the Commission submits, by the correct classification of the first operation to which the waste is to be subject.

57. That analysis does not of course mean that the Member State of dispatch is in effect powerless to prevent the export of waste destined ultimately for disposal, provided only that the disposal operation is preceded by a recovery operation: the fifth indent of Article 7(4)(a) of the Regulation provides that that Member State may object to the shipment of waste for recovery if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.

58. Finally I would note that the approach which I propose to adopt is not undermined by the Netherlands Government's assertion that in the present case the two operations at issue (incineration and use of the residue) in fact occur simultaneously rather than successively. While it may be correct that, in the high temperatures reached in cement kilns, the two operations would for practical purposes be more or less instantaneous, they can none the less for the purposes of analysis clearly be distinguished as separate steps: incineration of the organic component of the waste must logically precede use of the inorganic residue of that incineration. It appears moreover from the order for reference that that is the understanding of the national court.

59. I accordingly conclude that, where waste is to be subjected to a combined process involving several identifiable separate operations, it is the first such operation which determines whether the waste is intended for disposal or recovery for the purpose of the Regulation.

The second question -the correct classification of the process at issue

60. By its second question the national court asks whether, in the event of an affirmative answer to the first question, the process concerned constitutes recovery within the meaning of heads R1, R3 and R5 of Annex IIB if it results in the complete use of the waste employed therein.

61. Since I propose answering the first question in the negative, the second question as put by the referring court does not strictly arise. However, it may be useful to say a few words.

62. It is clear from the order for reference that the national court's second question arises because of the requirement as a matter of national law or practice that a material reuse operation may be classified as a recovery operation only if it results in reuse of at least 50% of the waste. On the basis of my proposed answer to the first question, however, the correct assessment of a combined procedure such as that at issue will depend on the correct classification of the first stage of that procedure. In the present case, that stage involves incinerating the waste in kilns in a cement factory, thereby replacing fuel

from other sources and hence conserving natural resources. For the reasons discussed in detail in my Opinion in *Commission* v *Germany* , (37) I am of the view that such an operation constitutes Use principally as a fuel or other source of energy under head R1 of Annex IIB, provided that, first, the greater part of the waste is used as a fuel and, second, the energy generated thereby is principally used in the sense that the greater part of the energy generated thereby is used. It is thus clear that, in order for the requirements of head R1 to be satisfied, it is not necessary for all the waste to be used as a fuel.

The third question -the relevance and lawfulness of national criteria

63. By its third question, the national court raises a number of issues about the criteria imposed by Netherlands law and practice for determining whether a given process constitutes recovery for the purpose of the Regulation.

64. In question 3a, the Court is asked whether the extent (expressed as calorific values) to which the waste contributes to the incineration process or the extent (expressed as the level of material re-used) to which the ash residues from that waste contribute to the production process is relevant as regards the classification of each individual operation as recovery or disposal (R1, R3 and R5 or D10).

65. The question whether the extent (expressed as calorific value) to which the waste contributes to the incineration process is relevant to the classification of the incineration as recovery under head R1 of Annex IIB or disposal under head D10 of Annex IIA also arose in *Commission* v *Germany* , and I have discussed it in depth in my Opinion in that case. I concluded that the only quantitative criterion imposed by the legislation on a recovery operation under head R1 was the requirement that the waste be principally used as a fuel or other source of energy; I have explained above (38) what that requirement means in practice. Further quantitative criteria such as the calorific value of the waste are in my view and on the basis of the law as it stands (39) irrelevant to the correct classification of the operation as recovery or disposal.

66. In question 3a the referring court also asks whether the extent to which the ash residues from the waste contribute to the production process is relevant as regards the classification of the operation as recovery or disposal. That raises the broader question - of some general importance - how extensive (re-)use must be to constitute recovery; in order to answer that question the Court would have to lay down criteria to be satisfied in order for an operation to fall under head R3 or R5 (recycling/reclamation of certain organic and inorganic substances). The observations submitted to the Court in the present case however have generally not focussed on that issue. Since in any event in the light of my proposed answer to the first question an answer to this aspect of the third question is not necessary to enable the national court to resolve the dispute before it, I do not propose to consider it further.

67. By question 3b the national court asks, first, on the basis of which criteria it is necessary to assess whether or not the contribution of the waste to the incineration or production process is sufficient for classification as recovery. In so far as that question concerns the relevance of the contribution of the waste to the incineration, it has been answered above. (40) In so far as it concerns the

relevance of the contribution of the waste to the production process, I have indicated (41) why I do not consider it appropriate or necessary to address that issue in the present case.

68. In question 3b the national court also asks whether in the absence of Community criteria as to the contribution of the waste to the incineration or production it is possible to apply national criteria. I have addressed that question at some length in my Opinion in *Commission* v *Germany* , (42) concluding that the answer is in the negative. As I stated in that Opinion, the unacceptable consequences of Member States being permitted to apply their own criteria in such a way are evident from the diverse minimum calorific values which, according to information before the Court, certain Member States require of waste in order for its incineration with recovery of heat generated to be classified as a recovery operation under head R1 in Annex IIB to the Directive. Those calorific values range from 5 000 kJ/kg in France to 21 000 kJ/kg in the United Kingdom. The application by different Member States of such wide-ranging thresholds would clearly run counter to the objectives of both the Directive, whose aims include a common terminology ... to improve the efficiency of waste management in the Community, (43) and the Regulation, which is built on the premiss that different Member States will apply the same procedures to waste intended for particular operations. As the Commission pointed out in *Commission* v *Germany* , if Member States were free to set their own divergent criteria determining which operations were to be classified as recovery operations, the impact of Article 7(4) of the Regulation, which exhaustively lists the cases in which Member States may object to shipments of waste for recovery, (44) would be much reduced.

69. That is not to say that a uniform criterion based on calorific value might not be a useful and workable means of distinguishing between recovery and disposal operations if set at Community level. However it appears that it has not been possible to agree such a criterion to date. In *Commission* v *Germany* the Court was referred to a working document submitted by the Commission to the Technical Adaptation Committee in 1999 (45) pursuant to the Directive, which provides for the amendments necessary for adapting the Annexes to the Directive to scientific and technical progress to be adopted in accordance with a prescribed procedure involving a committee composed of representatives of the Member States. (46) That document put forward a number of suggestions for limiting movements of waste to be incinerated. One of the options considered was the development of criteria for distinguishing more clearly between Incineration on land under head D10 of Annex IIA and Use principally as a fuel or other means to generate energy under head R1 of Annex IIB. One of the criteria discussed was calorific value: it was suggested that a calorific value of 17 000 kJ/kg be used as a limit value. However, it appears that a distinction based on that calorific value was not accepted by the majority of Member States.

70. I would finally add that, even though Article 7(4)(a) of the Regulation permits the Member State of dispatch to object to a proposed shipment in accordance with Article 7 of the Directive, which requires Member States to draw up waste management plans, that provision does not confer an unfettered discretion to

oppose any shipment not in accordance with such a plan: it is in my view clearly contrary to the scheme of the legislation as a whole for a Member State to incorporate in a waste management plan criteria for the distinction between disposal and recovery that conflict with the Directive.

The fourth question -the correct classification of a process involving a recovery operation and a disposal operation

71. By its fourth and final question the national court asks how, if one operation must be classified as recovery and another operation as disposal, the process as a whole must be regarded.

72. I have already stated in my proposed answer to the national court's first question that, where waste is to be subjected to a combined process involving several identifiable separate operations, it is the first such operation to which the waste will be subjected which determines whether the waste is intended for disposal or recovery for the purpose of the Regulation. More specifically - and as perhaps envisaged by the referring court - waste to be subjected to a recovery operation with the residue subsequently to be subjected to a disposal operation is to be notified under the Regulation as waste to be shipped for recovery. The Member State of dispatch may however object to such a shipment on the basis of the fifth indent of Article 7(4)(a) of the Regulation if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations. The Member State of dispatch will be in a position to make such an assessment since in accordance with the Regulation the consignment note must include information with regard to the planned method of disposal for the residual waste after recycling has taken place, the amount of the recycled material in relation to the residual waste and the estimated value of the recycled material. (47)

73. Verol and the Netherlands Government argue that a process involving both recovery and disposal operations should be classified as a recovery operation because of the priority accorded by the Directive to recovery. On the view that I have taken, that argument is not relevant. The Court has moreover met that point in its judgment in *ASA* , (48) stating that the principle of primacy of recovery of waste, which is intended to encourage recovery, applies by definition only to waste which is in fact intended for recovery and therefore does not prohibit scrutiny of the intended use by the competent authority of dispatch.

Conclusion

74. I am accordingly of the opinion that the questions referred for a preliminary ruling by the Raad van State, the Netherlands, should be answered as follows.

(1) Where waste is to be subjected to a combined process involving several identifiable separate operations, it is the first such operation which determines whether the waste is intended for disposal or recovery for the purpose of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community.

(2) An operation in which waste is incinerated in a process whereby it replaces fuel from other sources constitutes a recovery operation under head R1 of Annex

IIB to Council Directive 75/442/EEC of 15 July 1975 on waste provided that, first, the greater part of the waste is used as a fuel and, second, the greater part of the energy generated thereby is used.

1 –
Original language: English

2 –
OJ 1993 L 30, p. 1.

3 –
Case C-6/00 [2002] ECR I-1961; see also my Opinions delivered on 26 September 2002 in Case C-228/00 Commission v Germany and Case C-458/00 Commission v Luxembourg.

4 –
OJ 1975 L 194, p. 39, as amended by Council Directive 91/156/EEC of 18 March 1991, OJ 1991 L 78, p. 32, and by Council Directive 91/692/EEC of 23 December 1991, OJ 1991 L 377, p. 48.

5 –
Article 1(e).

6 –
Article 1(f).

7 –
As adapted by Commission Decision 96/350/EC of 24 May 1996 adapting Annexes IIA and IIB to Council Directive 75/442/EEC on waste, OJ 1996 L 135, p. 32.

8 –
Which requires Member States to take the necessary measures to the same effect.

9 –
Case C-187/93 Parliament v Council [1994] ECR I-2857, paragraph 26 of the judgment.

10 –
Article 2(i) and (k).

11 –
As adapted by Commission Decision 94/721/EC of 21 October 1994 adapting, pursuant to Article 42(3), Annexes II, III and IV to Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, OJ 1994 L 288, p. 36.

12 –
Recital 14 in the preamble to the Regulation.

13 –
Articles 1(3) and 11 of the Regulation.

14 –
Article 2(g).

15 –
And, if relevant, of transit

16 –

Articles 3(1) (waste for disposal) and 6(1) (waste for recovery).

17 –
Articles 3(3) and 6(3).

18 –
Articles 3(4) and 6(4).

19 –
Articles 3(5) and 6(5), first and fifth indents.

20 –
Article 6(5), sixth, seventh and eighth indents.

21 –
And, if relevant, of transit.

22 –
Articles 4(1) and 4(2).

23 –
And, if relevant, of transit.

24 –
Where the waste is listed in Annex IV or has not been assigned to Annex II, III or IV, the competent authorities concerned must give their consent in writing (Article 10).

25 –
Article 7(1) and (2).

26 –
Article 4(3)(b)(i).

27 –
Article 4(3)(a)(i).

28 –
Article 4(3)(b)(i).

29 –
Article 7(2).

30 –
Article 7(4)(b) concerns the objections which may be raised by the competent authorities of transit, not relevant to the present case.

31 –
Case C-203/96 [1998] ECR I-4075, paragraphs 33 and 34 of the judgment.

32 –
Cited in note 3, paragraph 69 of the judgment.

33 –
Paragraph 36 of the judgment.

34 –
By implication the waste to be shipped was regarded in national law as hazardous waste. It appears however that for the purposes of the Regulation the waste was classified under Annex III, Amber list.

35 –

It may be noted that the Dutch version of the Directive refers to all operations provided for in Annex IIB ('alle in bijlage II B bedoelde handelingen'). While that difference in wording may have been of relevance to the national court's analysis of the provision, it is not in my view sufficiently different from, for example, the English and French versions, which refer to 'any operations ..., to require separate analysis'.

36 – Sixth, seventh and eighth indents in Article 6(5).

37 – Cited in note 3. See in particular paragraphs 54 to 67.

38 – See paragraph 62.

39 – See further paragraphs 68 and 69 below.

40 – See paragraph 62.

41 – See paragraph 66.

42 – See in particular paragraphs 43 to 51.

43 – See the third recital in the preamble to Directive 91/156.

44 – ASA, cited in note 3, paragraph 36 of the judgment.

45 – 28 January 1999, XIE3/KW D(99).

46 – Articles 17 and 18.

47 – Sixth, seventh and eighth indents in Article 6(5).

48 – Paragraph 45 of the judgment; see also paragraph 78 of my Opinion.