The Application of European Waste Law by the National Courts

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I. Introduction

1. In this paper we will consider in what way national courts are confronted with the application of European waste law. Since there are major differences in the organization and jurisdiction of the courts in the different Member States of the European Union, we have opted not to address this issue on the basis of our own national experience, but instead to take as our starting point the cases that have been referred by various courts in several Member States to the European Court of Justice. The Court of Justice has indeed the good practice of specifying in its judgements on questions referred to it for a preliminary ruling the context in which those questions were put. Although naturally there are far more cases where national courts apply European waste law than cases where questions are referred for a preliminary ruling[1], this case-law nevertheless gives us a good and representative picture of the various circumstances in which national courts are confronted with European waste law.

The case-law of the Court of Justice shows that the context in which questions are referred for a preliminary ruling can vary considerably. Besides the obvious cases where the court has to apply a Regulation, in this case Regulation (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community (V), there are highly diverse cases where different European waste directives have to be applied in administrative (III) or criminal (II) cases. We will look into those cases in detail below. We know of only one civil case where it was necessary to consult the Court of Justice on the interpretation of European waste law (IV).

[1] It may indeed be assumed that many cases are settled by national courts without it being necessary to refer questions to the Court of Justice for a preliminary ruling, either because the court was of the opinion that there is no reasonable doubt about the validity or interpretation of the provisions of European law relied upon (the so-called "*acte claire*"), or because those questions could be solved on the basis of the existing case-law of the Court of Justice (so-called "*acte éclairé*"). This can be illustrated by the case-law of the Court of which I myself am a member. A total of 5 rulings were made in which European waste law was applied (rulings nos. 8/1995, 10/1995, 19/1997, 159/2002 and 195/2004). In none of those cases did the Court consider it necessary to refer a question for a preliminary ruling (www.arbitrage.be).

II. The application of European waste law in criminal cases

2.1. Introduction

2. A first category of cases occasioning references for a preliminary ruling are criminal cases in which persons are being prosecuted for punishable breaches of national waste legislation. In such cases, the counsel for the defence may cite European waste law to secure an acquittal. It is contended that national waste law is contrary to European waste law, and that therefore national waste law should not be applied, which in turn should lead to an acquittal[2]. On the other hand, it may happen that there are questions of interpretation relating to national waste law and that those questions of interpretation can be traced back to questions of interpretation of European waste law of which the national provisions at issue constitute the transposition into domestic law. Such questions of interpretation can be decisive with regard to the question whether or not waste law has been breached and whether or not therefore punishable acts have been committed. The case-law of the Court also reveals that (Italian) criminal courts sometimes ask themselves whether a limitation of the scope of national waste law – and the often concomitant decriminalization of previously punishable acts – is not contrary to European waste law. Although such references for a preliminary ruling often allow the Court to interpret European waste law in a way that is useful to all parties concerned with the application of European waste law, it is often not clear what practical relevance those references for a preliminary ruling have for the criminal case in connection with which they are made.

2.2. Cases in which the interpretation of the European Waste Directives is crucial to the interpretation of national implementation legislation

3. The well-know *Vessoso* and *Zanetti* case[3], in which the Court for the first time had the opportunity to rule on the definition of 'waste', as used in the original version of Directive 75/442/EEC, concerned a reference for a preliminary ruling in a criminal case. The question concerning the interpretation of the term 'waste' arose in the context of two criminal prosecutions brought before the *Prétura di Asti* (Italy) against a number of haulage contractors who were charged with transporting substances on behalf of third parties without obtaining prior authorisation, thereby infringing a Decree of the President of the Italian Republic. That decree, with was adopted for the purpose of transposing the Framework Waste Directive (Directive 75/442/EEG) and the Toxic and Dangerous Waste Directive (Directive 78/319/EEC) into national law, lays down penalties under criminal law for persons who transport or dispose of waste on behalf of third parties without obtaining the authorization of the competent Italian regional authority. In their defence, the defendants maintained that the

[2] We will not go into a full consideration of the case-law of the Court in connection with the original waste oil directive (see, among others, ECJ, 12 October 1993, *Criminal proceedings against José Vanacker and André Lesage and SA Baudoux combustibles*, Case C-37/92, *ECR*, 1993, I-4947; ECJ, 10 March 1983, *Inter-Huiles*, Case 172/82, *ECR*, 1983, 555) since, insofar as it concerns export-restricting measures, it has been superseded by Regulation (EC) No. 259/93 and the relevant case-law.

[3] ECJ, 28 March 1990, *Criminal proceedings against G. Vessoso and G. Zanetti*, Joined cases C-206/88 and C-207/88, *E.C.R.*, 1990, p. I-1461.

substances transported did not constitute waste within the meaning of the Presidential Decree. They claimed that in this case the substances transported were capable of economic reutilization and were not therefore abandoned or intended to be abandoned. In their view, since the activity to which the charges related did not fall within the scope of the Presidential Decree, the criminal penalties laid down therein were not applicable. The *Pretura* considered that, since the aim of the Presidential Decree was to transpose two European Waste Directives, it was bound to interpret the definition given in the Decree in a manner compatible with both Directives. The Court answered that "*[t]he concept of waste, within the meaning of Article 1 of Council Directive 75/442/EEC and Article 1 of Council Directive 78/319/EEC, is not to be understood as excluding substances and objects which are capable of economic reutilization [; t]he concept does not presume that the holder disposing of a substance or an object intends to exclude all economic reutilization of the substance or object by others.*" I have no knowledge of the judgment given by the national court subsequent to this preliminary ruling, although I assume that the counsel for the defence did not succeed since the Court shared the broad interpretation of the waste concept and the referring court of law probably gave a similar broad interpretation to the national definition.

4. The context in which the *Prétura di San Vito al Tagliamento* (Italy) made a reference for a preliminary ruling in the *Zanetti* case[4] of the same date is virtually the same. The counsel for the defence in that case held the view that what the accused had transported was not waste and that the Italian legislation was in certain respects contrary to the European Waste Directives by imposing more stringent demands. To the questions referred by the Prétura for a preliminary ruling, the Court answered, "*(1) National legislation which defines waste as excluding substances and objects which are capable of economic reutilization is not compatible with Council Directives 75/442/EEC and 78/319/EEC. (2) National legislation which does not make the transport of waste covered by Council Directive 75/442/EEC subject to a system of prior authorization is compatible with Article 10 of that directive. However, the Member States may make the transport of waste covered by that directive subject to a system of prior authorization if they consider this necessary in order to achieve the aims of the directive. (3) The vesting in authorities which do not have competence at the national level of the power to issue authorizations for the transport of waste is compatible with Article 5 of Council Directive 75/442/EEC".* Since the broad interpretation of the Italian legal definition of waste at the time was not found to be contrary to the European definition – and the reverse would be true – and the Italian legislation in those respects where it was more stringent than the Directives was not found to be contrary to the Directives in question either (since those directives are limited to a minimum harmonization), it may be assumed that the counsel for the defence did not succeed in this case either.

5. The *Gallotti* case[5] deals with references for a preliminary ruling from the *Pretura circondariale di Roma* (Italy). The questions were raised in criminal proceedings against various people accused of contravening Italian legislation on waste. Although the orders for

[4] ECJ, 28 March 1990, *Criminal proceedings against E. Zanetti and Others*, Case C-359/88, *ECR*, 1990, I-1509.
[5] ECJ, 12 September 1996, *Criminal proceedings against Sandro Gallotti, Roberto Censi, Giuseppe Salmaggi, Salvatore Pasquire, Massimo Zappone, Francesco Segna and others, Cesare Cervetti, Mario Gasbarri, Isidoro Narducci and Fulvio Smaldone*, Joined cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95, *ECR*, 1996, I –4345.

reference are not very clear in that respect, it seems that the main charges against the accused are setting up special waste tips without a permit, contrary to Article 10 of Presidential Decree No 915/82, disposing of waste without a permit, contrary to Article 25 thereof, and failing to comply with Articles 3 and 9 octies of Law No 475/88 relating to keeping waste records. In the orders for reference, the Pretore notes first of all that Directive 91/156 radically amended Council Directive 75/442/EEC of 15 July 1975 on waste (*OJ* 1975 L 194, p. 39) by changing the definition of waste, encouraging recovery operations and setting as objectives the prevention and reduction of the amount of waste by means of technologies based on recycling, re-use and the production of energy. He concludes that the implementation of Directive 91/156 ought to lead to a radical change in Italian legislation whereby disposal operations will be distinguished from recovery operations which, in his view, should be subject to a less strict permit system. He notes, however, that the Italian legislature has not implemented Directive 91/156, although the time-limit for transposition expired on 1 April 1993. Continuing his analysis, the Pretore points out that in Directive 91/156 the solution chosen seems to have been primarily, if not exclusively, an administrative system of waste control, restricting criminal-law controls to extreme cases. Accordingly, Presidential Decree No 915/82 is incompatible with the directive, in that criminal-law penalties predominate in its provisions on management and supervision. As a result, he concludes Italian operators are in a less favourable position than those in the rest of the Community, whereas the aim of the directive is to ensure that the internal market functions properly and to remove disparities in the treatment of operators in the single market through the adoption of uniform legislation. The questions raised by the Pretore are answered as follows by the Court: "*Article 5 and the third paragraph of Article 189 of the EC Treaty must be interpreted as not precluding a Member State from imposing criminal penalties to ensure compliance with the obligations laid down by Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste, provided that those penalties are analogous to those applicable to infringements of national law of a similar nature and importance and are, in any event, effective, proportionate and dissuasive.*" With this answer, the Court makes it clear that the obligations ensuing from European waste law are not such as to necessarily lead to the acquittal of the persons being prosecuted under criminal law.

6. In the *Van de Walle* case[6], too, the European waste legislation was put up as a defence by the accused. The reference was made by the *Cour d'appel de Bruxelles* (Belgium) in the course of proceedings brought against Mr Van de Walle, Mr Laurent and Mr Mersch, senior staff of Texaco Belgium SA, and against Texaco itself, who, as the result of an accidental leak of hydrocarbons from a service station under that company's sign, are charged with the offence of abandoning waste. The service station was covered by a commercial lease between Texaco and the owner of the premises. Since 1988 it had been operated by a manager under an operating agreement which provided that the land, building, equipment and movable property for the operation were made available to the manager by Texaco. The manager operated the service station on his own behalf but did not have the right to make changes to the premises without prior written permission from Texaco, which supplied the service station with petroleum products and, in addition, retained control over bookkeeping and supplies. Following the discovery of the hydrocarbon leak, which was the result of defects in the service station's storage facilities, Texaco took the view that the station could no longer continue to operate and decided to terminate the management contract in April 1993, alleging

[6] ECJ, 7 September 2004, *Criminal proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA*, Case C-1/03.

serious negligence on the part of the manager. It subsequently terminated the commercial lease in June 1993. Although disclaiming liability, Texaco proceeded to decontaminate the soil and replaced part of the storage facilities which gave rise to the hydrocarbon leak. It carried out no further activities on the site after May 1994. The Brussels Capital Region took the view that decontamination had not been completed and paid for other remedial measures which it considered necessary in order to carry out its building plan. Since Texaco's actions appeared to constitute infringements of the Order of 7 March 1991, and in particular Articles 8, 10 and 22 thereof, proceedings were brought against Mr Van de Walle, Texaco's managing director, Mr Laurent and Mr Mersch, officers of the company, and Texaco as a legal entity before the Tribunal correctionnel (Criminal Court) of Brussels. The Brussels Capital Region claimed damages in those proceedings. By judgment of 20 June 2001, that court acquitted the defendants, exonerated Texaco and stated that it was not competent to rule on the application by the party claiming damages. The Ministère public (Public Prosecutor) and the party claiming damages appealed against that judgment before the court which has made the reference. That court took the view that Article 22 of the Order of 7 March 1991 imposed penalties for failure to comply with the obligations set out in Article 8 thereof and not for failure to comply with the requirements of Article 10. It therefore considered that in order to be subject to criminal sanctions under Article 22, the actions of the accused must constitute abandonment of waste within the meaning of Article 8. It observed that Texaco had not rid itself of its waste by supplying it to the service station and that neither the petrol delivered nor the tanks which remained buried in the ground after the decontamination activities carried out by that undertaking could constitute waste within the meaning of Article 2(1) of the Order, that is to say, a substance or object which the holder discards or intends or is required to discard. The court was in doubt, however, as to whether subsoil contaminated as the result of an accidental spill of hydrocarbons could be considered waste and stated that it doubted that that classification was possible, since the land in question had not been excavated and treated. It also pointed out that legal opinion differs as to whether the accidental spill of a product which contaminates soil is comparable to the abandonment of waste. The questions referred by the Court of Appeal were answered as follows by the Court: "*Hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of Article 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking.*" This surprising answer – it is not all that straightforward to treat polluted soil as waste, especially not in Member States that have special legislation on soil remediation which contains rules that usually deviate from waste legislation – may result in an acquittal of the accused, insofar as it is not proved that the leak is the result of actions by Texaco itself. However, the case is still pending before the Court of Appeal in Brussels.

2.3. Limitation of the scope of the national legislation in breach of European regulations

7. The questions referred for a preliminary ruling in the *Tombesi* case[7] were raised in criminal proceedings pending before two Italian criminal courts, the *Pretura Circondariale di Terni* and the *Pretura Circondariale di Pescara.* In Case C-304/94 Euro Tombesi and Adino Tombesi were charged with the offence of discharging without authorization marble rubble and debris from marble. They were also charged with failing to keep the required records of loading and unloading and with making false declarations. In Case C-330/94 Roberto Santella was charged with producing without authorization toxic and dangerous waste, consisting of pitch obtained from the emissions produced by electro-static filters used in cooking ovens, to be disposed of by burning. Finally, in Case C-342/94 Giovanni Muzi and Others were charged with *inter alia* an offence concerning specific waste known as 'sansa' (olive oil residues). Before the Pretura Circondariale di Terni, the defendants in the main proceedings claimed that the substances and objects involved were no longer regarded as waste under rules introduced by a later legislative measure, which meant that the conduct complained of no longer constituted an offence. The Pretura Circondariale di Terni considered that the urgent adoption of Decree Law No 530/94 was contrary to the applicable Community directives, in so far it removed an entire category of waste from the scope of the Italian and the Community legislation. Thereupon the court referred a number of questions for a preliminary ruling.

In Case C-224/95 Anselmo Savini was charged with the offence of transporting without the authorization of the Region of Abruzzo special waste. Before the Pretore di Pescara Mr Savini claimed that, as a result of the adoption of a Decree-Law No 530/94, which excluded from the scope of DPR 915/82 the substances which had been transported, his conduct could not be penalized. The Pretore di Pescara considered that the combined provisions of Decree-Law No 619/94 and the Decree of the Environment Minister of 5 September 1994 removes all operations relating to the substances which they list from the scope of Italian legislation. Entertaining doubts as to the compatibility of such exclusion with Community law, the Pretore di Pescara "suspended the proceedings and referred two questions to the Court of Justice for a preliminary ruling".

The Court gave the following answer to all those questions: "*The concept of 'waste' in Article 1 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, referred to in Article 1(3) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste and Article 2(a) 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, is not to be understood as excluding substances and objects which are capable of economic reutilization, even if the materials in question may be the subject of a transaction or quoted on public or private commercial lists. In particular, a deactivation process intended merely to render waste harmless, landfill tipping in hollows or embankments and waste incineration constitute disposal or recovery operations falling within the scope of the abovementioned Community rules. The fact that a substance is classified as a re-usable residue without its characteristics or purpose being defined is irrelevant in that regard. The same applies to the grinding of a waste substance.*"

With this judgment it has become clear that the limitation of the scope of the Italian waste legislation was at odds with the requirements of the European Waste Directives and the above-mentioned Regulation. Although this judgment is of great significance for the

[7] ECJ, 25 June 1997, *Criminal proceedings against Euro Tombesi and Adino Tombesi, Roberto Santella, Giovanni Muzi and Others, Anselmo Savini*, Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95.

interpretation of the European waste concept and is often quoted for that reason, it is not immediately clear in what respect the judgment of the Court of Justice has contributed to the settlement of the actual criminal cases in connection with which the questions were referred for a preliminary ruling. It follows from the absence of a direct effect of Directives recalled in the judgment - "*it must be borne in mind that, according to settled case-law (see, in particular, Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 36), a directive which has not been transposed may not create obligations for an individual and a provision of a directive may not therefore be relied upon as such against such a person*" – that the fact that the Italian waste legislation was restricted in scope in a manner that is contrary to European waste law and the resulting decriminalization cannot be undone by relying upon the Directive.

8. The *Saetti and Frediani* case[8] concerns questions raised by the *Giudici per le indagini preliminari of the Tribunale di Gela (Italy)* in the course of criminal proceedings against Mr Saetti and Mr Frediani, the director and former director respectively of the Gela oil refinery operated by AGIP Petroli SpA, who were accused inter alia of having failed to comply with Italian legislation on waste. As a result of complaints concerning petroleum refinery activities at Gela, the Public Prosecutor of the Tribunale di Gela had a technical survey carried out in the installation. That survey determined that the refinery was using petroleum coke, resulting from the refining of crude oil, as fuel for its combined steam and electricity power station; most of the energy produced there was used by the refinery itself, but surplus electricity was sold to other industries or to an electricity company. The Public Prosecutor took the view that the petroleum coke constituted waste subject to Legislative Decree No 22/97 and, since it was being stored and used without the administrative permit required by that legislation, charged both persons with having failed to comply with that permitting requirement. In addition the investigating judge sequestrated at the request of the Public Prosecutor the two petroleum coke depots which supplied the refinery's combined heat and power station. After the entry into force of the amending Legislative Decree's op 7 March 2002 – that removed petroleum coke used as industrial fuel from the scope of Legislative Decree No 22/97 – and the Law op 6 May 2002 – that stated that petroleum coke used as fuel for production purposes was excluded from the scope of Legislative Decree No 22/97 and indicated that Petroleum coke may also be used at production sites in combustion processes intended to generate electrical or thermal energy for purposes no directly related to refining processes, provided that emissions do not exceed the limits fixed by the relevant provisions - the public prosecutor ended the sequestration, since the new Italian legislation authorised the use of petroleum coke under certain conditions. The Court ruled that: "*Petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC op 18 March 1991.*" Now that the limitation of the scope of Italian waste legislation – and the resulting decriminalization – in this case did not turn out to be contrary to European waste law, the criminal investigation probably had to be discontinued. Should the Court have given the opposite answer, this would probably not have led to a different conclusion, since "*a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, inter alia, Case 80/86 Kolpinghuis*

[8] ECJ, 15 January 2004, *Saetti and Frediani*, Case C-235/02, *ECR*, 2004, p. I- 1005

Nijmegen [1987] ECR 3969, paragraph 13, and Case C-168/95, Arcaro [1996] ECR I-4705, paragraph 37).”[9]

9. The *Lirussi and Bizzaro* case[10] concerns questions referred by the *Pretore di Udine* for a preliminary ruling. Those questions were raised in criminal proceedings instituted against Mr Lirussi and Mrs Bizzaro, who were charged with having stored waste under improper conditions. In the criminal proceedings brought against Mr Lirussi and Mrs Bizzaro, the Public Prosecutor pointed out that the unauthorised storage of which the defendants were accused could, in both cases, be regarded as `temporary storage' within the meaning of the Italian legislation and, as such, exempt from authorisation since the time-limits and maximum quantities provided for in respect of such storage were not exceeded. Although he considered that the defendants' conduct was therefore not punishable as a criminal offence, the Public Prosecutor none the less requested that a question be referred to the Court for a preliminary ruling in order to determine whether the national legislation is compatible with the provisions of Community law and whether the conduct in question could be regarded as constituting `temporary storage'. The Court answered the questions as follows: " *1. The concept of `temporary storage' of waste is distinct from that of `storage pending further operations' and does not fall within the definition of `waste management' within the meaning of Article 1(d) 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 national competent authorities are required to ensure that temporary storage operations comply with the obligations resulting from Article 4 of Directive 75/442.*"

This judgment, too, offers a useful clarification of the European Waste Directive. Insofar as point 2 of the operative part of the judgment of the Court of Justice is complied with, Italian waste legislation is also compatible in this respect with European waste law. If the answer of the Court had been different, the question could once more come up, as in the previous two cases, what the implications might be for the case pending before the national court.

10. The *Fornasar* case[11] concerns questions referred by the *Pretura Circondariale di Udine (Sezione Distaccata di Cividale del Friuli)* for a preliminary ruling. Those questions were raised in criminal proceedings brought against Messrs Fornasar, Strizzolo, Toso, Mucchino, Peressutti and Chiarcosso, who were charged with having released toxic-harmful waste under the description special waste contrary to the legislation in force at the material time (1994). The accused were charged on the basis of those rules. However, under Article 2 of the Italian Criminal Code which provides that 'no person may be punished for an action which, in accordance with a subsequent law, does not constitute an offence, the national court must ascertain whether the material seized may still be classified as hazardous waste under the current rules, as they were amended by Ministerial Decree No 141 of 11 March 1998. According to an expert's report produced for the national court, the substance at issue in this case is either a non-halogenated organic substance not employed as a solvent (No 20 in Annex G to Legislative Decree No 389/97, which corresponds to No 20 of Annex I.B of Directive 91/689), or other waste containing any of the constituents listed in Annex H to Legislative

[9] Idem, paragraph 25.
[10] ECJ, 9 October 1999, *P. Lirussi and F. Bizzaro*, Joined Cases C-175/98 and C- 177/98, *ECR*, 1999, p. I- 6881.
[11] ECJ, 22 June 2000, *Fornasar*, Case C-318/98.

Decree No 389/97 and displaying any of the properties listed in Annex I to that Legislative Decree (No 40 of Annex G to Legislative Decree No 389/97, which corresponds to No 40 of Annex I.B to Directive 91/689), composed of isocyanates (No C37 of Annex H to Legislative Decree No 389/97 which corresponds to No C37 of Annex II to Directive 91/689) at a level of concentration such as to render it classifiable as harmful (No H5 of Annex I to Legislative Decree of 389/97, which corresponds to No H5 of Annex III to Directive 91/689). The expert found that, bearing in mind the nature of the place from which the substance was removed for dumping, the only reasonable working hypothesis as to its use was that of local foaming for heat isolation purposes. The only heading of the national rules and the list of hazardous wastes under which the substance might fall was No 080402, 'Waste adhesives and sealants free of halogenated solvents, in group 0804, 'Wastes from the MFSU (manufacture, formulation, supply and use) of adhesive and sealants (including water-proofing products). He none the less observed that it would be excessive, from a technical point of view, to include foaming for heat isolation purposes under that heading. In any event, the available documents were not sufficient to prove that that was the original intended use of the substance. Therefore, it was not possible to identify the origin or genesis of the waste. In order to ascertain whether the material seized can still be classified as hazardous waste under the rules currently in force, the Pretura Circondariale di Udine, Sezione Distaccata di Cividale del Friuli, decided to stay proceedings and to refer six questions to the Court. The Court answered those questions as follows: "*1. Council Directive 91/689/EEC of 12 December 1991 on hazardous waste does not prevent the Member States, including, for matters within their jurisdiction, the courts, from classifying as hazardous waste other than that featuring on the list of hazardous waste laid down by Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689, and thus from adopting more stringent protective measures in order to prohibit the abandonment, dumping or uncontrolled disposal of such waste. If they do so, it is for the authorities of the Member State concerned which have competence under national law to notify the Commission of such cases in accordance with the second indent of Article 1(4) of Directive 91/689. 2. Article 1(4) of Directive 91/689 and Decision 94/904 must be interpreted as meaning that it is not a necessary precondition for waste to be classified, in a specific case, as hazardous, that its origin be determined."* In view of these answers, it may be assumed that the criminal case has been settled in the proper manner.

11. The *Niselli* case[12] concerns questions referred by the *Tribunale di Terni* (Italy) for a preliminary ruling. The reference was made in the course of criminal proceedings against Mr Niselli, who is accused of having managed waste without the prior authorisation of the competent authority. After the entry into force of Decree-Law No 138/02, the Tribunale penale di Terni (Criminal Court, Terni) is asking, in essence, whether the authentic interpretation of waste given in Article 14 of Decree-Law No 138/02 could be contrary to Directive 75/442. According to that interpretation, the facts with which Mr Niselli is charged no longer constitute an offence, because the scrap metal seized was intended to be reused and could not therefore be described as waste. However, if that interpretation is incompatible with Directive 75/442, the criminal proceedings must continue on the basis of the offence charged. While noting that the Commission has initiated a procedure against the Italian Republic for failure to fulfil its obligations under Directive 75/442, the Tribunale penale di Terni decided to stay the proceedings and to refer some questions to the Court for a preliminary ruling. The answer of the Court reads as follows*: "1. The definition of waste in the first subparagraph of*

[12] ECJ, 11 November 2004, *Antonio Niselli*, Case C-457/02.

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 and by Commission Decision 96/350/EC of 24 May 1996, cannot be construed as covering exclusively substances or objects intended for, or subjected to, the disposal or recovery operations mentioned in Annexes II A and II B to that directive or in the equivalent lists, or to which their holder intends or is required to subject them. 2. The meaning of waste for the purposes of the first subparagraph of Article 1(a) of Directive 75/442, as amended by Directive 91/156 and by Decision 96/350, is not to be interpreted as excluding all production or consumption residues which can be or are reused in a cycle of production or consumption, either without prior treatment and without harm to the environment, or after undergoing prior treatment without, however, requiring a recovery operation within the meaning of Annex II B to that directive." Although the judgment of the Court is naturally of great significance for the interpretation of the waste concept, the question comes up once again what the referring court is supposed to do with the answer. In the words of the Court, "*In that regard, it must be noted that a directive may indeed not of itself impose obligations on a private individual and may not therefore be relied on as such against him (see, among others, Case C-343/98 Collino and Chiappero [2000] ECR I6659, paragraph 20). Likewise, a directive cannot, of itself and independently of a national rule of law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, in particular, Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 13, and Case C168/95 Arcaro [1996] ECR I4705, paragraph 37).*"

III. Administrative cases

3.1. Introduction

12. The case-law shows that the administrative courts, too, can be confronted in different ways with the application of European waste law. A distinction can be made between cases where the administrative court is asked to review national administrative regulations for compatibility with European waste law – and where appropriate to annul the national regulations that are incompatible with that law – (3.2) and cases where European waste law is relevant to reviewing the legality of individual administrative decisions, such as environmental licences (3.3) or other government decisions (3.4).

3.2. National regulations that are incompatible with European waste law

13. The *Inter-Environnement Wallonie* case[13] concerns questions referred by the Belgian Council of State for a preliminary ruling. Those questions were raised in proceedings brought by *Inter-Environnement Wallonie*, a non-profit-making association, for annulment of the Order of the Walloon Regional Government of 9 April 1992 on toxic or hazardous waste.

[13] ECJ, 18 December 1997, *Inter-Environnement Wallonie ASBL*, Case C-129/96

Article 5 (1) of that Order provided that: "Authorization is required for the setting-up and running of an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste *which is not an integral part of an industrial production process*." Consequently, no special licence was required for such installations if they formed an integral part of an industrial production process. The Council of State doubted whether Article 5 (1) of the Order was indeed in conformity with Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689. Finding that the Order was adopted at a time when the period allowed by the directive for its transposition had not yet expired, the Council of State questioned also to what extent a Member State may, during that period, adopt a measure contrary to the directive. The European Court of Justice answered these questions as follows: "*1. A substance is not excluded from the definition of waste in 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, merely because it directly or indirectly forms an integral part of an industrial production process. 2. The second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed."* After having received the answer to the questions referred for a preliminary ruling, the Council of State did indeed partly annul Article 5 (1) of the Order of the Walloon Government of 9 April 1992. The words "which is not an integral part of an industrial productions process"[14] were annulled by a judgment of 25 January 2001[15]. Consequently, the special licensing system henceforth also applies for installations integrated in the production process for the disposal of toxic or dangerous waste.

14. Another example is the *Radlberger Getränkegesellschaft* case[16]. The *Verwaltungsgericht Stuttgart* (Germany) referred questions for a preliminary ruling in proceedings brought by Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG, which are Austrian drinks producers, against Land Baden-Württemberg. The claimants exported carbonated soft drinks, fruit juices, other non-carbonated drinks and table water to Germany, in non-reusable recoverable packaging. With a view to recovery of that packaging, they joined the global waste-collection system operated by the company Der Grüne Punkt - Duales System Deutschland AG and on that basis were exempted from the obligation to charge the deposit laid down in Paragraph 8(1) of the German Packaging Regulation for drinks distributed in Germany in non-reusable packaging. The German Government announced on 28 January 1999 that in 1997 the proportion of reusable drinks packaging fell below 72% for the first time, namely to 71.33%. Since over two consecutive periods, namely between February 1999 and January 2000 and between May 2000 and April 2001, this proportion remained below 72% throughout Federal territory, on 2 July 2002 the Government announced pursuant to Paragraph 9(3) of the Packaging Regulation that from 1 January 2003 a mandatory deposit would be charged on mineral water, beer and soft drinks. Under the Packaging Regulation the claimants in the main proceedings would therefore be required from that date to charge the deposit prescribed in Paragraph 8(1) thereof on most of their packaging for drinks distributed in Germany and then to accept the return of, and recover, the empty

[14] "non intégrées dans un processus de production industrielles"

[15] Council of State, n° 92.669, 25 January 2001, *l'Association sans but lucratif Inter-Environnement Wallonie*, http://www.raadvst-consetat.be/

[16] ECJ, 14 December 2004, *Radlberger Getränkegesellschaft mbh & C° and S. Spiz KG v. Land Baden-Württemberg*, Case C-309/02.

packaging. The claimants in the main proceedings brought an action against Land Baden-Württemberg before the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart) in which they submit that the rules laid down in the German Packaging Regulation on quotas for reusable packaging and the related deposit and return obligations are contrary to Articles 1(1) and (2), 5, 7 and 18 of Directive 94/62 and Article 28 EC. The questions raised by the referring court were answered by the Court of Justice as follows: "*1. Article 1(2) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste does not preclude the Member States from introducing measures designed to promote systems for the reuse of packaging. 2. While Article 7 of Directive 94/62 does not confer on the producers and distributors concerned any right to continue to participate in a given packaging-waste management system, it precludes the replacement of a global system for the collection of packaging waste with a deposit and return system where the new system is not equally appropriate for the purpose of attaining the objectives of that directive or where the changeover to the new system does not take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it enters into force. 3. Article 28 EC precludes national rules, such as those laid down in Paragraphs 8(1) and 9(2) of the Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Regulation on the Avoidance and Recovery of Packaging Waste), when they announce that a global packaging-waste collection system is to be replaced by a deposit and return system without the producers and distributors concerned having a reasonable transitional period to adapt thereto and being assured that, at the time when the packaging-waste management system changes, they can actually participate in an operational system"*. Having regard to the second and third answers of the Court, the referring court will have to sustain the action of the claimants.

3.3. European waste law and the legality of licences

15. The *Palin Granit Oy* case[17] concerns an administrative dispute in connection with the granting of an environmental licence. It involves a reference for a preliminary ruling by the Korkein hallinto-oikeus (Supreme Administrative Court of Finland). Those questions were raised in appeal proceedings challenging the grant of an environmental licence by the Vehmassalo public-health municipal joint board to the Palin Granit Oy company to operate a granite quarry. Under Finnish law, the municipal authorities are not competent to grant an environmental licence for a landfill and, consequently, the outcome of the main proceedings depended on whether leftover stone resulting from stone quarrying was to be regarded as waste or not. The Court answered the questions as follows: "*1. 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 Council Directive 75/442/EEG of 15 July 1975 on waste. 2. 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 for determining whether the stone is to regarded as waste."* The Supreme Administrative Court found subsequently that left-over rock which was stored was to be considered as waste, as is specified in the judgement of the ECJ. While the case was pending, the Finnish legislation on environmental protection had undergone a total reform. The Supreme

[17] ECJ, 18 April 2002, *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, Case C-9/00, ECR, 2002, I-3533.

Administrative Court did not regard the storage area as a landfill and, hence, the regional environmental centre was not the competent permit authority. Therefore, the judgement of the administrative court was repealed and the case was sent back to the municipal permit authority, but it was to consider the case by applying the new Environmental Protection Act (2000)[18] .

16. A similar case is the *AvestaPolarit Chrome Oy* case[19], which also concerns questions referred by the same Finnish Supreme Administrative Court for a preliminary ruling. AvestaPolarit operated a mine whose principal product is chromium. The firm brought proceedings against the conditions of operation of that mine imposed on it by Lapland Environment Centre. By decision of 16 June 1999, the Environment Centre granted the environment licence sought by AvestaPolarit, 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. AvestaPolarit appealed to the Supreme Administrative Court 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 Law 1072/1993. The European Court of Justice answered the questions as follows: *"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."* The Supreme Administrative Court held subsequently that boulders with a volume of 1.5-5 m^3 which were stockpiled in an area belonging to the mining site about one year as a maximum and immediately thereafter used for production, were not to be classified as waste, because they were at least primarily reused and could be reused in the production process without any prior processing measures. Smaller boulders, ore-dressing sand etc. were not to be classified as waste if the conditions defined above were fulfilled. Even if there was evidence that a part of that material could be reused for producing certain objects of steatite or to be sold to other companies, a considerable part of the material which was stored was to be regarded as waste. Because the company had not presented any detailed plan for reuse, the permit decision was in part repealed and the case remanded back to the permit authority, which was to, after the hearing of the company who should produce a plan for reuse, reconsider certain permit provisions[20].

[18] Information supplied by K. Kuusiniemi (31.10.2005).
[19] ECJ, 11 September 2003, *AvestaPolarit Chrome Oy, formerly Outokumpu Chrome Oy*, Case C-114/01.
[20] K. Kuusiniemi, EUFJE Questionnaire concerning EU Waste Law, 30.09.2005, p.3

17. The *Commune de Braine-le-Château* case[21] also concerns a review of the legality of an environmental licence. The questions arose in the course of actions brought before the *Conseil d'Etat* (Council of State) (Belgium) by, respectively, the commune of Braine-le-Château (C-53/02) and Mr Tillieut, the "association des habitants de Louvain-la-Neuve" ASBL and Mr Grégoire (C-217/02) against the Région wallonne (the Walloon Region) concerning permits to operate waste disposal sites. By a decision of 21 May 1999, the Walloon Government granted BIFFA Waste Services SA a permit to extend and operate a landfill in Braine-le-Château (Belgium). The commune of Braine-le-Château, supported by Mr Feron and Mr De Codt, brought an action before the Council of State for annulment of the permit issued on 21 May 1999. In support of its application, it alleges, among other things, infringement of Articles 4, 5, 7 and 9 of the Directive 75/442/EEC. It submits that, despite Article 7 of the Directive and Article 24(2) of a Regional Decree, the Walloon Government had not adopted any waste management plan on the date when that permit was issued. By Ministerial Order of 16 December 1998, Propreté, Assainissement, Gestion de l'environnement SA (PAGE) was issued a permit to continue to operate a landfill at Les trois burettes in Mont Saint-Guibert (Belgium). That order lays down aftercare conditions and sets up a support committee and a scientific committee for the landfill. Mr Tillieut and Others and the association l'Épine blanche ASBL brought actions before the Council of State for the annulment of the Ministerial Order. Mr Tillieut and Others claim that the permit granted under the Order was issued for a site not listed in a plan for waste disposal sites, contrary to Articles 7(1) and 9 of the Directive and Article 24(2) of the Regional Decree. The Court of Justice answered the questions referred by the Council of State as follows: "1*) Article 7 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, must be interpreted to mean that the management plan or plans which the competent authorities of the Member States are required to draw up under that provision must include either a geographical map specifying the exact location of waste disposal sites or location criteria which are sufficiently precise to enable the competent authority responsible for issuing a permit under Article 9 of the Directive to determine whether the site or installation in question falls within the management framework provided for by the plan. 2) Article 7(1) of Directive 75/442, as amended by Directive 91/156, must be interpreted as requiring Member States to draw up waste management plans within a reasonable period, which may go beyond the time-limit for transposing Directive 91/156 laid down in the first subparagraph of Article 2(1) of the latter. 3) Articles 4, 5 and 7 of Directive 75/442, as amended by Directive 91/156, read in conjunction with Article 9 thereof, must be interpreted as not precluding a Member State which has not adopted, within the period prescribed, one or more waste management plans relating to suitable sites or installations for waste disposal from issuing individual permits to operate such sites and installations.*" In view of the latter answer, the Council of State dismissed the actions for annulment of the permit that was granted, insofar as they are based on the absence of a waste management plan in accordance with the requirements of the Directive[22]. However, the case has not been settled conclusively yet, since the Council of State now wants to give the parties the opportunity to define their position on the pertinence of referring to the Court of Arbitration for a preliminary ruling, having regard to judgment no. 59/2005 of the Court of Arbitration of 16 March 2005, where the Court in another case gave a negative answer to a similar question, ruling that there had been no violation of the principle of equality and non-discrimination[23].

[21] ECJ, 1 April 2004, *Commune de Braine-le-Château, Michel Tillieut and Others v. Région wallonne,* Joined cases C-53/02 and C-217/02.
[22] Council of State, *la Commune de Braine-le-Château*, N° 147.570, 11 July 2005, p. 7
[23] Court of Arbitration, no. 59/2005, 16 March 2005, www.arbitrage.be

3.4. European waste law and the legality of other government decisions

18. The *Mayer Parry Recycling Ltd* case[24] concerns questions referred by the *High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court).* Those questions were raised in proceedings between Mayer Parry Recycling Ltd and the Environment Agency concerning the latter's refusal to grant Mayer Parry's application for accreditation as a reprocessor, which is defined as a person who carries out the activities of waste recovery or recycling. Mayer Parry is a company which specialises in the treatment of scrap metal so as to render it suitable for use by steelmakers for the purpose of producing steel. Mayer Parry obtains scrap metal, which includes packaging waste, from industrial and other sources. The scrap metal has commercial value and Mayer Parry generally has to pay to obtain it. Mayer Parry collects, inspects, tests for radiation, sorts, cleans, cuts, separates and shreds (fragmentises) the scrap metal. Through this process, Mayer Parry transforms ferrous scrap metal into material which meets the specifications of Grade 3B (Grade 3B material). It sells the Grade 3B material to steelmakers, which use it to produce ingots, sheets or coils of steel. Mayer Parry applied to the Environment Agency for accreditation as a reprocessor entitled to issue PRNs (Packaging Waste Recovering Notes) under the voluntary scheme established by the Environment Agency and the Scottish Environment Protection Agency, as set out in the so-called Orange Book. The Agency refused the application by decision of 15 November 1999. Mayer Parry brought judicial review proceedings before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), seeking, inter alia, the annulment of that decision and a declaration that it carries out recovery and recycling within the meaning of Directive 94/62. The High Court states that, during the course of the proceedings before it, it has become apparent that it is necessary to establish whether the activities carried out by Mayer Parry do or do not constitute recycling within the meaning of Directive 94/62. The questions referred to the Court of Justice for a preliminary ruling were answered as follows: "*1. Recycling within the meaning of Article 3(7) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste is to be interpreted as not including the reprocessing of metal packaging waste when it is transformed into a secondary raw material such as material meeting the specifications of Grade 3B, but as covering the reprocessing of such waste when it is used to produce ingots, sheets or coils of steel. 2. That interpretation would be no different if the concepts of recycling and waste referred to by Council Directive 75/442/EEC of 15 July 1975 on waste were taken into account."*

In view of the answer of the Court of Justice, there was no way the claimant could be accredited as a reprocessor. This is probably the reason why the claimant discontinued its action in December 2003, so that the national court no longer needed to pass judgment[25].

19. In the *Enichem Base* case[26], the Court answered questions raised before the *Tribunale amministrativo regionale per la Lombardia* in proceedings brought by several producers of plastic containers, wrappings and bags against the Municipality of Cinisello Balsamo

[24] ECJ, 19 June 2003, *The Queen on the application of Mayer Parry Recycling Ltd and Environment Agency v. Secretary of State for the Environment, Transport and the Regions,* Case C-444/00.
[25] Information obtained from Lord Justice Carnwath (26.10.2005).
[26] ECJ, 13 July 1989, *Enichem Base and others v. Comune di Cinisello Balsamo,* Case 380/87, *ECR,* 1989, 2491.

concerning the decision of the Mayor of that municipality of 16 February prohibiting the supply to consumers of non-biodegradable bags and other containers in which to carry away their purchases and the sale or distribution of plastic bags, with the exception of those intended for the collection of waste. The companies Enichem Base, Montedipe, Solvay, SIPA Industriale, Altene, Neophane and Polyflex Italiana brought an action before the Tribunale amministrativo regionale for the annulment of that decision. They also asked that the operation of the decision be suspended. Since the plaintiffs had claimed in support of their applications for annulment that the decision in question was contrary to Community law, the national court stayed the proceedings and referred four questions to the Court for a preliminary ruling. The ECJ answered as follows: *"(1) Directive 75/442, properly construed, does not give individuals the right to sell or use plastic bags and other non-biodegradable containers. (2) Article 3(2) of Directive 75/442 must be interpreted as requiring Member States to inform the Commission of any draft rules such as those at issue in the main proceedings, prior to their final adoption. (3) Article 3(2) of Directive 75/442, properly construed, does not give individuals any right which they may enforce before national courts in order to obtain the annulment or suspension of national rules falling within the scope of that provision on the ground that the rules were adopted without having been previously communicated to the Commission of the European Communities."* On the basis of the answers of the Court of Justice, in particular the third answer, it may reasonably be assumed that the referring court dismissed the action for annulment filed by the claimants.

20. In the *Comitato* case[27], the *Tribunale Amminstrativo Regionale, Lombardia* (Italy) referred to the Court five questions on the interpretation of Council Directive 75/442/EEC. Those questions were raised in proceedings between a group known as *Comitato di Coordinamento per la Difesa della Cava* and several individuals, on the one hand, and the Lombardy Region, on the other, concerning the latter' s decision to site a waste tip within its territory. The *Giunta Regionale* of the Lombardy Region approved, by various decisions in 1989 and 1990, a plan for a tip for solid urban waste to be established in a municipality within the region. A number of individuals instituted proceedings against those decisions, claiming that they undermined their rights regarding protection of the environment. The national court before which the action was brought, having found that the national rules implementing the directive (Decree No 915 of the President of the Italian Republic of 10 September 1982, Gazzetta Ufficiale della Repubblica Italiana No 343 of 15 December 1982, p. 9071) provided for the disposal of waste almost exclusively by means of tipping, expressed doubts as to the compatibility of those rules with the directive, which required the Member States to adopt appropriate measures to encourage the prevention, recycling and processing of waste. The ECJ answered the questions as follows: "Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste does not confer on individuals rights which the national courts must safeguard". It may therefore be assumed that European waste law played no significant part in the further settlement of this case by the national court.

[27] ECJ, 23 February 1994, *Comitato di Coordinamento per la Difesa della Cava and others v. Regione Lombardia and others*, Case C-236/92, *ECR*, 1994, I-483.

IV. Civil courts

21. The *Plato Plastik* case[28] concerns a reference for a preliminary ruling from the *Landesgericht Korneuburg* (Austria). These questions have arisen in the context of an action brought by Plato Plastik Robert Frank GmbH (Plato Plastik), which manufactures and distributes plastic bags, against Caropack Handelsgesellschaft mbH (Caropack), which markets them, concerning the latter's refusal to provide confirmation that it has joined the system for the collection and recovery of packaging waste. Plato Plastik manufactures and distributes plastic carrier bags and tie bags. It supplies these bags direct to retailers or intermediaries. Caropack markets carrier bags supplied by Plato Plastik. Some of the bags are offered for sale in food supermarkets, where they hang near the checkouts and are handed to customers on request against separate payment. Among these bags are some which bear the logo *Der Grüne Punkt*, which indicates that the producer takes part in the system for the collection and recovery of packaging waste. Other bags are used in clothes shops. The shop assistant puts the purchased goods in the bag without the customer having to pay separately for the bag. Caropack also markets tie bags supplied by Plato Plastik. These are available to customers, free of charge, at the fruit and vegetable sections of food supermarkets. Customers put their purchases in them and weigh the goods. 17. By virtue of the Verpackungsverordnung, Plato Plastik is, as a producer of plastic bags, deemed to be a packaging producer with an obligation either to take back the packaging waste itself, free of charge, or to join a collection and recovery system. The collection and recovery system for transportation and sales packaging established by the Austrian Verpackungsverordnung is managed in Austria by a single company, Altstoffrecycling Austria Aktiengesellschaft (ARA). It appears from the file that undertakings which join the collection and recovery system set up by that company the ARA system') must pay a fee for doing so. Instead of joining the ARA system, Plato Plastik concluded an agreement transferring to Caropack its obligation to take back plastic bags. Plato Plastik considers that, on the basis of that agreement, Caropack undertook to give it in each case written confirmation that it had joined the collection and recovery system for the goods delivered to it. When the Austrian administrative authorities prosecuted Plato Plastik for not joining the ARA system, Plato Plastik requested confirmation from Caropack that the latter participated in the said system for plastic bags delivered to it. Caropack refused to give such confirmation on the ground that carrier bags are not packaging within the meaning of the Verpackungsverordnung and Directive 94/62 and that, therefore, it had no obligation to take them back. Caropack also questioned whether the ARA system was compatible with Community law. Plato Plastik appealed to the Landesgericht Korneuburg, seeking an order requiring Caropack, on the basis of the abovementioned agreement, to give it the confirmation in question. The Landesgericht Korneuburg considers that Caropack is not required to give the confirmation requested by Plato Plastik because the carrier bags referred to in the main proceedings are not packaging within the meaning of Directive 94/62 or because Plato Plastik is not deemed to be a packaging producer. In any case, according to the national court, there is no obligation to participate in the ARA system or to pay the fee in question in so far as the provisions of the Verpackungsverordnung are contrary to Community law. In those circumstances the Landesgericht Korneuburg decided to stay the proceedings and to refer different questions to the Court for a preliminary ruling. The Court answered these questions as follows: "*1. Article*

[28] ECJ, 29 April 2004, *Plato Plastik Robert Frank GmbH v Caropack Handelsgesellschaft mbH*, Case C-431/01

3(1) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste must be interpreted as meaning that the plastic carrier bags handed to customers in shops, whether free of charge or not, constitute packaging within the meaning of that directive. 2. In the context of the first subparagraph of Article 3(1) of Directive 94/62, producer' refers to the producer of the goods, not the manufacturer of the packaging products." We do not know what further action the national court has taken in this case. Judging from the ruling given by the Court of Justice, it may reasonably be assumed that Plato Plastik should succeed in its action.

V. The application of regulations

4.1. Introduction

22. Since a Regulation is directly applicable in domestic law, it may naturally be assumed that national courts would be confronted with the application of such regulations in cases that are referred to them. It is therefore not surprising that quite a few questions should be referred for a preliminary ruling in connection with the main Regulation on the subject of waste, namely Regulation No. 259/93. What is special about this Regulation is that, with respect to certain key concepts, such as "waste", "disposal" and "recovery", it refers to the definitions given in Directive 75/442/EEC, which means that the interpretation of that Directive is relevant to the interpretation of the Regulation. In the context of the Regulation, the concept of waste as laid down in the aforementioned Regulation does have direct effect, whereas this is not the case beyond that. Therefore quite a few questions are referred for a preliminary ruling in which some clarification is sought with respect to certain parts of the Regulation and of the Directive.

4.2. Interpretation of Regulation No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community

23. The *Dusseldorp* case[29] concerns questions referred by the Dutch Council of State for a preliminary ruling. Those questions were raised in proceedings between *Chemische Afvalstoffen Dusseldorp BV and Others* and the Netherlands Minister for Housing, Regional Development and the Environment concerning exports to Germany of waste for recovery there. In 1994 Dusseldorp applied for authorisation to export to Germany two loads of oil filters and related waste. By two decisions the Minister raised objections to the export pursuant to the National Long-term Plan for the Disposal of Dangerous Waste and Article 7 (2) and (4) (a) of the Council Regulation (EEC) N° 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community. Dusseldorp and others brought subsequently an action before the Council of State seeking the annulment of the Minister's decisions which, they maintain, are incompatible with the Community legislation. The court was uncertain as to whether the

[29] ECJ, 25 June 1998, *Chemische Afvalstoffen Dusseldorp BV and Others v. Minister van Volksgezondheid, Ruimtelijke Ordening en Milieubeheer*, Case C-203/96.

principles of self-sufficiency and proximity, as implemented in the Long- term Plan, could be applied to shipments of waste for recovery, and referred four questions to the Court of Justice. The Court answered these questions as follows: "*1. Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991 and Council Regulation (EEC) N° 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community cannot be interpreted as meaning that the principles of self-sufficiency and proximity are applicable to shipments of waste for recovery. Article 130t of the EC treaty does not permit Member States to extend the application of those principles to such waste when it is clear that they create a barrier to exports which is not justified either by an imperative measure relating to protection of the environment or by one of the derogations provided for by Article 36 of that Treaty. 2. Article 90 of the EC Treaty, in conjunction with Article 86, precludes rules such as the Long-term Plan whereby a Member State requires undertakings to deliver their waste for recovery, such as oil filters, to a national undertaking on which it has conferred the exclusive right to incinerate dangerous waste unless the processing of their waste in another Member State is of a higher quality than that performed by that undertaking if, without any objective justification and without being necessary for the performance of a task in the general interest, those rules have the effect of favouring the national undertaking and increasing its dominant position."* Since the substance of the case concerned waste for recovery, the Council of State had no option but to annul the Minister's decisions imposing the export ban[30].

24. The *Beside* case[31] concerns the interpretation of certain provisions of Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community. Questions were referred by the Dutch Council of State in a case where Beside BV and its managing director, Mr Besselen, applied to the Council of State for the annulment of a decision taken by the Minister of Health, upholding an earlier decision obliging them to return waste to Germany which they had imported from Germany without prior notification. The applicants contended that the waste in question was mentioned on the green list of waste intended for recovery, so that no prior notification was required and consequently the decision to return the waste was also unlawful. The Court replied as follows: "*1. The expression `municipal/household waste' referred to under AD 160 in the amber list in Annex III to 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 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, includes both waste which for the most part consists of waste mentioned on the green list in Annex II to the Regulation, mixed with other categories of waste appearing on that list, and waste mentioned on the green list mixed with a small quantity of materials not referred to on that list. 2a. The reference to the storage of materials in point R 13 of Annex II B to Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, must be interpreted as covering not only cases in which storage takes place in the undertaking in which the other operations mentioned in that annex must be carried out but also cases in which storage precedes transport to such an undertaking, regardless of whether the latter is established inside or outside the Community. 2b. The information listed in Article 11(1) of Regulation No 259/93 constitutes the minimum evidence which the competent authority may,*

[30] Council of State, Administrative Section, 28 January 1999, N° E03.95.0106-A

[31] ECJ, 25 June 1998, *Beside BV and I.M. Besselsen v. Minister van Volksgezondheid, Ruimtelijke Ordening en Milieubeheer,* Case C-192/96.

in the absence of notification, require in order to establish that `green waste' is intended for recovery. 3. Regulation No 259/93 must be interpreted as meaning that the Member State of destination may not unilaterally return waste to the Member State of dispatch without prior notification to the latter; the Member State of dispatch may not oppose its return where the Member State of destination produces a duly motivated request to that effect." Thereupon the Council of State considered that the waste can rightly be labelled as municipal/household waste, as included under AD 160 in the so-called amber list in Annex III to the Regulation and intended for recovery. It was a case of storage within the meaning of R13 in Annex IIB to the Directive, which means that notification was required for the transport of the waste at issue. Since no such notification had been given, it was a case of illicit trading, and a decision to return the waste was lawful subject to observance of the requirements of the Regulation in that respect.[32]

25. The *Arco Chemie* case[33] bears many similarities with the Beside case. It concerns questions referred by the Dutch Council of State in cases where *ARCO Chemie Nederland* and *Epon NV* appealed against a decision in which the Minister and the Director of Environmental and Water Services respectively were of the opinion that "LUWA-bottoms" did and "wood chips" did not constitute waste within the meaning of the aforementioned Regulation and Directive 75/442/EEC. The Court answered those questions as follows: "[Case C-418/97] *1. It may not be inferred from the mere fact that a substance such as LUWA-bottoms undergoes an operation listed in Annex IIB to Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive91/156/EEC of 18 March 1991, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of that directive. 2. For the purpose of determining whether the use of a substance such as LUWA-bottoms as a fuel is to be regarded as constituting discarding, it is irrelevant that that substance may be recovered in an environmentally responsible manner for use as fuel without substantial treatment. The fact that that use as fuel is a common method of recovering waste and the fact that that substance is commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined. The fact that a substance used as fuel is the residue of the manufacturing process of another substance, that no use for that substance other than disposal can be envisaged, that the composition of the substance is not suitable for the use made of it or that special environmental precautions must be taken when it is used may be regarded as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of that directive. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.* [Case C-419/97] *1. It may not be inferred from the mere fact that a substance such as wood chips undergoes an operation listed in Annex IIB to Directive 75/442, as amended by Directive 91/156, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of the directive. 2. The fact that a substance is the result of a recovery operation within the meaning of Annex IIB to that directive is only*

[32] Council of State, Administrative Section, 29 April 1999, Nos. E03.95.1115-A and E03.95.1116-A.

[33] ECJ, 15 June 2000, *ARCO Chemie Nederland v. Minister v. Volksgezondheid, Ruimtelijke Ordening en Milieubeheer e.a.*, Cases C-418/97 and C-419/97.

one of the factors which must be taken into consideration for the purpose of determining whether that substance is still waste, and does not as such permit a definitive conclusion to be drawn in that regard. Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of Directive 75/442, as amended by Directive 91/156, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined. For the purpose of determining whether the use of a substance such as wood chips as a fuel is to be regarded as constituting discarding, it is irrelevant that that substance may be recovered in an environmentally responsible manner for use as fuel without substantial treatment. The fact that that use as fuel is a common method of recovering waste and the fact that that substance is commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of that directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined." In view of this answer, it was for the referring court to ascertain whether or not the substances referred to in the lawsuits pending before it should be considered as waste on the basis of the criteria that the Court of Justice refers to in its answer to the questions referred to it for a preliminary ruling. The Council of State considered that the wood chips should be classed as waste from the moment they are accepted by EPON. Consequently, the two challenged decisions were found unlawful and annulled[34].

26. The *Oliehandel Koeweit BV* case is along the same lines[35]. It also involves cases where several companies appealed to the Dutch Council of State against ministerial decisions opposing the export of certain types of waste to Germany. In all those cases, the Minister was of the opinion that they involved the export of waste for disposal instead of waste for recovery as the firms claimed. The types of waste in question were waste oils to be used as fuel to generate energy for an oil refinery, adding fly ash to mortar and filling in galleries with that mortar, using fibreglass –E waste to fill in the spaces resulting from working a clay quarry, using a iron chloride solution in waste disposal facilities to stabilise the bonding of other metallic wastes, thereby facilitating the formation of a precipitate that is made into filter cakes, which are disposed of, and waste incinerator fly ash used in manufacturing concrete mortar. The Court answered the questions as follows: "*1. Recovery operations involving the recycling or reclamation of metals and metal compounds or the recycling or reclamation of other inorganic materials, as referred to in operations R4 and R5, respectively, of Annex IIB to 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, may also cover the re-use referred to in Article 3(1)(b)(i) of that directive. Those operations do not necessarily imply that the substance in question undergoes processing, can be used several times or can subsequently be reclaimed. 2. A waste treatment operation may not be classified simultaneously as both disposal and recovery within the meaning of Directive 75/442, as amended by Directive 91/156 and by Decision 96/350. Where an operation, having regard solely to its wording, may a priori be covered by a disposal operation set out in Annex IIA to that directive or a recovery operation referred to in Annex IIB to that directive, it must be*

[34] Council of State, Administrative Section, 29 June 2001, *AB Rechtspraak Bestuursrecht 2001*, 1244-1247.
[35] ECJ, 27 February 2003, *Oliehandel Koeweit BV e.a. v. Minister v. Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer,* Joined Cases C-307/00 tot C-311/00

determined on a case-by-case basis whether the main objective of the operation in question is that the waste should serve a useful purpose, by replacing the use of other materials which would have had to be used to fulfil that function, and in such a case to uphold the classification as recovery. 3. The classification chosen by the competent authorities of the Member State of destination as regards a given waste treatment operation does not prevail over the classification chosen by the competent authorities of the Member State of dispatch, any more than the classification chosen by the latter prevails over that chosen by the competent authorities of the Member State of destination. 4. It follows from the system put in place by 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 that, when the competent authority of the Member State of dispatch forms the view that the purpose of a waste shipment has been incorrectly classified as recovery in the notification, that authority must base its objection to the shipment on the ground of that error in classification, without reference to a particular provision of that regulation which, such as Article 4(3)(b)(i) in particular, defines the objections which Member States may make to shipments of waste for disposal. 5. Having regard to Article 8(2)(b) of Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, as amended by Council Directive 87/101/EEC of 22 December 1986, the shipment of waste oils containing more than 50 ppm of PCB for use as a fuel constitutes illegal traffic in waste within the meaning of Article 26(1)(e) of Regulation No 259/93, to which the competent authority is required to object on the ground solely of that illegality, without reference to any of the specific provisions of that regulation setting out the objections which Member States may raise to waste shipments."

27. The *SITA EcoService Nederland BV* case[36], too, concerns questions referred by the Dutch Council of State in connection with a similar issue, except that this time it involved a ministerial objection to the export of waste to Belgium. The question actually was whether "a compact mixture of waste glue, sealant, resin and paint, as well as waste containing silicon mixed with sawdust" and "organic and inorganic sediments with a low halogen content, mixed with sawdust" used by a Belgian cement industry as "fuel in cement kilns and as raw material in the production of clinker by cement factories" had to be considered as waste intended for disposal or as waste intended for recovery. In the opinion of the Court, "*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.*". Thereupon the Council of State considered that the challenged decisions were unlawful since

[36] ECJ, 3 April 2003, *SITA EcoService Nederland BV* v.*Minister v. Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer,* Case C-116/01

the waste had to be regarded as waste for recovery and also that the condition concerning the calorific value was unlawful. Consequently, the challenged decisions were annulled.[37]

28. The *DaimlerChrysler* case[38] concerns questions referred by the *Bundesverwaltungsgericht* (Germany). Those questions were raised in proceedings between DaimlerChrysler AG (DaimlerChrysler) and Land Baden-Württemberg concerning the legality of a decree of the Government and the Minister for the Environment and Transport of that Land making it compulsory to offer certain waste for disposal to an approved body. DaimlerChrysler disputed the legality of the Decree and, by application lodged on 4 December 1996, requested the Verwaltungsgerichtshof Baden-Württemberg, Germany, to annul it. DaimlerChrysler maintained that it was harmed by the obligation to offer the special waste to an incineration centre in Hamburg, on the ground that it was thereby prevented from having the waste produced by its factories in Land Baden-Württemberg incinerated more cheaply abroad, particularly in Belgium. Shipping the waste to the Hamburg installation, over distances generally between 600 and 800 kilometres, caused it to incur additional costs of DEM 2.2 million each year. In support of its action, DaimlerChrysler claimed, inter alia, that the obligation laid down in the Decree to offer the waste to AVG's incineration centre is equivalent to a quantitative restriction on exports prohibited by Article 34 of the EC Treaty (now, after amendment, Article 29 EC) and is contrary to the provisions of the Directive and the Regulation. The Verwaltungsgerichtshof Baden-Württemberg held that the action for annulment was unfounded and dismissed it by judgment of 24 November 1997. By decision of 14 May 1998, the Bundesverwaltungsgericht, on appeal by DaimlerChrysler, granted the latter leave to appeal on a point of law. The Court referred the questions to the Court of Justice, which gave the following answers: "*1. Where a national measure generally prohibiting exports of waste for disposal is justified by the principles of proximity, priority for recovery and self-sufficiency, in accordance with Article 4(3)(a)(i) 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, it is not necessary for that national measure to be subject to a further and separate review of its compatibility with Articles 34 and 36 of the EC Treaty (now, after amendment, Articles 29 EC and 30 EC). 2. Article 4(3) of Regulation No 259/93 does not authorise a Member State which has adopted legislation introducing an obligation to offer waste for disposal to an approved body to provide that, where the waste is not allocated to a treatment centre for which that body is responsible, its shipment to treatment installations in other Member States is authorised only on condition that the intended disposal satisfy the requirements of the environmental protection legislation of that Member State. 3. Articles 3 to 5 of Regulation No 259/93 preclude a Member State from applying to shipments between Member States of waste for disposal, before the implementation of the notification procedure laid down in the regulation, its own procedure in relation to the offer and allocation of the waste."* On the basis of the second and third answers in particular, the referring court had to alter the decision appealed against and to annul the challenged Decree.

[37] Council of State, Administrative Section, 22 October 2003, E03.99.00042 and E03.99.00043.
[38] ECJ, 13 December 2001, *DaimlerChrysler AG v. Land Baden-Württemberg*, Case C-324/99, *ECR*, I-9897.

29. In the *Abfall Service AG* case[39], the Court answered questions referred by the *Verwaltungsgerichtshof* (Austria). Those questions were raised in proceedings between Abfall Service AG (ASA) and the Bundesminister für Umwelt, Jugend und Familie (BMU) concerning the legality of a decision by which the BMU had objected to a shipment of waste planned by ASA. The decision concerned a planned shipment of 7.000 tonnes of hazardous waste (slag and ashes produced as a by-product in the operation of waste incinerators into a specific product at a waste treatment plant in Vienna. The waste was to be deposited in former salt-mine in Germany, to secure hollow spaces (mine-sealing)." The ground for BMU's objection was that the planned shipment was not a shipment of waste as a recovery operation, but constituted in fact a disposal operation referred to in D12 of Annex II A of Directive 75/442/EEC. The Court answered these questions as follows:"*1. It follows from the system established by 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 Commission Decision 98/368/EC of 18 May 1998, that the competent authority of dispatch, within the meaning of Article 2 (c) thereof, is competent to verify whether a proposed shipment classified in the notification as a shipment of waste for recovery does in fact correspond to that classification, and that, if that classification is incorrect, the authority must oppose the shipment by raising an objection founded on that misclassification within the period prescribed by Article 7 (2) of the Regulation. 2. The deposit of waste in a disused mine does not necessarily constitute a disposal operation for the purposes of D 12 of Annex II A to Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC op 18 March 1991 and Commission Decision 96/350/EC of 24 May 1996. The deposit must be assessed on a case-by-case basis to determine whether the operation is a disposal or a recovery operation within the meaning of that Directive. Such a deposit constitutes a recovery if its principal objective is that the waste serves a useful purpose in replacing other materials which would have had to be used for that purpose."* The Court called upon the referring court to examine in the case at issue whether the principal objective of the deposit of the waste in the site of destination is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose or not. If so, this would have to lead to an annulment of the challenged decision. If not, it would have to lead to a dismissal of the appeal lodged against the ministerial decision opposing the transport of the waste. The *Verwaltungsgerichtshof* eventually annulled the challenged decision because the Minister had failed in that particular case to verify whether the operation was a disposal or a recovery operation, since he had assumed that the deposit of waste in a disused mine always had to be considered as a form of waste disposal[40].

30. The *EU-Wood-Trading* case[41] concerned questions referred by the *Oberverwaltungsgericht Rheinland-Pfalz* (Germany). The applicant took recourse against Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH, regarding objections raised by the latter against the shipment of 3 500 tonnes of wood waste which EUWoodTrading was envisaging exporting to Italy. The waste in question consisted, particularly, of treated or painted wood from demolitions, from furniture or from joinery off-cuts. It was intended that it be recovered for the production of chipboard panels. The competent authority of dispatch

[39] ECJ, 27 February 2002, *Abfall Service AG (ASA) v. Bundesminister für Umwelt, Jugend und Familie*, Case C-6/00.
[40] Verwaltungsgerichtshof, Zl. 2002/07/00035-19, 21 March 2002.
[41] ECJ, 16 December 2004, *EU-Wood-Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, Case C-227/02

objected to that shipment under the first and second indents of Article 7(4)(a) of the Regulation. The objection was based on the fact that, in view of the lead content of the waste in question, which exceeded a reference value fixed in a guideline of the Environment Ministry of the Land Rhineland-Palatinate, the recovery of that waste could not be carried out without endangering human health and harming the environment, contrary to the requirements both of the Directive and of the Law of 27 September 1994. EUWoodTrading lodged an opposition with the competent authority of dispatch against those objections and produced another analysis of the waste showing, per kilogram of dry material, a lead content of 23 mg and an arsenic content of 3.4 mg. That opposition was rejected and EU WoodTrading appealed that decision. The Court answered the questions raised by the referring judge as follows: "*1. The first indent of Article 7(4)(a) 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, as amended by Commission Decisions 98/368/EC of 18 May 1998 and 1999/816/EC of 24 November 1999, is to be interpreted as meaning that the objections to a shipment of waste for recovery which the competent authorities of dispatch and of destination are empowered to raise may be based on considerations connected not only to the actual transport of the waste in each competent authority's area of jurisdiction but also on the recovery planned for that shipment. 2. The first indent of Article 7(4)(a) of Regulation No 259/93, as amended by Decisions 98/368 and 1999/816, is to be interpreted as meaning that for the purposes of an objection to a shipment of waste the competent authority of dispatch may, in assessing the effects on health and the environment of the recovery envisaged at the destination, provided it complies with the principle of proportionality, rely on the criteria to which, to avoid such effects, the recovery of waste is subject in the State of dispatch, even where those criteria are stricter than those in force in the State of destination. 3. The second indent of Article 7(4)(a) of Regulation No 259/93, as amended by Decisions 98/368 and 1999/816, is to be interpreted as meaning that a competent authority of dispatch may not rely on those provisions to raise an objection to a shipment of waste based on the fact that the planned recovery does not comply with the national laws and regulations for protection of the environment, public order, public safety or health protection.*" In view of these answers, in particular the answer under nos. 1 and 2, it may be assumed that the referring court eventually did not find the challenged decision unlawful.

31. The *Siomab SA* case[42] concerns questions referred by the *Cour d'appel de Bruxelles* (Belgium). The reference was made in the course of proceedings between Siomab SA and the Institut bruxellois pour la gestion de l'environnement (IBGE) concerning a shipment of waste that Siomab intended to make to Germany. Siomab operates an incineration plant for household waste and similar products in Brussels. The plant produces residues, in particular, salts. On 30 November 2001, Siomab concluded a contract with GTS-Grunde Teutschenthal Sicherungs GmbH & Co. KG for burying the salts in the galleries of the salt mines at Teutschenthal, in Germany. In order to ship that waste, Siomab sent the IBGE a notification file for transmission to the competent authority of destination, the Landesamt für Geologie und Bergwesen Sachsen-Anhalt. The IBGE took the view that the operation concerned was a shipment of waste for disposal of type D 12 Permanent storage (e.g. emplacement of containers in a mine, etc.), listed in Annex II A to the Directive. The German authority objected to the requested shipment on the ground that under national mining law only recovery, and not disposal, is permissible in the Teutschenthal mine. Siomab brought an action before the Conseil d'État (Council of State) seeking annulment of the IBGE's decision

[42] ECJ, 19 October 2004, *Siomab SA v. Institut bruxellois pour la gestion de l'environnement*, Case-472/02.

to refuse to transmit a new notification of the shipment of waste to the competent authority of destination. In interlocutory proceedings, Siomab requested the President of the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels), Belgium, to order the IBGE to transmit, without amendment, the new notification of the shipment of waste to the competent authority of destination. That request was rejected. Siomab lodged an appeal against that order with the Cour d'appel de Bruxelles (Court of Appeal, Brussels), claiming, inter alia, that it was not for the IBGE to reclassify on its own initiative the purpose of the shipment of waste and that, in the context of the specific procedure for recovery operations, the Regulation does not empower the competent authority of dispatch to refuse to transmit the notification. The IBGE contended that, on the contrary, it had a duty to verify the classification of the planned shipment and that it was therefore not required to give notification in the case of abuse of the Regulation. The Court of Justice gave the following answer to the questions referred by the Court of Appeal: "*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 Commission Decision 98/368/EC of 18 May 1998 and Commission Decision 1999/816/EC of 24 November 1999, is to be interpreted as meaning that, where a Member State has recourse, under Article 6(8) of that regulation, to the specific procedure whereby the competent authority of dispatch transmits the consignment note for a shipment of waste for recovery, that authority, if it considers it necessary to object to the shipment on the ground that it has been incorrectly classified by the notifier, may not reclassify the shipment on its own initiative and is required to transmit that document to the other competent authorities and the consignee. It is then for that authority to inform the notifier and the other competent authorities concerned of its objection by any appropriate means before the end of the period laid down in Article 7(2) of the Regulation at the latest*." This answer should normally bring the referring court to the conclusion that the Brussels environmental authority (the IBGE) had acted wrongly and was required to transmit the notification to the competent authority of the place of destination. The result will eventually probably be the same, however, since the IBGE upon receiving the reply from the competent authority of the place of destination could still object on the grounds that the waste had been wrongly classified as waste intended for recovery. After all, the answer of the Court of Justice does not suggest that the IBGE might have been mistaken on this point.

VI. Conclusion

32. Our investigation of the case-law of the Court of Justice in connection with questions about European waste law referred for a preliminary ruling has shown that the circumstances in which national courts are confronted with the application of European waste law can differ considerably.

As may be expected given the direct effect of Regulations, the national courts are confronted primarily with questions concerning the application and interpretation of Regulation (EEC) No. 259/93. Our investigation has revealed that it is administrative courts in particular that refer questions on this subject, although it is obvious that criminal courts, too, may be faced with such questions, at least insofar as breaches of the Regulation have been made punishable by the national authorities of Member States. What is special about the Regulation is that, as far as a number of key concepts are concerned, such as "waste", "recovery" and "disposal", it refers to concepts that are defined in Directive 75/442/EEC. As

a result, those concepts assume direct effect in the context of the Regulation, so that questions of interpretation may also arise in that connection in the context of the Regulation.

Administrative courts are also confronted with the application of European waste law when they are asked to judge the legality of administrative regulations and other individual government decisions in fields covered by European waste directives. For example, questions may arise concerning the compatibility of those national regulations or of individual government decisions with either the minimum requirements of a directive – where a directive, like Directive 75/442/EEC, is intended to achieve minimum harmonization – or with the uniform requirements of the directive – where full harmonization is pursued as is the case, at least in certain parts, with Directive 94/62/EC. In the latter case, the question also usually comes up whether the national regulations are consistent with certain Treaty provisions, such as those that are intended to ensure the free movement of goods.

Criminal courts, too, may be confronted with the application of European waste directives, in particular when they are asked to rule on the punishability of certain breaches of national waste legislation established in pursuance of the European directives. The interpretation of certain concepts from European waste law can be decisive for the interpretation of the corresponding concepts in domestic law. The survey given in this paper also shows that quite a few (Italian) criminal courts raise questions concerning limitations, contrary to European law, of the scope of national waste legislation and the decriminalization resulting from those limitations. Although those questions are important indicators of problems with the application of European waste directives in certain Member States and the questions referred for a preliminary ruling can contribute to a further clarification of European waste law by the Court of Justice, we may rightly question the relevance of such questions to the cases that have been submitted to the criminal courts.

Finally, it turns out that civil courts, too, are likely to deal with cases involving European waste law where this is decisive in establishing the various obligations of private parties.

All this illustrates that the national courts have an important task in enforcing European environmental law in general and waste law in particular. On this point, we may endorse the words of Gil Carlos RODRÍGUEZ IGLESIAS, former President of the European Court of Justice, "*All national judges – tens of thousands of them – are competent to apply EC law on an everyday basis. They apply it directly; they interpret their national laws in conformity with it, if at all possible; if not, they must leave aside national laws that are contrary to EC law, because it is the duty of national judges to guarantee the rights provides for in the treaty and in EC legislation. In other words, individuals may rely upon provisions of Community law before national courts without any implementing element of domestic law, the only requirement being that the provisions relied upon should be sufficiently clear and unconditional to create such rights. The co-operation between the Court of Justice and the national courts through the preliminary reference procedure has been decisive to ensure the proper application of Community law and the protection of individual rights created by the Community legal order. The Court's jurisprudence in the area of environmental protection shows particularly well the important role that national judges play in the implementation and enforcement of obligations created by Community directives.*"[43]

[43] G.C. RODRÍGUEZ IGLESIAS and K. RIECHENBERG, *Sustainable Development in the European Union – Environmental Law before the European Court of Justice*, Contribution to the Global Judges Symposium, Johannesburg, August 2002, 31