Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

12 December 2013 *

(Environment — Waste — Concept — Directive 2006/12/EC — Shipments of waste — Information from the competent national authorities — Regulation (EEC) No 259/93 — Discarding of a substance or object or intention or requirement to discard it)

In Joined Cases C-241/12 and C-242/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Rechtbank te Rotterdam (Netherlands), made by decision of 11 May 2012, received at the Court on 18 May 2012, in the criminal proceedings against

Shell Nederland Verkoopmaatschappij BV (C-241/12),

Belgian Shell NV (C-242/12),

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge in the First Chamber, A. Borg Barthet (Rapporteur), E. Levits and M. Berger, Judges,

Advocate General: N. Jääskinen,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 6 March 2013,

after considering the observations submitted on behalf of:

— Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV, by R. Fibbe and R. Laan, advocaten,

— the Netherlands Government, by M. de Ree and C. Wissels, acting as Agents,

— the European Commission, by A. Alcover San Pedro, D. Düsterhaus and P.-J. Loewenthal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 June 2013,

gives the following

* Language of the case: Dutch.

Judgment

1 These requests for a preliminary ruling concern the interpretation of the concept of 'waste' within the meaning 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 (OJ 1993 L 30, p. 1), as amended by Commission Regulation (EC) No 2557/2001 of 28 December 2001 (OJ 2001 L 349, p. 1; 'Regulation No 259/93') and Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

2 The requests have been made in the course of two sets of criminal proceedings brought against Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV respectively (jointly 'Shell'), concerning the transport of a consignment of ultra light sulphur diesel unintentionally mixed with methyl tertiary butyl ether ('the consignment at issue') from Belgium to the Netherlands.

Legal context

Regulation No 259/93

3 The 6th, 9th and 18th recitals in the preamble to Regulation No 259/93 state:

'… it is important to organise the supervision and control of shipments of wastes in a way which takes account of the need to preserve, protect and improve the quality of the environment;

…

… shipments of waste must be subject to prior notification to the competent authorities enabling them to be duly informed in particular of the type, movement and disposal or recovery of the waste, so that these authorities may take all necessary measures for the protection of human health and the environment, including the possibility of raising reasoned objections to the shipment;

…

… in the event of illegal traffic, the person whose action is the cause of such traffic must take back and/or dispose of or recover the waste in an alternative and environmentally sound manner; … should he fail to do so, the competent authorities of dispatch or destination, as appropriate, must themselves intervene'.

4 Pursuant to Article 2 of Regulation No 259/93,

'…

(a) "waste" is as defined in Article 1(a) of [Council] Directive 75/442/EEC [of 15 July 1975 on waste (OJ 1975 L 194, p. 39)];

…

(h) "consignee" means the person or undertaking to whom or to which the waste is shipped for recovery or disposal;

(i) "disposal" is as defined in Article 1(e) of Directive 75/442/EEC;

…

(k) "recovery" is as defined in Article 1(f) of Directive 75/442/EEC'.

5 Title II of Regulation No 259/93, entitled 'Shipments of waste between Member States', includes Chapter A concerning the procedure applicable to the shipment of waste for disposal, of which Article 3 of that regulation forms part. Paragraph 1 of that article provides:

'Where the notifier intends to ship waste for disposal from one Member State to another Member State and/or pass it in transit through one or several other Member States, and without prejudice to Articles 25(2) and 26(2), he shall notify the competent authority of destination and send a copy of the notification to the competent authorities of dispatch and of transit and to the consignee.'

6 Under Article 5(1) of that regulation, the shipment may be effected only after the notifier has received authorisation from the competent authority of destination.

7 Title II, Chapter B, of Regulation No 259/93 concerns the procedure applicable to shipments of waste for recovery. Article 6 of that regulation, which forms part of that chapter, provides, in paragraph 1:

'Where the notifier intends to ship waste for recovery listed in Annex III from one Member State to another Member State and/or pass it in transit through one or several other Member States, and without prejudice to Articles 25(2) and 26(2), he shall notify the competent authority of destination and send copies of the notification to the competent authorities of dispatch and transit and to the consignee.'

8 Under Article 26(1) of that regulation:

'Any shipment of waste effected:

(a) without notification to all competent authorities concerned pursuant to the provisions of this Regulation; or

(b) without the consent of the competent authorities concerned pursuant to the provisions of this Regulation;

shall be deemed to be illegal traffic.'

Regulation No 1013/2006

9 Under Article 2 of Regulation No 1013/2006, '"waste" is as defined in Article 1(1)(a) of Directive 2006/12/EC [of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9)]'.

10 Article 61(1) of that regulation provides:

'Regulation (EEC) No 259/93 and Decision 94/774/EC are hereby repealed with effect from 12 July 2007.'

11 Article 64(1) of that regulation provides:

'This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Union*.

It shall apply from 12 July 2007.'

Directive 2006/12

12 Recitals 2 to 4 and 6 in the preamble to Directive 2006/12 state:

'(2) The essential objective of all provisions relating to waste management should be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.

(3) Common terminology and a definition of waste are needed in order to improve the efficiency of waste management in the Community.

(4) Effective and consistent rules on waste disposal and recovery should be applied, subject to certain exceptions, to movable property which the holder discards or intends or is required to discard.

…

(6) In order to achieve a high level of environmental protection, Member States should … [take] responsible action to ensure the disposal and recovery of waste …'

13 Article 1 of that directive provides:

'1. For the purposes of this Directive, the following definitions shall apply:

(a) "waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard;

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

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

…

(e) "disposal" shall mean any of the operations provided for in Annex II A;

(f) "recovery" shall mean any of the operations provided for in Annex II B;

…

2. For the purposes of paragraph 1, point (a), the Commission, acting in accordance with the procedure referred to in Article 18(3), shall draw up a list of waste belonging to the categories listed in Annex I. This list shall be periodically reviewed and, if necessary, revised in accordance with the same procedure.'

14 Article 4 of that directive provides:

'1. Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment …

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

15 Under Article 8 of the directive:

‘Member States shall take the necessary measures to ensure that any holder of waste:

(a) has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or II B; or

(b) recovers or disposes of it himself in accordance with the provisions of this Directive.’

16 Article 20 of Directive 2006/12 provides:

‘Directive 75/442/EEC is hereby repealed, without prejudice to Member States’ obligations relating to the time-limits for transposition into national law set out in Annex III, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV.’

17 In accordance with Article 21 thereof, Directive 2006/12 entered into force on 17 May 2006.

18 Annex I to that directive lists the following categories of waste:

‘…

Q2 Off-specification products

…

Q4 Materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap

…

Q7 Substances which no longer perform satisfactorily (e.g. contaminated acids, contaminated solvents, exhausted tempering salts, etc.)

…

Q14 Products for which the holder has no further use (e.g. agricultural, household, office, commercial and shop discards, etc.)

…

Q16 Any materials, substances or products which are not contained in the abovementioned categories.’

19 Annex II B to that directive contains the following list of recovery operations:

‘R 1 Use principally as a fuel or other means to generate energy

R 2 Solvent reclamation/regeneration

R 3 Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes)

R 4 Recycling/reclamation of metals and metal compounds

R 5 Recycling/reclamation of other inorganic materials

R 6 Regeneration of acids or bases

R 7 Recovery of components used for pollution abatement

R 8 Recovery of components from catalysts

R 9 Oil re-refining or other reuses of oil

R 10 Land treatment resulting in benefit to agriculture or ecological improvement

R 11 Use of wastes obtained from any of the operations numbered R 1 to R 10

R 12 Exchange of wastes for submission to any of the operations numbered R 1 to R 11

R 13 Storage of wastes pending any of the operations numbered R 1 to R 12 (excluding temporary storage, pending collection, on the site where it is produced).'

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

20 On 3 September 2006 Shell loaded Ultra Light Sulphur Diesel (ULSD) onto a ship and delivered it to a client established in Belgium ('the Belgian client').

21 When the consignment at issue was delivered to that client, it became apparent that, at the time that the ship was loaded, the tanks were not completely empty, which resulted in the ULSD being mixed with methyl tertiary butyl ether (MTBE).

22 Since the flashpoint of that consignment was too low for it to be resold as fuel for diesel engines in accordance with its initial purpose and since the client was precluded from storing the mixture having regard to its environmental permit, the consignee returned the consignment to Shell, which shipped the consignment back to the Netherlands.

23 Before the Rechtbank te Rotterdam (Rotterdam District Court), the prosecutor alleges that, at the time of its shipment from Belgium to the Netherlands, the product in question constituted waste and by having failed to adhere to the notification procedure laid down in Article 15 of Regulation No 259/93, Shell was guilty of illegal traffic, within the meaning of Article 26(1) of that regulation.

24 Shell argues, however, that the consignment at issue could not be categorised as waste.

25 Taking the view that the outcome of the proceedings before it is dependent upon the interpretation of the concept of waste within the meaning of Regulations Nos 259/93 and 1013/2006, the Rechtbank te Rotterdam decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must a consignment of diesel be categorised as waste within the meaning of [Regulations Nos 259/93 and 1013/2006] in the following circumstances:

— the consignment consists of Ultra Light Sulphur Diesel, which has been unintentionally mixed with methyl tertiary butyl ether;

— after the consignment is delivered to a buyer, it transpires that – because of the mix – it does not satisfy the specifications agreed between the buyer and the vendor and is therefore "off-spec";

— the consignment – following a complaint by the buyer – is taken back by the vendor in accordance with the purchase agreement, and the vendor refunds the purchase price;

— the vendor has the intention – whether or not after mixing it with another product – of placing the consignment back on the market?

2. If the answer to question 1 is in the affirmative:
   (a) is it possible to specify a point in time in the abovementioned factual circumstances from which this is the case;
   (b) does the status of the consignment change to a non-waste product at any point in time between the delivery to the buyer and a new blending carried out by or on behalf of the vendor and, if so, at what point?

3. Is it relevant to the answer to question 1:

— whether the consignment could be used as fuel in the same way as pure ULSD, but because of its lower flashpoint it no longer satisfied the (safety) requirements;

— whether, as a result of the new composition, the consignment could not be stored by the buyer pursuant to an environmental permit;

— whether the consignment could not be used by the buyer for the purpose for which it had been bought, namely for sale as diesel fuel from the pump;

— whether or not the buyer intended to return the consignment to the vendor pursuant to the purchase agreement;

— whether the vendor did in fact intend to take back the consignment with a view to processing it through blending it and to place it back on the market;

— whether or not the consignment can be restored either to the state originally intended or processed into a product that is marketable for a price approaching that of the market value of the original ULSD consignment;

— whether that restoration/processing is a common production process;

— whether the market value of the consignment in the state that it is in at the time that it is taken back by the vendor is (virtually) the same as the price of a product that does satisfy the agreed specifications;

— whether the consignment taken back can be sold on the market in the state that it is in at the time that is taken back without being processed;

— whether trade in products such as the consignment is common and is not regarded in relevant trade circles as trade in waste?'

26 By order of the President of the Court of 2 July 2012, Cases C-241/12 and C-242/12 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

27 By its questions referred for a preliminary ruling, which it is appropriate to examine together, the Rechtbank te Rotterdam asks, in essence, whether a consignment of diesel which, at the time of its loading into a tanker, was accidentally mixed with another substance must be categorised as waste within the meanings of Regulations No 259/93 and No 1013/2006 where, after delivery to the purchaser, it was found that that consignment did not meet the contractual specifications or the safety requirements, because of its low flashpoint, and whether, because of its new composition, it could not be stored by the purchaser having regard to its environmental permit nor sold by it at the pump as diesel fuel as was intended, so that it was, at the purchaser's request, returned to the seller which intends to resell it after having mixed it with another product.

28 At the outset, it must be pointed out that Regulation No 1013/2006, interpretation of which is requested by the referring court, does not apply *ratione temporis* to the disputes in the main proceedings since, as is apparent from the documents, the consignment at issue was loaded onto the vessel for the Netherlands during September 2006.

29 It is sufficient to note, in that regard, that, in accordance with Article 64(1) of Regulation No 1013/2006, that regulation became applicable with effect from 12 July 2007, on which date, furthermore, as provided in Article 61(1) thereof, it repealed Regulation No 259/93.

30 Consequently, the questions referred must be examined in the light of the relevant provisions of Regulation No 259/93.

31 As is apparent from the sixth recital in the preamble thereto, the aim of Regulation No 259/93 is to organise the supervision and control of shipments of waste in a way which takes account of the need to preserve, protect and improve the quality of the environment.

32 In particular, it follows from Articles 3(1) and 6(1) of Regulation No 259/93, read in conjunction with the ninth recital in the preamble to that regulation, that shipments from one Member State to another and/or transit through one or more Member States of waste for disposal or recovery must be subject to prior notification to the competent authorities enabling them to take all necessary measures for the protection of human health and the environment.

33 In that context, the referring court asks whether the consignment at issue is covered by the concept of 'waste', within the meaning of that regulation, in order to ascertain whether, under those provisions, Shell was or was not required to inform the Netherlands authorities of the shipment of that consignment from Belgium to the Netherlands.

34 Under Article 2(a) of Regulation No 259/93, read in conjunction with Article 20 of Directive 2006/12, 'waste' is defined as the substances or objects described in Article 1(1)(a) of that directive, that is to say, 'any substance or object in the categories set out in Annex I [to that directive] which the holder discards or intends or is required to discard'.

35 Having regard to the residual category Q 16, in Annex I to Directive 2006/12, which covers '[a]ny materials, substances or products which are not contained in the [previously mentioned] categories', the list of categories of waste in Annex I is principally illustrative. The same is true of the list drawn up by the Commission pursuant to Article 1(2) of that directive of waste falling within the categories listed in Annex I.

36 The fact remains that if a substance or object falls within one or several of those categories of waste, apart from category Q 16, that constitutes initial evidence in favour of its classification as 'waste' within the meaning of Article 1(1)(a) of Directive 2006/12.

37 However, in accordance with settled case-law, the classification of a substance or object as waste is to be inferred primarily from the holder's actions and the meaning of the term 'discard' (see, to that effect, Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 53, and Case C-263/05 *Commission* v *Italy* [2007] ECR I-11745, paragraph 32).

38 As regards the meaning of the term 'discard', it also follows from that case-law that that term must be interpreted in the light of the aim of Directive 2006/12, which, in the words of recital 2 in the preamble to the directive, consists in the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, having regard to Article 191(2) TFEU, which provides that European Union policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. It follows that the term 'discard', and therefore the concept of 'waste' within the meaning of Article 1(1)(a) of Directive 2006/12, cannot be interpreted restrictively (see, to that effect, *Commune de Mesquer*, paragraphs 38 and 39).

39 It is apparent from the provisions of Directive 2006/12 that the term 'discard' covers both disposal and recovery of a substance or object, within the meaning of Article 1(e) and (f) of that directive (see, to that effect, Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 27).

40 More specifically, the existence of 'waste', within the meaning of Directive 2006/12, must be determined in the light of all the circumstances, regard being had to the aim of that directive and the need to ensure that its effectiveness is not undermined (see Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraphs 73, 88 and 97; Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraph 24; and *Commission* v *Italy*, paragraph 41).

41 Certain circumstances may constitute evidence that a substance or object has been discarded or of an intention or requirement to discard it within the meaning of Article 1(1)(a) of Directive 2006/12.

42 Firstly, particular attention must be paid to the fact that the object or substance in question is not or is no longer of any use to its holder, such that that object or substance constitutes a burden which he will seek to discard (see, to that effect, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, paragraph 37). If that is indeed the case, there is a risk that the holder will dispose of the object or substance in his possession in a way likely to cause harm to the environment, particularly by dumping it or disposing of it in an uncontrolled manner. That object or substance, because it falls within the concept of 'waste' within the meaning of Directive 2006/12, is subject to the provisions of that directive, which means that, in accordance with Article 4 of that directive, its recovery or disposal must be carried out in such a way that human health is not endangered and without using processes or methods likely to harm the environment.

43 As regards a possible requirement 'to discard' the consignment at issue, within the meaning of Article 1(1)(a) of Directive 2006/12, it must be noted, firstly, that, a priori, there is no absolute obligation to dispose of that consignment since it is not composed of a prohibited or illegal substance or of specified risk material of which the holder would be required to dispose (see, by analogy, Case C-176/05 *KVZ retec* [2007] ECR I-1721, paragraph 59). As is apparent from the decision for reference, that consignment could be sold on the market, without having been processed, in the condition in which it was when it was returned to Shell.

44 In its written observations, the Commission submits, nevertheless, that since, firstly, the consignment at issue was not suitable for the use intended for it by the Belgian client and, secondly, the Belgian client was not authorised to store it, due to its low flashpoint, that consignment was, so far as that client was concerned, a burden of which it intended, if it was not required, to discard.

45 Those facts alone do not, however, permit the conclusion that that consignment was 'waste' within the meaning of Article 1(1)(a) of Directive 2006/12. It is necessary first to ascertain whether, by returning the consignment to Shell on the ground that it did not meet the contractual specifications, the Belgian client did effectively 'discard' it, within the meaning of Article 1(1)(a) of Directive 2006/12.

46 In that regard, it is particularly important that the Belgian client returned the contaminated ULSD to Shell, with a view to obtaining a refund, pursuant to the sale contract. By so acting, that client cannot be regarded as having intended to dispose of or recover the consignment at issue and, accordingly, it did not 'discard' it within the meaning of Article 1(1)(a) of Directive 2006/12. Moreover, it is appropriate to add that, in circumstances such as those in the main proceedings, the risk that the holder will discard that consignment in a way likely to harm the environment is low. That is the case, a fortiori, where, as in the present case, the substance or object concerned has a significant commercial value.

47 In those circumstances, it remains to be ascertained whether Shell intended to 'discard' the consignment at issue, at the time when its contamination was disclosed. Such an intention cannot be imputed to Shell before that time, since it was not aware at that time that it held a substance which did not meet the terms of the contract concluded with the Belgian client.

48 In that regard, the referring court, for which it is to ascertain whether the holder of the object or substance in question did in fact intend to 'discard' it, must take into account all the facts of the case, while ensuring compliance with the objective of Directive 2006/12, which is to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment.

49 With regard to the facts, referred to by the referring court, that, firstly, the consignment at issue could be sold on the market without being processed, in the condition in which it was when it was returned to Shell by the Belgian client and, secondly, the commercial value of the consignment at issue corresponds largely to that of a product which meets the agreed specifications, it is necessary to point out that, although those facts tend rather to refute the idea that that consignment was a burden which Shell would seek to 'discard', they cannot be decisive, since they do not show Shell's actual intention.

50 Moreover, it is necessary to bear in mind in that regard that, in accordance with settled case-law, the concept of 'waste' must not be understood as excluding substances and objects which have a commercial value and which are capable of economic reutilisation (see, to that effect, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, paragraph 29).

51 Nor does the fact that the trade in products analogous to the consignment at issue is not, as a general rule, regarded as a trade in waste, permit it to be ruled out that Shell intended to 'discard' the consignment, although it constitutes additional evidence to suggest that that consignment is not waste.

52 However, the fact that Shell took back the consignment at issue with the intention of blending it and placing it back on the market is of decisive importance in the present case.

53 It would not be justified at all to make goods, substances or products, which the holder intends to exploit or market on economically advantageous terms whether or not there is to be a subsequent recovery process, subject to the provisions of Directive 2006/12, which seek to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment. However, having regard to the requirement to interpret the concept of 'waste' widely, the reasoning should be confined to situations in which the reuse of the goods or substance in question is not a mere possibility but a certainty, which it is for the referring court to ascertain, without the necessity of using any of the waste recovery processes referred

to in Annex II B to Directive 2006/12 prior to reuse (see, by analogy, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, paragraph 36, and Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, paragraph 36).

54 Having regard to all the foregoing considerations, the answer to the questions referred is that Article 2(a) of Regulation No 259/93 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, a consignment of diesel accidentally mixed with another substance is not covered by the concept of 'waste', provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market, which it is for the referring court to ascertain.

Costs

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

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

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, as amended by Commission Regulation (EC) No 2557/2001, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, a consignment of diesel accidentally mixed with another substance is not covered by the concept of 'waste', provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market, which it is for the referring court to ascertain.

[Signatures]