OPINION OF ADVOCATE GENERAL JACOBS
delivered on 24 October 1996 *

1. The present cases form part of a large number of cases currently pending before the Court concerning the Community legislation on waste. [1] In these cases the Pretura Circondariale di Pescara and the Pretura Circondariale di Terni seek guidance on the extent to which industrial residues fall to be classified as 'waste' and hence are subject to the system of regulation introduced by the Community rules.

The relevant Community legislation

2. Notwithstanding the absence of a specific legal basis for environmental legislation in the original EEC Treaty, the Council adopted in the 1970s and early 1980s a series of directives on waste on the basis of Articles 100 and 235. The main directive, Council Directive 75/442/EEC on waste, [2] required Member States to establish a general system of authorization and supervision of waste disposal operations (Article 5). Any installation or undertaking treating, storing or tipping waste on behalf of third parties was required to obtain a permit from the competent authority (Article 8). Undertakings transporting, collecting, storing, tipping or treating their own waste, and those which collected or transported waste on behalf of third parties, were also subject to supervision by the competent authority designated by the Member State (Article 10). 'Waste' was broadly defined in Article 1(a) of the Directive as 'any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of the national law in force'. 'Disposal' was defined in Article 1(b) as:

'— the collection, sorting, transport and treatment of waste as well as its storage and tipping above or under ground,

* Original language: English.

1 — See Cases C-26/95 *Rosi*, C-174/95 *Mattei*, C-175/95 *Belli*, C-176/95 *Scrocca*, C-186/95 *Iommi*, C-187/95 *Deodati and Luchini*, C-331/95 *Piccolo*, C-332/95 *Corbo*, C-342/95 *Miranda*, C-363/95 *Tancredi*, C-377/95 *Onorati and Marulli*, C-6/96 *Gallotti*, C-24/96 *Iannilli*, C-34/96 *Paolonatoni*, C-107/96 *Commission* v *Spain*, C-129/96 *Inter-Environnement Wallonie*, C-189/96 *Marchionne*, C-190/96 *Alari*, C-192/96 *Beside*, C-193/96 *Buchen*, C-203/96 *Chemische Afvalstoffen*, C-223/96 *Commission* v *France*, C-251/96 *Cordella and Newbold*, C-271/96 *Nardi*, C-272/96 *Cipriani*, C-273/96 *Terranova* and C-296/96 *Pezzola*. See also the judgment of 12 September 1996 in Joined Cases 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 *Gallotti and Others*.

2 — Council Directive 75/442/EEC of 15 July 1975, OJ 1975 L 194, p. 39.

— the transformation operations necessary for its re-use, recovery or recycling'.

3. Council Directive 78/319/EEC [3] laid down specific rules for toxic and dangerous waste. The terms 'waste' and 'disposal' were given definitions corresponding to those in Directive 75/442.

4. Council Directive 76/403/EEC [4] laid down specific rules for the disposal of polychlorinated biphenyls and polychlorinated terphenyls.

5. Council Directive 84/631/EEC, [5] as amended by Council Directive 86/279/EEC, [6] established a system of supervision and control of the transfrontier shipment of hazardous waste. 'Hazardous waste' meant essentially toxic and dangerous waste as defined in Article 1(b) of Directive 78/319.

6. Following international initiatives with respect to waste management taken under the auspices of the United Nations, in particular the Basle Convention on the control of transboundary movements of hazardous wastes and their disposal, signed by the Community on 22 March 1989, the Council adopted a resolution on 7 May 1990 calling for proposals for the amendment of Directive 84/631 and for early agreement by the Council on proposals for the amendment of Directives 75/442 and 78/319.

7. On 18 March 1991 the Council adopted Directive 91/156/EEC [7] substantially amending Directive 75/442. The Directive, which was adopted on the basis of Article 130s inserted by the Single European Act, introduces a more detailed definition of waste and reinforces the obligations on Member States with respect to waste management. In keeping with the requirements of Article 130r of the Treaty the amendments made by the Directive 'take as a base a high level of environmental protection' (first recital in the preamble). The Directive recognizes the need to ensure a 'common terminology and a definition of waste' in order to improve the efficiency of waste management (third recital) and notes that 'any disparity between Member States' laws on waste disposal and recovery can affect the quality of the environment and interfere with the functioning of the internal market' (fifth recital). The preamble also notes the need to complement responsible removal and recovery of waste by measures restricting production of waste (fourth recital) and emphasizes the desirability of encouraging the 'recycling of waste and

3 — Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste, OJ 1978 L 84, p. 43.

4 — Council Directive 76/403/EEC of 6 April 1976 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls, OJ 1976 L 108, p. 41.

5 — Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ 1984 L 326, p. 31.

6 — Council Directive 86/279/EEC of 12 June 1986 amending Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ 1986 L 181, p. 13.

7 — Council Directive 91/156/EEC of 18 March 1991, OJ 1991 L 78, p. 32.

re-use of waste as raw materials' (sixth recital).

8. Article 4 of the amended Directive (hereinafter all references to the 'Directive' are to Directive 75/442 as amended, unless otherwise specified) imposes the general obligation on Member States:

'to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

— without risk to water, air, soil and plants and animals,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

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

9. More specifically, Article 8 provides:

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

— has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex IIA or B, or

— recovers or disposes of it himself in accordance with the provisions of this Directive.'

10. Articles 9 and 10 of the amended Directive provide for the issue by the competent

national authorities of permits to establishments or undertakings which carry out waste disposal or recovery operations within the meaning of Annex IIA or Annex IIB. Article 11(1) provides, without prejudice to Directive 78/319 on toxic and dangerous waste, that Member States may exempt from the permit requirement establishments or undertakings carrying out their own waste disposal at the place of production and carrying out waste recovery. However, that exemption applies only if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions for exemption and if the types or quantities of waste and methods of disposal or recovery are such that the conditions imposed in Article 4 are complied with. Article 11(2) provides that exempt undertakings must be registered with the competent authorities, and Article 11(3) requires Member States to inform the Commission of the general rules adopted under paragraph 1.

11. Article 12 of the Directive provides for registration with the competent authorities of establishments or undertakings which collect or transport waste on a professional basis or which arrange for the disposal or recovery of waste on behalf of others (dealers or brokers) where they are not subject to authorization. Article 13 provides for periodic inspection of establishments or undertakings carrying out the operations referred to in Articles 9 to 12.

12. The term 'waste' is defined in the first subparagraph of Article 1(a) of the amended Directive as:

'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

13. The second subparagraph of Article 1(a) adds that:

'The Commission ... will draw up ... a list of waste belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised ...'

14. Annex I, entitled 'categories of waste', lists a series of different types of waste. Of particular relevance to the present cases are 'production or consumption residues not otherwise specified below' (Q1), 'unusable parts (e.g. reject batteries, exhausted catalysts, etc)' (Q6) and 'residues of industrial processes (e.g. slags, still bottoms, etc.)' (Q8). The broad definition of waste is reinforced by the final category: 'any materials,

substances or products which are not contained in the above categories' (Q16).

15. A detailed list of waste known as the European Waste Catalogue was adopted by the Commission pursuant to Article 1(a) of the Directive by Decision 94/3/EC. [8] Introductory Note 3 of the Catalogue states that:

'the EWC is an harmonized, non-exhaustive list of wastes, that is to say, a list which will be periodically reviewed and if necessary revised in accordance with the committee procedure.

However, the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances. The entry is only relevant when the definition of waste has been satisfied.'

16. As already noted, the system of permits introduced by Articles 9 and 10 of the Directive applies to both disposal and recovery of waste. Article 1(e) of the amended Directive defines 'disposal' as any of the operations provided for in Annex IIA. Annex IIA, entitled 'Disposal Operations', lists a series of operations such as tipping above ground or underground (e. g. landfill), land treatment, surface impoundment, specially engineered landfill, release into seas and incineration. Article 1(f) defines 'recovery' as any of the operations provided for in Annex IIB, namely:

'R1 solvent reclamation/regeneration,

R2 recycling/reclamation of organic substances which are not used as solvents,

R3 recycling/reclamation of metals and metal compounds,

R4 recycling/reclamation of other inorganic materials,

R5 regeneration of acids or bases,

8 — Commission Decision 94/3/EC of 20 December 1993, OJ 1994 L 5, p. 15.

R6 recovery of components used for pollution abatement,

R7 recovery of components from catalysts,

R8 oil re-refining or other re-uses of oil,

R9 use principally as a fuel or other means to generate energy,

R10 spreading on land resulting in benefit to agriculture or ecological improvement, including composting and other biological transformation processes, except in the case of waste excluded under Article 2(1)(b)(iii),

R11 use of wastes obtained from any of the operations numbered R1-R10,

R12 exchange of wastes for submission to any of the operations numbered R1-R11,

R13 storage of materials intended for submission to any operation in this Annex, excluding temporary storage, pending collection, on the site where it is produced.'

17. On 12 December 1991 the Council also adopted Directive 91/689/EEC on hazardous waste, [9] replacing Directive 78/319. Article 1(3) of that directive provides that the definition of waste and of other terms used in the directive shall be those in Directive 75/442.

18. On 1 February 1993 the Council replaced Directive 84/631 by Regulation (EEC) No 259/93 [10] on the supervision and control of shipments of waste within, into and out of the European Community. Article 2(a) of that regulation similarly adopts the definition of waste in Article 1(a) of Directive 75/442. The Regulation lays down different rules and procedures for the shipment to another Member State or outside the Community of waste intended for disposal (Articles 3 to 5 and Articles 14 and

9 — OJ 1991 L 377, p. 20. The Directive was itself modified by Council Directive 94/31/EC, OJ 1994 L 168, p. 28.

10 — OJ 1993 L 30, p. 1

15) and waste intended for recovery (Articles 6 to 11 and Articles 16 and 17).

The relevant Italian legislation

19. Directives 75/412, 76/403 and 78/319 were implemented in Italian law by Presidential Decree No 915 of 10 September 1982. [11] The first paragraph of Article 2 of the Decree defines waste as 'any substance or object deriving from human activity or natural cycles which is abandoned or destined to be abandoned'. The Decree distinguishes between urban, special and hazardous waste, which are subject to different rules. Articles 24 et seq. lay down a series of penalties for infringement of the provisions of the Decree.

20. Decree-Law No 397 of 9 September 1988, [12] converted into Law No 475 of 9 November 1988, [13] lays down special rules concerning industrial waste, together with penalties for infringements (see Article 9 octies). That decree-law introduced arrangements for residues from production processes capable of re-use as secondary raw materials which differed from those applicable to waste in general. However, it appears from the orders for reference that the Italian Court of Cassation has interpreted that decree-law as merely laying down a legal framework, so that Presidential Decree No 915 continues to apply until such time as specific rules are laid down; the Court of Cassation has also held that the latter decree does not envisage a separate category comprising secondary raw materials.

21. The position in Italian law has however been modified by a series of decree-laws adopted since November 1993 (the first being Decree-Law No 443 of 9 November 1993). The unchanged title of the decree-laws adopted between that date and July 1996 was 'Provisions concerning the re-use of residues deriving from production or consumption cycles in a production or combustion process and concerning the elimination of waste'. [14] Although the provisions of the decree-laws differ somewhat, their basic content seems to have been the same. The continued renewal of the decree-laws may be explained by the fact that under the Italian Constitution a decree-law, although immediately applicable, retroactively loses all effect if Parliament does not convert it into law within 60 days of its publication (paragraph 3 of Article 77 of the Italian Constitution). The Italian Parliament has not converted any of the measures into law.

11 — *Gazzetta Ufficiale della Repubblica Italiana* (GURI) No 343 of 15 December 1982, p. 9071.

12 — GURI No 213 of 10 September 1988, p. 3.

13 — GURI No 264 of 10 November 1988, p. 3.

14 — The final decree-law with that title, Decree-Law No 246 of 3 May 1996 (GURI No 106 of 8 May 1996), was replaced by Decree-Law No 352 of 8 July 1996 on rules governing waste recovery activities (GURI No 158 of 8 July 1996).

22. The decree-laws distinguish between 'waste' and 'residues' and provide for simplified procedures for the collection, transport, treatment and re-use of residues as defined by Decree of the Minister of the Environment. For example, Decree-law No 246 of 3 May 1996, in force at the time of the hearing before this Court, applies by virtue of Article 1 to 'activities aimed at the re-use of residues derived from production or consumption cycles'. Article 2(1)(b) of the Decree-law defines 'residue' as a 'residual substance or material deriving from a production or consumption process capable of re-use'. Article 5 lays down a mere notification (rather than authorization) requirement for the treatment, storage and re-use of residues listed in Annexes 2 and 3 of the Decree of the Minister of the Environment of 5 September 1994 [15] and the Decree of the Minister of the Environment of 16 January 1995. [16]

23. In addition to laying down simplified rules for the abovementioned residues, the Decree-Law excludes from its scope altogether 'materials quoted with specific commodity characteristics in commodity exchanges or official lists drawn up by the Chambers of Commerce, Industry, Craft and Agriculture ... as set out in Annex 1 to the Decree of the Minister of the Environment of 5 September 1994' (see Article 3(3)). Annex 1 of the latter decree, cited above, sets out residues considered to be secondary raw materials.

24. By virtue of Article 8 of the Decree-Law operations involving the treatment, storage and re-use of residues deriving from production or consumption cycles not referred to in Article 5 remain subject to the legal and authorization regime laid down by Presidential Decree No 915 of 10 September 1982 and Presidential Decree No 203 of 24 May 1988.

25. Article 12 of the Decree-Law also replaces the criminal penalties imposed by Presidential Decree No 915 with penalties adapted to the modified rules. In particular Article 12(4) and (6) provide:

'(4) No penalty shall be imposed on any person who before 7 January 1995 committed an act constituting an offence under Presidential Decree No 915 ... in the exercise of activities classified as collection, transport, storage, treatment or pre-treatment, recovery or re-use of residues in the manner and in the cases provided for and in conformity with the provisions of the Decree of the Minister of the Environment of 26 January 1990, published in GURI No 30 of 6 Feb-

15 — *Supplemento Ordinario* No 126 to GURI No 212 of 10 September 1994.

16 — *Supplemento Ordinario* to GURI No 24 of 30 January 1995.

ruary 1990, or in conformity with regional rules.

...

(6) The provisions of Presidential Decree No 915 ... do not apply in so far as they regulate and punish activities which the present Decree regulates and classifies as being aimed at the re-use of residues. The penalties provided for by Presidential Decree No 915 ... apply where the residues are not actually and objectively destined for re-use.'

The facts and the national courts' questions

26. In Case C-224/95 Anselmo Savini is charged under Article 25(1) of Presidential Decree No 915/82 with the offence of transporting without the authorization of the region of Abruzzo special waste (scrap of various kinds) produced by Elios Srl, a company manufacturing electro-mechanical assemblies and electrical machinery. It appears that Elios Srl sold the scrap, consisting of unsheathed copper left over from the manufacture of copper windings, fragments of cable, ferrous material, ferrous scrap and mixed scrap, to SIA, an undertaking which was authorized by another region, the region of Marche, to collect and transport such materials. The scrap was transported by Anselmo Savini without authorization from the region of Abruzzo, where the transport operation began.

27. In the *Savini* case the Pretura Circondariale di Pescara has put the following questions to the Court:

'(1) Does the EEC legislation provide for the exclusion from the definition of waste and the relevant rules relating to the protection of health [and] of the environment of substances and objects which are capable of economic reutilization?

(2) Does the concept of waste arising out of Directives 156/91/EEC and 689/91/EEC and Regulation (EEC) No 259/93 cover any substance which the addressee disposes of, has decided to dispose of or is under a duty to dispose of, regardless of the fact that the substance to be reutilized may be the subject of a legal transaction or quoted on public or private commercial lists?'

28. In Case C-304/94 Euro Tombesi and Adino Tombesi are charged *inter alia* under Article 25(11) of Presidential Decree No 915/82 with the offence of discharging

without authorization a load of marble rubble and debris from marble worked by a firm of which they are the proprietors and legal representatives. They are also charged with failing to keep the required records of loading and unloading and with making false declarations.

29. In Case C-330/94 Roberto Santella is charged under Articles 16 and 26 of Presidential Decree No 915/82 for causing 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.

30. Finally, in Case C-342/94 Giovanni and Paolo Astori Muzi are charged with *inter alia* an offence contrary to Article 25(1), in conjunction with Article 6, of Presidential Decree No 915/82 concerning specific waste called 'Sansa' (olive oil residues).

31. In Cases C-304/94, C-330/94 and C-342/94 the Pretura Circondariale di Terni has a sought a ruling on the following matters:

'The Pretura di Terni asks the Court of Justice of the European Communities to give a preliminary ruling by way of interpretation to establish whether the definitions of "waste" and "waste destined for recovery" laid down in Council Directive 91/156/EEC of 18 March 1991 and Council Directive 91/689/EEC of 12 December 1991 and Regulation (EEC) No 259/93 of 1 February 1993 should at present continue to be understood and interpreted in the light of the previous case-law of the Court and whether at the same time those two definitions may in every case be regarded as including all materials, in so far as they are residual, derived from production or consumption cycles in a manufacturing or combustion process and, if so, whether those materials as well are to be regarded from the point of view of Community rules as being subject to the system established by the abovementioned directives.

In addition, this court refers that question to the Court of Justice for a ruling on the interpretation of the abovementioned Community legislation, in particular as to:

— whether a deactivation process intended merely to render waste harmless may be included among the operations intended to make a residue re-usable and therefore as such falling outside the system laid down by the Community legislation on waste;

— whether landfill tipping in hollows or embankments may be regarded as the recovery of waste capable of being classified as residues not governed by EEC legislation on waste;

— whether waste incineration may be included among the recovery of materials simply because marketable residues are obtained therefrom and may consequently fall outside the system laid down by the Community legislation on waste and in particular outside the incineration rules;

— whether waste may be classified as a re-usable residue without its characteristics or purpose being defined to that end and may thus fall outside the scope of the EEC legislation on waste;

— whether waste which is merely ground without its characteristics being altered in any way may become a residue falling outside the EEC legislation on waste where the future reutilization of such ground residue has not been established.'

Admissibility

32. The Commission questions the admissibility of the last five questions put by the Pretura Circondariale di Terni in Cases C-304/94, C-330/94 and C-342/94 on the ground that the orders for reference fail to explain their link with the facts of the cases.

33. It seems to me that the questions concerning landfill and incineration relate to the prosecutions in the *Tombesi* and *Santella* cases respectively. The penultimate question, which is of more general relevance, appears to be prompted by the national court's concern that the decree-laws envisage the exclusion of re-usable residues from the rules on waste without any guarantee of re-use.

34. Admittedly, the precise connection with the facts of the present cases of the second question, concerning a deactivation process intended to render waste harmless, and the final question, concerning the grinding of waste, is unclear (although the former question appears to be directly relevant to the facts of a more recent identically worded reference from the Pretura di Terni in Case C-26/95 *Ivana Rosi*, in which the accused is charged with operating without authorization a plant rendering harmless and dispos-

ing of special waste such as plastic). Nevertheless, I do not think it can be concluded that the questions are of no relevance to the main proceedings; moreover, the general context in which they are put is clear and, as I shall explain below, it is possible to give the Pretura a reply which will assist it in resolving the issues raised by the main proceedings. I am therefore of the view that the Court should reply to all the questions put to it.

35. There are however two other matters which can conveniently be dealt with here. First, it is clear that in at least three of the cases the facts took place before the adoption of the first of the abovementioned decree-laws, namely Decree No 443 of November 1993, and before the final date for implementation of Directive 91/156, namely 1 April 1993. It might therefore be wondered why the national courts should have put questions designed to test the compatibility of the provisions of decree-laws not yet adopted with those of a directive which had not yet taken effect. The explanation appears to lie in the third paragraph of Article 2 of the Italian Penal Code, which lays down the principle — known to a number of legal systems — that, where the provisions applicable at the time of the facts and later provisions differ, the provisions which are more favourable to the accused take precedence. Under the fifth paragraph of Article 2 of the Penal Code the more favourable provision principle applies even where a decree-law is not approved or is converted with amendments. It is however unclear whether reliance upon the unconverted decree-laws in question might not now be precluded by the judgment of 22 February 1995 of the Corte Costituzionale, in which the fifth paragraph of Article 2 was held to be unconstitutional except with regard to facts occurring during the period of provisional validity of an unconverted decree-law. That however is of course a matter of Italian law to be determined by the national courts alone. I would merely point out that, in the event that Presidential Decree No 915/82 alone is applicable to the main proceedings, I see no material difference with respect to the scope of the concept of waste as regards residues between the Directive in its original form (which appears to have been applicable at the time of the facts) and in its amended form.

36. There is however secondly a point of Community law to which the national courts' attention should be drawn. As already noted, the national courts' questions appear to be intended to test the compatibility with Community law of the decree-laws adopted in derogation from the general rules on waste laid down by Presidential Decree No 915. Thus the national courts appear to assume that, if the decree-laws were incompatible with Community law, they should be set aside, allowing the prosecutions to proceed on the basis of Presidential Decree No 915.

37. The Court has held that, in the absence of proper implementation in national law, a directive cannot of itself impose obligations on individuals and in particular cannot 'have

the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive'. [17] That rule, which is founded on the principle that a Member State may not benefit from its failure to respect Community law and, in criminal matters, on the principle of legality (*nullum crimen, nulla poena sine lege*), [18] seems to apply in the present cases since the Italian prosecuting authorities are apparently seeking to rely on the Community legislation in order to preclude reliance by the accused on the decree-laws derogating from Presidential Decree No 915. That is so notwithstanding the fact that the principle of legality may have less force in the present cases if, as appears to be the position, the Directive was implemented in Italian law but the implementation was undone after the alleged offence occurred by unconverted decree-laws.

Substance

38. The first issue raised in the questions put by both national courts is whether the Court's case-law concerning the definition of waste in the original version of Directive 75/442 is still valid following the amendment of that directive by Directive 91/156.

39. In *Vessoso and Zanetti* [19] the Court held that:

'It is clear ... that a substance of which its holder disposes may constitute waste within the meaning of Directives 75/442 and 78/319 even when it is capable of economic reutilization.'

40. The Court based that conclusion on the fact that both directives stressed the importance of encouraging recovery of waste and that disposal of waste within the meaning of the directives included the transformation operations necessary for its recovery, re-use or recycling. [20] As I noted in my Opinion in *Commission* v *Germany*, [21] that reasoning applies *a fortiori* to the amended Directive, which sets out in greater detail the operations which may lead to recovery of waste (Annex IIB) and imposes a specific permit requirement in respect of undertakings or

17 — See, most recently, the judgment of 26 September 1996 in Case C-168/95 *Luciano Arcaro*, where the Court re-affirmed its judgments in Case 152/84 *Marshall* [1986] ECR 723, Case 14/86 *Pretore di Salò* [1987] ECR 2545 and Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969.

18 — See the Opinion of Advocate General Ruiz-Jarabo Colomer of 18 June 1996 in Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X*, at paragraph 43 et seq.

19 — Joined Cases C-206/88 and C-207/88 [1990] ECR I-1461, paragraph 8 of the judgment. See also Case C-359/88 *Zanetti & Others* [1990] ECR I-1509, paragraphs 12 and 13.

20 — See paragraph 8 of the judgment in *Vessoso*.

21 — Case C-422/92 [1995] ECR I-1097.

establishments carrying out such operations (Article 10).

41. The national courts' next inquiries may conveniently be dealt with together. The Pretura di Pescara seeks essentially to ascertain what relevance is to be attached to the fact that a substance may be the subject of a legal transaction or quoted on public or private commercial lists; as already noted, the decree-laws in issue in the main proceedings exclude from the rules on waste residues which are quoted on commodity exchanges or official lists drawn up by Chambers of Commerce and Industry. The Pretura di Terni's next inquiry concerns the extent to which the term 'waste' extends to residues from production or consumption cycles.

42. Before turning to those questions it is necessary to examine a little more closely than in previous cases the scope of the notion of waste in the Community legislation. In that connection it may be helpful first to review the submissions made to the Court. Written observations were submitted by Mr Savini, by the Danish, French, Italian, Netherlands and United Kingdom Governments and by the Commission. With the exception of the French Government, all of the foregoing also presented oral argument at the hearing.

43. Mr Savini submits that the producer or holder of a substance does not discard or intend to discard it if he treats it as if it were part of the normal commercial cycle. Where, as is said to be the case here, items of scrap metal are a perfect substitute for a raw material such as raw copper or raw iron they do not constitute waste, and it should make no difference whether they reach the smelter either directly or through one or more specialist intermediaries who do not alter their composition. While acknowledging that any substance may, if discarded, be classified as waste whether or not it is in a commercial list, Mr Savini submits that substances appearing in commercial lists will almost invariably be substances capable of immediate use, either as raw materials or end products.

44. The Danish Government, on the other hand, contends that the notion of waste covers all residual products. Residual products are by definition not the goal sought by a production process. They do not have a constant economic value. Their use depends on what markets are available for them. The Danish Government adds that an apparently innocuous substance may prove dangerous for the environment.

45. Although less explicit, the French Government also seems to take a broad view of the notion of waste, observing that waste,

including a residue, continues to be waste until it has been recovered.

46. The Italian Government argues that the new Community definition of waste places importance on a subjective element, namely the decision of the holder to discard the substance or object. It adds that the scope of that element is unclear and that the committee set up under Article 18 of the amended Directive is currently examining the criteria which might be used in order to distinguish waste from secondary raw materials. Against that background the Italian Government argues that it is legitimate to employ the possibility of use as a basic criterion and to exclude from the notion of waste, at least as a matter of presumption, substances which have recognized properties and are normally traded on markets.

47. The Netherlands and United Kingdom Governments take an intermediate view. The Netherlands Government points out that the term 'discard' is used in two separate ways since the Directive covers both disposal and recovery of waste. The Directive does not extensively set out when a substance is to be regarded as a secondary raw material and when it is to be described as waste. The environmental objectives underlying the waste directives mean that very stringent conditions must be fulfilled before a substance can be categorized as a secondary raw material and that that is possible only in exceptional cases. In the Netherlands the following criteria have been laid down for that purpose: the substance must be transported directly from the producer to the person who will make further use of it; it must be used 100% in a production process; and it must not be subject to any process comparable to a current means of waste disposal or recovery. In such circumstances a substance will not necessarily be classified as waste. The Netherlands Government emphasizes however that a substance will be so classified if any form of pre-treatment is necessary before its use in a production process. The Netherlands Government gives by way of an example of a secondary raw material gypsum from a power station used instead of fresh gypsum for desulphurization purposes and clean crushed egg shells which may be used as fertiliser without any further treatment or processing.

48. The United Kingdom argues that a substance is to be regarded as waste if it leaves the normal commercial cycle or the normal chain of utility and is consigned to a specialized recovery operation such as those in Annex IIB, a matter which must be decided on a case-by-case basis. The United Kingdom illustrates its approach by reference to the facts of the main proceedings. With reference to scrap metal, for example, the United Kingdom observes that metallic residues which can be used as a raw material without further processing and high-grade steel and non-ferrous scrap meeting the technical specifications necessary for smelting in a furnace operation do not constitute waste.

However, it points out that in practice further processing will in most cases be required before smelting is possible.

49. The Commission rejects the use of concepts such as continuity of economic or utility cycle in favour of a case-by-case approach based on a broad interpretation of the legislation.

50. The necessary starting point in appraising those arguments is the definition given to the term 'waste' in Article 1(a). That provision states that waste is any substance or object in the categories set out in Annex I which the holder 'discards or intends or is required to discard'. It seems to me that little is to be gained by considering the normal meaning of the term 'discard'. It is clear from the provisions of the Directive, in particular Article 4, Articles 8 to 12 and Annexes IIA and B, that the term 'waste' and the regulatory system of the Directive extend both to substances or objects which are disposed of and to those which are recovered. Thus the term 'discard' employed in the definition of waste in Article 1(a) has a special meaning encompassing both the disposal of waste and its consignment to a recovery operation. The scope of the term 'waste' therefore depends on what is meant by 'disposal operation' and 'recovery operation'.

51. Unfortunately, however — if perhaps inevitably — those terms do not appear to be exhaustively defined. Annex IIA lists disposal operations 'such as they occur in practice'; similarly Annex IIB is merely 'intended to list recovery operations as they are carried out in practice'. That wording suggests that the lists are merely illustrative and based on existing experience.

52. It may nevertheless be inferred from the term 'recovery operation' itself and from the list in Annex IIB set out above that what is entailed by 'recovery' is a process by which goods are restored to their previous state or transformed into a useable state or by which certain usable components are extracted or produced. It follows that, as the Italian, Netherlands and United Kingdom Governments suggest, goods which are transferred to another person and put to continued use in their existing form are not 'recovered' in the above sense. [22] Thus a second-hand motor vehicle sold to another person for continued use as a motor vehicle does not constitute waste.

22 — See also Jürgen Fluck, 'The term "waste" in EU law', *European Environmental Law Review*, 1994, p. 79. For a discussion of Fluck's and the United Kingdom's approach see Ilona Cheyne and Michael Purdue, 'Fitting definition to purpose: the search for a satisfactory definition of waste', *Journal of Environmental Law*, 1995, p. 149.

53. However, the distinction implicit in the Directive between goods which are the subject of continued use in their existing form and those which are subject to a recovery operation seems somewhat artificial. Certainly it is easy to see that recovery would include, for example, the recycling of glass from broken bottles by returning it to a furnace. Such an operation is readily recognizable as a recovery operation because it involves the recycling of the components of an existing end product in order to produce another end product. In other cases, however, it may be difficult to distinguish between recovery and continued processing of raw materials or intermediate products. That is particularly so in relation to residues or by-products from production processes. Although residues are not expressly referred to in Annex IIB, they are mentioned as specific categories of waste in Annex I. Clearly, if residues are disposed of by their holder they constitute waste. However, by analogy with the operations listed in Annex IIB, it also seems that the consignment of a residue to a process designed to transform it or certain of its components into a usable raw material constitutes a recovery process within the meaning of the Annex. Indeed Article 3(1)(b)(i) of the Directive requires Member States to take appropriate measures to encourage 'the recovery of waste by means of recycling, re-use or reclamation or *any other process with a view to extracting secondary raw materials*' (my emphasis). Moreover, many of the items listed in Annex IIB, for example R1 ('Solvent reclamation'), R2 ('Recycling/reclamation of organic substances which are not used as solvents'), R3 ('Recycling/reclamation of metals and metal compounds'), would be capable of including recovery of residues from industrial processes. Thus I share the French Government's view that, where a residue cannot be used in a normal industrial process without undergoing a recovery operation such as those listed in Annex IIB, it must be regarded as waste until such time as it is recovered.

54. The problem, however, is that the distinction between recovery of waste and normal processing of raw materials is somewhat fragile. In economic terms waste which is destined for recovery and use as a substitute raw material in an industrial process is a raw material even before it is recovered. It is, for example, conceivable that a producer might, depending on commercial conditions, switch to the use of a substitute raw material and even adapt his process to accommodate a residue or by-product directly, integrating the 'recovery' operation into the normal process. Equally a manufacturer may need to treat or refine a naturally occurring primary raw material before he uses it in a production process; yet this would presumably not be considered a recovery process.

55. The difficulty therefore arises in interpreting and applying the Directive that the concept of 'recovery operation', upon which the definition of waste in part depends, is not exhaustively defined in the Directive and may be inherently difficult to apply in some cases. Moreover there is an element of circularity: whether there is 'recovery' depends on

whether there is 'waste', which in turn depends on whether there is 'recovery'. It seems to me that the way to overcome that difficulty is not to seek to lay down a comprehensive definition but to work by example, in other words to examine whether the holder of an object or substance consigns or intends to consign it to one of the operations listed in Annex IIB or to an analogous operation.

56. Contrary to the Commission's view, it seems to me therefore that the approach of the Netherlands and United Kingdom Governments of distinguishing between goods belonging to the normal commercial cycle and waste by examining whether an object or substance is consigned to a recovery operation is entirely in keeping with the Directive. I accept the Commission's argument that to some extent a case-by-case approach is necessary. However, I think the Commission perhaps overlooks the Member States' need to lay down practical rules and guidelines for the day-to-day application of the Directive providing the necessary degree of legal certainty for individuals; that is particularly so since failure to respect national implementing rules may lead to the imposition of criminal penalties. The definition of 'waste' in the Directive is imprecise and open-ended, and it is clear that the Member States have found it difficult to apply to the various situations which may occur in practice. The Italian Government has stated that the problem of distinguishing between secondary raw materials and residues has been the subject of discussion in the committee set up under Article 18 of the Directive. As the Directive stands at present, I think it must to some extent be left to Member States to develop more detailed criteria to apply the term 'recovery operation' to the various situations which may occur in practice. Such an approach is consistent with the division of responsibilities between the Court and the national courts under the Treaty. It is for the national courts to apply the Directive to the facts of the potentially large number of borderline cases which may arise in practice. The role of the Court should be limited to providing national courts with the interpretative guidance which they require. In that regard it is clear that 'waste' must be interpreted broadly in the light of the objective of ensuring a high level of environmental protection and in particular covers objects or substances even where they have a commercial value and are destined for further use if they must first undergo a recovery operation listed in, or analogous to those listed in, Annex IIB.

57. It is in fact probably unnecessary in the present cases to determine the extent of any discretion left to the Member States since it is clear that the Italian decree-laws which prompted the national courts' questions are inconsistent with the Directive. A residue cannot be removed from the scope of the Directive simply because it is quoted with specific commodity characteristics in commodity exchanges or official lists drawn up by Chambers of Commerce and Industry. That a recognized market exists for a substance is not sufficient even to raise a presumption that it does not constitute waste.

Under the Directive the sole question is whether the substance in issue is subject to a disposal or recovery operation within the meaning of Annex IIA or B.

58. I also disagree with Mr Savini's suggestion that the classification of an object or substance depends on the manner in which the holder treats it. The fact that a seller of scrap metal treats the scrap as goods sold in the normal course of its business and applies its normal invoicing and accounting routines is immaterial. For example, the turnover of a garage which fits new batteries in motor cars might consist in part in the sale of used batteries which it removes from its customers' cars to a company which extracts and regenerates the acids which they contain; the income from the sale of the old batteries may even affect the pricing of the new batteries. There can however be no doubt that the regeneration of the acids contained in the batteries constitutes a recovery operation within the meaning of Item R5 of Annex IIB and that the old batteries used for that purpose constitute waste within the meaning of the Directive; that is so regardless of how the garage treats such sales for accounting and budgetary purposes.

59. I do not, on the other hand, share the Danish Government's view that all residual products that are not the primary goal of a production process constitute waste. I accept its point that an apparently innocuous residual product may prove dangerous for the environment and that such products do not have a constant economic value. However, the same may be true of the substances which are the primary goal of a production process. The Directive does not seek to regulate the processing, transport and storage of all products which may be harmful to the environment — it merely regulates waste, i. e. substances or objects which are disposed of or which undergo a recovery process. Moreover, it seems to me that the concept of a product which is the primary goal of a production process would be unworkable. A production process may result in a range of products with individual markets and fluctuating market values.

60. I now turn to the more specific questions put by the Pretura di Terni in the second paragraph of its questions. It seems to me that the essential point to bear in mind in replying to those questions is that the accused in the main proceedings are seeking to have the substances in question classified as re-usable residues rather than waste destined for disposal in order to be able to evade the application of the rules laid down by Presidential Decree No 915. The main point to be conveyed to the Pretura, therefore, is that under the Community legislation there is no separate category of re-usable residues and that a substance destined for either disposal or recovery is subject to the rules on waste. While I broadly agree with the views which the Commission expresses

on the questions in its written observations (somewhat tentatively in the absence of more precise details of the operations), I think the Court should avoid being drawn in these cases into making a precise distinction between disposal and recovery operations (which may have consequences for the application of Regulation No 259/93 which, as already noted, lays down different rules for the two categories of operation).

61. Against that background I would suggest that, in response to the first three questions put in the second paragraph of the Pretura's questions, the Court should simply reply that 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 Community legislation on waste. Similarly I suggest that the Court should respond to the final question by pointing out that the mere fact that waste is ground without its characteristics being in any way altered does not take it outside the scope of the Community legislation. At first sight the penultimate question, which asks whether waste may be classified as a re-usable residue 'without its characteristics or purpose being defined to that end', is a little opaque. It is apparent however from the order for reference that the Pretura's concern is that the decree-laws envisage the exclusion of re-usable residues from the rules on waste without any certainty of re-use. I think therefore it would be sufficient to reply that the fact that a substance is classified as a re-usable residue without its characteristics or purpose being defined does not remove it from the scope of the Community rules on waste.

Conclusion

62. I am therefore of the opinion that the Court should reply as follows to the questions put by the Pretura di Pescara (Case C-224/95) and the Pretura di Terni (Cases C-304/94, C-330/94 and C-342/94):

In Case C-224/95

The Community rules on waste, in particular those laid down in Council Directive 75/442/EEC (as amended by Council Directive 91/156/EEC), Council Directive 91/689/EEC and Regulation (EEC) No 259/93, apply to any substances or objects which the holder discards or intends or is required to discard, even where

they are capable of re-use and may be the subject of a legal transaction or quoted as being of commercial value on public or private commercial lists.

In Cases C-304/94, C-330/94 and C-342/94

(1) The term 'waste' in Council Directive 75/442/EEC (as amended by Council Directive 91/156/EEC), Council Directive 91/689/EEC and Regulation (EEC) No 259/93 is not to be understood as excluding substances and objects which are capable of economic reutilization. A residual substance derived from a production or consumption cycle in a manufacturing or combustion process constitutes 'waste' and is subject to the system established by the Community rules if its holder discards it or intends or is required to discard it. A substance is discarded if it is disposed of or is subject to a recovery operation listed in Annex IIB of Directive 75/442, as amended, or to an analogous operation.

(2) 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 Community rules. That a substance is classified as a re-usable residue without its characteristics or purpose being defined is not sufficient to remove it from the scope of the Community rules. The same applies to the grinding of a waste substance.