JUDGMENT OF THE COURT (Second Chamber)

10 May 2007 *

In Case C-252/05,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 20 May 2005, received at the Court on 15 June 2005, in the proceedings

The Queen on the application of **Thames Water Utilities Ltd**

Thames Water Utilities Ltd

v

South East London Division, Bromley Magistrates' Court,

interested party:

Environment Agency,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris, J. Makarczyk, L. Bay Larsen and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 January 2007,

after considering the observations submitted on behalf of:

— Thames Water Utilities Ltd, by R. McCracken QC and G. Jones,

— the Environment Agency, by D. Hart QC and M. Harris, Barrister,

— the United Kingdom Government, by E. O'Neill, acting as Agent, assisted by J. Maurici, Barrister,

— the Belgian Government, by M. Wimmer, acting as Agent,

— the Netherlands Government, by H. Sevenster, acting as Agent,

— the Commission of the European Communities, by M. Konstantinidis and D. Lawunmi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 February 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) ('Directive 75/442'), and of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ 1991 L 135, p. 40). The national court seeks essentially to determine whether waste water which escapes from a sewerage network constitutes waste within the meaning of Directive 75/442, and, if so, whether it is excluded from the scope of that directive by virtue of Article 2(1)(b)(iv) or Article 2(2).

Legal context

Community law

Waste

2 Article 1 of Directive 75/442 provides:

'For the purposes of this Directive:

(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;

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

...'

3 Article 2 of that directive provides:

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

...

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

...

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

...

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

Waste water

4 Article 1 of Directive 91/271 provides:

'This Directive concerns the collection, treatment and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors.

The objective of the Directive is to protect the environment from the adverse effects of the abovementioned waste water discharges.'

5 The first subparagraph of Article 3(1) of that directive provides that 'Member States shall ensure that all agglomerations are provided with collecting systems for urban waste water' and Article 3(2) provides that 'collecting systems described in paragraph 1 shall satisfy the requirements of Annex I(A)'.

6 Annex I(A) to Directive 91/271 imposes the following obligations:

'...

The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding:

...

— prevention of leaks,

...'

National law

Waste

7 Section 33(1) of the Environmental Protection Act 1990 provides:

'... a person shall not —

(a) deposit controlled waste ... in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence.'

8 Under Section 75(4) of the Environmental Protection Act 1990 'controlled waste' is defined as 'household, industrial and commercial waste or any such waste'.

9 Section 75(8) of the Environmental Protection Act 1990 provides that '... references to waste in subsection (7) above and this subsection do not include sewage (including matter in or from a privy) except so far as the regulations provide otherwise'.

10 The Controlled Waste Regulations 1992 were enacted pursuant to the Environmental Protection Act 1990.

11 Under Regulation 5(1) of the Controlled Waste Regulations 1992, '... waste of the descriptions set out in Schedule 3 shall be treated as industrial waste for the purposes of Part II of the [Environmental Protection Act 1990]'.

12 Paragraph 7(a) of Schedule 3 makes reference to '[s]ewage not falling within a description in regulation 7 which ... is ... disposed of in or on land'. However, Regulation 7(1)(a) excludes from the scope of controlled waste 'sewage, sludge or septic tank sludge which is treated, kept or disposed of (otherwise than by means of mobile plant) within the curtilage of a sewage treatment works', provided that the treating, keeping or disposing is an integral part of the operation of those sewage treatment works.

13 Under Regulation 7A of the Controlled Waste Regulations 1992, '[f]or the purposes of Part II of the [Environmental Protection Act 1990], waste which is not Directive waste shall not be treated as household waste, industrial waste or commercial waste'.

14 Lastly, under the Controlled Waste Regulations 1992 'Directive waste' is 'any substance or object in the categories set out in Part II of Schedule 4 [to the Waste Management Licensing Regulations 1994] which the producer or the person in possession of it discards or intends or is required to discard but with the exception of anything excluded from the scope of [Directive 75/442] by Article 2 of the Directive, "discard" has the same meaning as in the Directive, and "producer" means anyone whose activities produce Directive waste or who carries out preprocessing, mixing or other operations resulting in a change in its nature or composition'.

Waste water

15 At the time of the alleged offences, Section 94(1) of the Water Industry Act 1991 provided:

'It shall be the duty of every sewerage undertaker —

(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers as to ensure that that area is and continues to be effectually drained; and

(b) to make provision for the emptying of those sewers and such further provision ... as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.'

16 Furthermore, in the case of breach of duty by a sewerage undertaker as referred to in Section 94(1) of the Water Industry Act 1991, the Secretary of State or the Director-General of Water Services must, under Section 18 of that Act, issue a final (applicable following adversarial proceedings) or provisional (immediately applicable) enforcement order, requiring that action be taken to secure compliance with that duty.

17 The Urban Waste Water Treatment (England and Wales) Regulations 1994, enacted for the purposes of implementing Directive 91/271, supplement the provisions of Section 94 of the Water Industry Act 1991.

18 Regulation 4(1) of the Urban Waste Water Treatment (England and Wales) Regulations 1994 provides:

'This regulation supplements the duty imposed ... by section 94 of the Water Industry Act 1991 ... and any contravention of the requirements of this regulation shall be treated for the purposes of that Act as a breach of that duty.'

19 Regulation 4(4) provides that the duties under Section 94(1)(b) are to include a duty 'to ensure that urban waste water entering collecting systems is, before discharge, subject to treatment provided in accordance with regulation 5'.

The main proceedings and the questions referred

20 Thames Water Utilities Ltd is a statutory sewerage undertaker. It is the defendant in criminal proceedings brought by the Environment Agency, an independent corporate body whose responsibilities include certain aspects of pollution control within England and Wales. It is alleged that Thames Water Utilities Ltd deposited untreated sewage constituting 'controlled waste' on land in the county of Kent as

well as into controlled waters in that county. The competent court is the South East London Division, Bromley Magistrates' Court. That court refused to rule on a preliminary point of law as to whether sewage escaping from networks maintained by a sewerage undertaker such as Thames Water Utilities Ltd constituted 'controlled waste for the purposes of the English legislation'.

21 Thames Water Utilities Ltd brought an action before the referring court for judicial review of that refusal to give a ruling.

22 After observing that controlled waste for the purposes of national law must constitute waste within the meaning of Directive 75/442, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Whether sewage which escapes from a sewerage network maintained by a statutory sewerage undertaker pursuant to [Directive 91/271] and/or the Water Industry Act 1991 ... amounts to "Directive waste" for the purposes of [Directive 75/442]?

(2) If the answer to (1) is in the affirmative, whether the aforesaid sewage:

(a) is excluded from the scope of "Directive waste" under [Directive 75/442] by virtue of Article 2(1)(b)(iv) of [Directive 75/442], in particular, by virtue of [Directive 91/271] and/or the [Water Industry] Act 1991; or

(b) comes within Article 2(2) of [Directive 75/442] and is excluded from the scope of "Directive waste" under [Directive 75/442], in particular, by virtue of [Directive 91/271].'

Questions 1

The first question

23 By its first question the referring court seeks to ascertain whether waste water constitutes waste within the meaning of Directive 75/442 where it escapes from a sewerage network maintained by a statutory undertaker pursuant to the legislation enacted to transpose Directive 91/271.

24 Article 1(a) of Directive 75/442 defines waste as 'any substance or object in the categories set out in Annex I which the holder discards or intends ... to discard'. The annex clarifies and illustrates that definition by providing a list of substances and objects which can be classified as waste. However, the list is only intended as guidance, and the classification of waste is to be inferred primarily from the holder's actions and the meaning of the term 'discard' (see Case C-1/03 *Van de Walle and Others* [2004] ECR I-7613, paragraph 42 and the case-law cited).

25 Article 2(1) of Directive 75/442 furthermore sets out the types of waste which may, in certain circumstances, be excluded from the scope of that directive, even where the waste in question falls within the definition in Article 1(a) of that directive.

26 Under Article 2(1)(b)(iv) of Directive 75/442 this is the case with 'waste waters, with the exception of waste in liquid form'. It is clear from that provision that the Community legislature intended expressly to classify waste waters as waste within the meaning of the directive, while providing that that waste may, in certain circumstances, fall outside the scope of the directive and, therefore, the general legal regime for waste which it establishes.

27 In this respect, the verb 'to discard' must be interpreted in the light not only of the aims of Directive 75/442, that is, the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, but also of Article 174(2) EC. The latter provides that 'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the [principle] that preventive action should be taken ...'. The verb 'to discard' therefore cannot be interpreted restrictively (see, to that effect, Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraphs 36 to 40).

28 The fact that waste water escapes from a sewerage network does not affect its character as 'waste' within the meaning of Directive 75/442. The escape of waste water from a sewerage network constitutes an event by which the sewerage undertaker, the holder of that waste water, 'discards' it. The fact that the waste water is spilled accidentally does not alter the outcome. The Court has held that accidental spillage of hydrocarbons onto land may be regarded as an action by which the holder of those hydrocarbons 'discards' them (see, to that effect, *Van de Walle and Others*, paragraph 47). The Court also held that Directive 75/442 would be made redundant in part if hydrocarbons which cause contamination were not considered waste on the sole ground that they were spilled by accident (see *Van de Walle*, paragraph 48). The same reasoning must be applied to waste water which leaks accidentally.

29 The answer to Question 1 must therefore be that waste water which escapes from a sewerage network maintained by a statutory sewerage undertaker pursuant to Directive 91/271 and the legislation enacted to transpose that directive constitutes waste within the meaning of Directive 75/442.

Question 2(a)

30 By Question 2(a) the referring court seeks, essentially, to ascertain whether waste water which escapes from a sewerage network is waste falling outside the scope of Directive 75/442 by virtue of Article 2(1)(b)(iv) and, in particular, by virtue of Directive 91/271 or the Water Industry Act 1991, or those two legal instruments taken together.

31 Under Article 2(1)(b)(iv) of Directive 75/442 waste waters, with the exception of waste in liquid form, are excluded from the scope of that directive, provided however that those waste waters are already covered by 'other legislation'.

32 As the Court held in paragraph 49 of the judgment in Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, the expression 'other legislation' in Article 2(1)(b) of Directive 75/442 may also refer to national legislation.

33 However, to be regarded as 'other legislation' within the meaning of Article 2(1)(b) of Directive 75/442, the rules in question must not merely relate to a particular substance, but must contain precise provisions organising its management as waste

within the meaning of Article 1(d) of the directive. Otherwise, the management of that waste would be organised neither on the basis of Directive 75/442 nor on that of another directive nor on that of national legislation, which would be contrary both to the wording of Article 2(1)(b) of Directive 75/442 and to the very objective of the Community legislation on waste (see, to that effect, *AvestaPolarit Chrome*, paragraph 52).

34 It follows that, for Community or national legislation to be regarded as 'other legislation', it must contain precise provisions organising the management of waste and ensure a level of protection which is at least equivalent to that resulting from Directive 75/442 and, more particularly, Articles 4, 8 and 15.

35 Directive 91/271 does not ensure such a level of protection. Although it regulates the collection, treatment and discharge of waste water, it does no more than lay down, as regards leakage of waste water, a duty to prevent the risk of such leaks when designing, constructing and maintaining collecting systems. Directive 91/271 does not lay down any objective in relation to the disposal of waste or decontamination of contaminated soil. It cannot therefore be regarded as relating to the management of waste water which escapes from sewerage networks and ensuring a level of protection which is at least equivalent to that resulting from Directive 75/442.

36 As regards the national rules applicable to the case in the main proceedings, it has not been possible, either on the basis of the written pleadings submitted to the Court or of the observations made at the hearing, to determine the exact scope of the powers conferred on the competent authorities of the United Kingdom. It will be for the national court to determine, in the light of the criteria set out in paragraphs 34 and 35 above, whether the Water Industry Act 1991 or the Urban Waste Water (England and Wales) Regulations 1994 contain precise provisions organising the management of the waste in question and whether they are such as to ensure a level of protection of the environment equivalent to that guaranteed by Directive 75/442 and, more particularly, by Articles 4, 8 and 15.

37 If this were not the case, it would fall to the national court to set aside the provisions of national law and to apply to the case in the main proceedings those of Directive 75/442 and of the national measures transposing it.

38 The answer to Question 2(a) must therefore be, first, that Directive 91/271 is not 'other legislation' within the meaning of Article 2(1)(b) of Directive 75/442 and, second, that it falls to the national court to ascertain whether, in accordance with the criteria set out in the present judgment, the national rules may be regarded as being 'other legislation' within the meaning of that provision. Such is the case if those national rules contain precise provisions organising the management of the waste in question and if they are such as to ensure a level of protection of the environment equivalent to that guaranteed by Directive 75/442 and, more particularly, by Articles 4, 8 and 15.

Question 2(b)

39 The Court has held that Directive 75/442, as amended by Directive 91/156, is a framework directive, Article 2(2) thereof providing that specific rules for particular instances, or supplementary rules, on the management of particular categories of waste may be laid down by means of individual directives. Such an individual directive may be considered to be special legislation (a *lex specialis*) vis-à-vis Directive 75/442, so that its provisions prevail over those of Directive 75/442 in situations which it specifically seeks to regulate (see, to that effect, Case C-444/00 *Mayer Parry Recycling* [2003] ECR I-6163, paragraphs 51 and 57).

40 However, as stated in paragraph 35 above, Directive 91/271 does not contain any provision which concerns, as such, waste water escaping from a sewerage network. It

cannot therefore be regarded as containing specific rules for particular instances or supplementing those of Directive 75/442 on the management of waste water which escapes from a sewerage network.

41 The answer to be given to Question 2(b) must therefore be that Directive 91/271 cannot be considered, as regards the management of waste water which escapes from a sewerage network, to be special legislation (a *lex specialis*) vis-à-vis Directive 75/442 and cannot therefore be applied pursuant to Article 2(2) of Directive 75/442.

Costs

42 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 (Second Chamber) hereby rules:

1. **Waste water which escapes from a sewerage network maintained by a statutory sewerage undertaker pursuant to Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment and the legislation enacted to transpose that directive constitutes 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.

2. **Directive 91/271 is not 'other legislation' within the meaning of Article 2(1)(b) of Directive 75/442, as amended by Directive 91/156. It falls to the national court to ascertain whether, in accordance with the criteria set out in the present judgment, the national rules may be regarded as being 'other legislation' within the meaning of that provision. Such is the case if those national rules contain precise provisions organising the management of the waste in question and if they are such as to ensure a level of protection of the environment equivalent to that guaranteed by Directive 75/442, as amended by Directive 91/156, and, more particularly, by Articles 4, 8 and 15.**

3. **Directive 91/271 cannot be considered, as regards the management of waste water which escapes from a sewerage network, to be special legislation (a *lex specialis*) vis-à-vis Directive 75/442, as amended by Directive 91/156, and cannot therefore be applied pursuant to Article 2(2) of Directive 75/442.**

[Signatures]