Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

10 November 2011 * [i]

(Protection of the environment – Regulations (EC) Nos 1013/2006 and 1418/2007 – Control of shipments of waste – Prohibition on the shipment of spent catalysts to Lebanon)

In Case C-405/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Amtsgericht Bruchsal (Germany), made by decision of 26 July 2010, received at the Court on 10 August 2010, in criminal proceedings against

QB,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, K. Schiemann (Rapporteur), L. Bay Larsen and E. Jarašiūnas, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2011,

after considering the observations submitted on behalf of:

– QB, by S. Jäger, Rechtsanwalt,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Aiello, avvocato dello Stato,

– the European Commission, by A. Marghelis and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 July 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 37 of 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), read in conjunction with Commission Regulation (EC) No 1418/2007 of 29 November 2007 concerning the export for recovery of certain waste listed in Annex III or IIIA to

* Language of the case: German.

Regulation No 1013/2006 to certain countries to which the OECD Decision on the control of transboundary movements of wastes does not apply (OJ 2007 L 316, p. 6), as amended by Commission Regulation (EC) No 740/2008 of 29 July 2008 (OJ 2008 L 201, p.36) ('Regulation No 1418/2007').

2 The reference has been made in criminal proceedings brought against QB for shipping spent automotive catalytic converters (or 'spent catalysts') from Germany to the Netherlands, with a view to exporting them to Lebanon.

Legal context

European Union ('EU') Law

3 Recitals 1 and 42 in the preamble to Regulation No 1013/2006 state that the objective of that regulation is to ensure the protection of the environment when waste undergoes shipment.

4 Recitals 26 and 28 to Regulation No 1013/2006 make it clear, in respect of exports from the European Union to third countries, that the scope of that protection encompasses 'the environment of the countries concerned'. In that regard, recital 33 to that regulation states, inter alia, that '[a]s regards exports from the [European Union] that are not prohibited, efforts should be made to ensure that the waste is managed in an environmentally sound manner throughout the period of shipment and including recovery or disposal in the third country of destination'.

5 As emerges from recital 3 to Regulation No 1013/2006, that regulation is intended – like 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), which it replaced – also to ensure the implementation of the obligations arising under the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, signed on 22 March 1989, which was approved on behalf of the European Community by Council Decision 93/98/EEC of 1 February 1993 (OJ 1993 L 39, p. 1) ('the Basel Convention').

6 According to recital 5 to Regulation No 1013/2006, that regulation also seeks to incorporate into EU legislation the content of Decision C(2001) 107 final of the Council of the Organisation for Economic Co-operation and Development (OECD) ('the OECD Decision') concerning the revision of Decision C(92) 39 final on the control of transboundary movements of wastes destined for recovery operations, in order to harmonise waste lists with the Basel Convention and to revise certain other requirements.

7 For those purposes, Regulation No 1013/2006 establishes, as is apparent from Article 1(1) thereof, procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination.

8 In Section 1 (entitled 'Exports to non-OECD Decision countries') of Chapter 2 (entitled 'Exports of waste for recovery') of Title IV (entitled 'Exports from the [European Union] to third countries') of Regulation No 1013/2006, Article 36(1) provides:

'Exports from the [European Union] of the following wastes destined for recovery in countries to which the OECD Decision does not apply are prohibited:

(a) wastes listed as hazardous in Annex V;

…

(f) wastes the import of which has been prohibited by the country of destination…

…'

9 Paragraphs 1, 2 and 3 of Article 37 of Regulation No 1013/2006, which is also in the above Section 1, provide:

'1. In the case of waste which is listed in Annex III or IIIA and the export of which is not prohibited under Article 36, the Commission shall, within 20 days of the entry into force of this Regulation, send a written request to each country to which the OECD Decision does not apply, seeking:

(i) confirmation in writing that the waste may be exported from the [European Union] for recovery in that country, and

(ii) an indication as to which control procedure, if any, would be followed in the country of destination.

Each country to which the OECD Decision does not apply shall be given the following options:

(a) a prohibition; or

(b) a procedure of prior written notification and consent as described in Article 35; or

(c) no control in the country of destination.

2. Before the date of application of this Regulation, the Commission shall adopt a Regulation taking into account all replies received pursuant to paragraph 1 ….

If a country has not issued a confirmation as referred to in paragraph 1 or if a country for any reason has not been contacted, paragraph 1(b) shall apply.

…

3. If a country indicates in its reply that certain shipments of waste are not subject to any control, Article 18 shall apply *mutatis mutandis* to such shipments.'

10 Article 35 of Regulation No 1013/2006 makes the waste shipments to which that provision applies subject to a procedure requiring prior written notification and prior written consent, issued inter alia by the competent authorities of dispatch and the competent authorities of destination.

11 Article 18 of Regulation No 1013/2006 makes shipments of the waste to which that provision applies subject to information requirements. It provides, inter alia, that the waste in question must be accompanied by certain documents; that it must be possible to produce, upon request, proof that a contract exists, between the person who arranges the shipment and the consignee, for recovery of the waste; and that such a contract is to be effective when the shipment starts.

12 Part I of Annex III to that regulation, which is entitled 'List of wastes subject to the general information requirements laid down in Article 18 ("Green" Listed Waste)', provides inter alia that wastes listed in Annex IX to the Basel Convention – which is reproduced as List B in Part 1 of Annex V to Regulation No 1013/2006 – are to be subject to the general information requirements laid down in Article 18.

13 The following category of waste is one of the categories in List B in Part 1 of Annex V to Regulation No 1013/2006:

‘B1120 Spent catalysts excluding liquids used as catalysts, containing any of:

– Transition Metals, excluding waste catalysts (spent catalysts, liquid used catalysts or other catalysts) on list A

…

– Lanthanides (rare earth metals):

…’

14 Recitals 1 and 6 to Regulation No 1418/2007 state:

‘(1) In accordance with Article 37(1) of Regulation [No 1013/2006] the Commission has sent a written request to each country to which [the OECD Decision] does not apply, seeking confirmation in writing that waste which is listed in Annex III or IIIA to that Regulation and the export of which is not prohibited under its Article 36 may be exported from the [European Union] for recovery in that country and requesting an indication as to which control procedure, if any, would be followed in the country of destination.

…

(6) Certain countries have in their replies made known their intention to follow control procedures applicable under national law that are distinct from those provided for in Article 37(1) of Regulation [No 1013/2006]. In addition, and in accordance with Article 37(3) of Regulation [No 1013/2006], Article 18 of that Regulation should apply *mutatis mutandis* to such shipments, unless a waste is also subject to the prior notification and consent procedure.’

15 According to the documents before the Court, the Lebanese Republic responded to the Commission’s request, referred to in recital 1 to Regulation No 1418/2007, by letter of 23 June 2007. It emerges in particular from the terms of that letter that the import of hazardous waste into Lebanon is governed by the Basel Convention and by a ministerial decision of 19 May 1997. The letter also stated that, in view of the fact that the category codes used by the European Community differ from those used by the Lebanese Republic, the latter did not intend to assume any responsibility in the event of an error or omission in its response.

16 Appended to that letter was the standard questionnaire sent out by the Commission, duly completed by the Lebanese authorities. The Lebanese authorities had made a note on that questionnaire to say, inter alia, that where the Ministerial Decision of 19 May 1997 cannot be applied in respect of one of the categories of waste referred to in that questionnaire, the entry ‘N/A’ had been made for that category. That entry was not made for category B1120 or for the list of the types of waste in that category. Rather, in the case of category B1120, the authorities had ticked column 1 of the questionnaire, headed ‘[t]he import of this waste from the European Community is prohibited’.

17 Article 1 of Regulation No 1418/2007 provides:

‘Export for recovery of waste listed in Annex III or IIIA to Regulation [No 1013/2006], which is not prohibited under Article 36 of that Regulation, to certain countries to which [the OECD Decision] does not apply shall be governed by the procedures set out in the Annex.’

18 Article 1a of that regulation provides:

‘Where a country in its reply to a written request sent by the Commission in accordance with the first subparagraph of Article 37(1) of Regulation [No 1013/2006] indicates that, with regard to certain shipments of waste, it will not prohibit them nor apply the procedure of prior written notification and consent as described in Article 35 of that Regulation, Article 18 of that Regulation shall apply *mutatis mutandis* to such shipments.’

19 The Annex to Regulation No 740/2008 states inter alia the following information:

‘*Note*: Article 18 of Regulation [No 1013/2006] applies to columns (c) and (d) in the Annex of Regulation [No 1418/2007] by virtue of Article 1 of this Regulation.’

20 The Annex to Regulation No 1418/2007 states:

‘The headings of the columns in this Annex refer to the following:

(a) prohibition;

(b) prior written notification and consent as described in Article 35 of Regulation [No 1013/2006];

(c) no control in the country of destination;

(d) other control procedures will be followed in the country of destination under applicable national law. …

…’

21 So far as Lebanon is concerned, category B1120 is mentioned both in column (a) and in column (d) of the Annex to Regulation No 1418/2007.

National legislation

22 Paragraphs 326(2) and 326(5) of the German Criminal Code (Strafgesetzbuch) provide:

‘(2) Whoever … brings waste within the meaning of subparagraph 1 into, out of or through the territorial area to which this law applies, shall be … punished [by a term of imprisonment of up to five years or by a fine].

…

(5) If the perpetrator has acted out of carelessness, the punishment shall be:

1. in the situations envisaged in subparagraphs 1 and 2, a term of imprisonment of up to three years or a fine,

…’

23 Paragraph 2(1) of the Ordinance on fines for the shipment of waste (Abfallverbringungsbußgeldverordnung) provides inter alia that anyone who, purposely or through carelessness, acts in breach of Regulation No 1418/2007 by exporting waste contrary to Article 1

thereof, read in conjunction with column (a) of the Annex thereto, is to be deemed to have committed an offence within the meaning of point 18(a) of Paragraph 18(1) of the Law on the shipment of waste (Abfallverbringungsgesetz).

The dispute in the main proceedings and the question referred for a preliminary ruling

24 QB is the manager of ALU-KAT GmbH, a company whose seat is in Bruchsal (Germany) and whose activities include the recovery and disposal of waste metal.

25 The Public Prosecutor's Office claims that, on or around 25 May 2009, QB shipped 3 794 spent automotive catalytic converters, obtained from third parties as waste for recovery or disposal, to Rotterdam (Netherlands) where they were seized by the customs authorities. The spent catalysts were then to be exported to Lebanon. Moreover, according to the Public Prosecutor's Office, QB was aware that the spent catalysts fell within waste category B1120 of Annex IX to the Basel Convention and, at the very least, she knowingly accepted that the fact that they belonged to that category meant that the shipment of those spent catalysts to Lebanon was prohibited under Article 37(2) of Regulation No 1013/2006, read in conjunction with Regulation No 1418/2007.

26 The Amtsgericht Bruchsal (Bruchsal District Court), before which criminal proceedings have been brought against QB on the basis of Article 326 of the Criminal Code and Article 2(1) of the Ordinance on fines for the shipment of waste, observes that the constituent elements of the criminal offences referred to in those provisions would not be present if it were found that the export to Lebanon of waste in category B1120 is not prohibited.

27 However, the Amtsgericht Bruchsal has doubts in that regard. It observes, first, that, in the 'Lebanon' section of the Annex to Regulation No 1418/2007, waste in category B1120 is entered both in column (a), indicating that imports are prohibited, and in column (d), indicating that other control procedures will be followed in the country of destination under the applicable national law. Secondly, the Amtsgericht Bruchsal observes that, according to recital 6 to Regulation No 1418/2007, where certain countries have in their replies made known their intention to follow control procedures, applicable under national law, which are distinct from those provided for under Article 37(1) of Regulation No 1013/2006, Article 18 of that regulation should apply *mutatis mutandis* to such shipments, in accordance with Article 37(3), unless the waste is also subject to the prior notification and consent procedure.

28 In those circumstances, the Amtsgericht Bruchsal decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are the rules laid down in Article 37 of [Regulation No 1013/2006], read in conjunction with [Regulation No 1418/2007], to be interpreted as meaning that it is prohibited to ship to Lebanon waste which falls within waste category B1120 of Annex IX to the Basel Convention?'

Consideration of the question referred

29 It should be noted at the outset that the type of treatment to be applied to the waste at issue in the main proceedings at its final destination is not clear from the order for reference.

30 To that extent, it should be borne in mind that, if it were to be established, on conclusion of the assessments of fact which fall exclusively within the jurisdiction of the referring court, that the waste at issue in the main proceedings was intended for disposal in Lebanon, its export to that country would accordingly be unlawful under paragraphs 1 and 2 of Article 34 of Regulation No 1013/2006,

which prohibit exports from the European Union of waste intended for disposal, with the exception of waste intended for disposal in countries party to the European Free Trade Association (EFTA) which are also Parties to the Basel Convention.

31 As it is, however, the provisions of EU law mentioned in the question referred for a preliminary ruling concern only the export from the European Union of waste intended for recovery.

32 In that regard, it should be noted that, under Article 36(1)(f) of Regulation No 1013/2006, exports from the European Union of waste intended for recovery in countries to which the OECD Decision does not apply are prohibited where the import of such wastes has been prohibited by the country of destination. It is common ground that the Lebanese Republic falls within the category of countries to which the OECD Decision does not apply.

33 Moreover, in the case of waste listed in Annex III or Annex IIIA to Regulation No 1013/2006 which is intended for recovery in countries to which the OECD Decision does not apply and the export of which is not prohibited under Article 36 of Regulation No 1013/2006, Article 37 of that regulation provides that the Commission must obtain information on the applicable procedures before adopting a regulation taking into account all the replies received.

34 As is clear from Article 37(1)(i) of Regulation No 1013/2006, the related request to be sent by the Commission to the third countries concerned is to seek, inter alia, confirmation in writing that the waste may be exported from the European Union for recovery in those countries. That objective is expressly referred to, moreover, in recital 1 to Regulation No 1418/2007.

35 As it is, however, the fact that, in the 'Lebanon' section of the Annex to Regulation No 1418/2007, waste in category 'B1120' is entered in column (a) signifies that, far from having confirmed in writing that waste such as that at issue in the main proceedings may be exported to Lebanon, the authorities of that country have, on the contrary, officially notified the Commission, in their response to the Commission's request under Article 37(1), that the shipment of such waste from the European Union to Lebanon, for recovery in that country, is prohibited.

36 Moreover, it is not disputed that the above entry accurately reflects the content of the response from the Lebanese authorities since – as was stated in paragraph 16 above – it is clear from the completed questionnaire appended to their letter of 23 June 2007 that, in the case of waste in category B1120, the Lebanese authorities ticked column 1 which was headed '[t]he import of this waste from the European Community is prohibited'.

37 It is clear from the above that, in the circumstances, the prohibition on exporting waste in category B1120 to Lebanon has come about because Lebanon itself forbids the import of such waste into its territory, with the result that the export ban is mandatory as a consequence both of Article 37 of Regulation No 1013/2006 and of the entry of that category of waste in column (a) in the 'Lebanon' section of the Annex to Regulation No 1418/2007 – those being the only provisions mentioned in the question referred for a preliminary ruling – and, additionally, as the Commission rightly argued, by operation of Article 36(1)(f) of Regulation No 1013/2006.

38 As regards the fact underlying the questions referred by the Amtsgericht Bruchsal – that is to say, the fact that, in the case of Lebanon, waste in category B1120 was also entered in column (d) of that annex – the following findings must be made.

39 First, it is necessary to reject, in that connection, the explanation argued for by the Commission to the effect that, where a third country has indicated that it prohibits the import into its territory of a certain type of waste, the 'control procedures … distinct from those provided for in Article 37(1) of Regulation [No 1013/2006]', to which reference is made in recital 6 to Regulation No 1418/2007, relate to an

import ban of that kind. Indeed, it should be borne in mind that the control procedures referred to in Article 37(1) – those provided for in Article 18 or Article 35 of Regulation No 1013/2006 – relate, by their very nature, exclusively to waste the import of which has not been prohibited.

40 Secondly, it appears – according to another explanation given by the Commission – that the entry of waste in category B1120 in column (d) came about as a result of the reservation expressed by the Lebanese authorities in the letter of 23 June 2007, mentioned above, concerning the possible consequences of any differences as between the various waste category codes used by the Community, on the one hand, and the Lebanese Republic, on the other.

41 Whatever the precise reasons which led the Commission to make that entry, the fact remains that it cannot, in any event, do anything to cast doubt on the finding set out in paragraph 37 above that, as EU law stands at present, the export of waste in category B1120 from the European Union to Lebanon is prohibited; nor, therefore, contrary to QB's contention, can it justify application of the procedure laid down in Article 18 of Regulation No 1013/2006.

42 The provision that entry in column (d) is to signify that 'other control procedures will be followed in the country of destination under applicable national law' must be interpreted in the light of Regulation No 1013/2006 and consistently with that regulation.

43 However, under Article 37(1) of Regulation No 1013/2006, the Commission must, within 20 days of the entry into force of that regulation, send a written request to each country to which the OECD Decision does not apply, seeking confirmation in writing that the waste may be exported from the European Union for recovery in that country and an indication as to which control procedure, if any, would be followed in the country of destination. Article 37(1) of Regulation No 1013/2006 also provides that each country to which the OECD Decision does not apply is to be given the following options: (i) a prohibition, or (ii) a procedure of prior written notification and consent as described in Article 35 of that regulation, or (iii) no control in the country of destination. Article 37(3) of Regulation No 1013/2006 specifies that, if the 'no control' option is chosen, Article 18 is to apply.

44 It follows from those provisions that an indication as to which control procedure, if any, would be applied to the waste in the country of destination necessarily implies, as does the application to shipments of such waste of the simple information procedure provided for under Article 18 of Regulation No 1013/2006, that such waste may indeed be exported from the European Union for recovery in that country.

45 As regards Article 18 of Regulation No 1013/2006 and the reference to that provision in recital 6 in the preamble to Regulation No 1418/2007, it should be added that Article 1a of Regulation No 1418/2007 expressly confirms that Article 18 of Regulation No 1013/2006 is to apply *mutatis mutandis* to shipments only where a country indicates, in its reply to a written request sent by the Commission in accordance with the first subparagraph of Article 37(1) of that regulation, that 'with regard to [such] shipments of waste, it will not prohibit them nor apply the procedure of prior written notification and consent as described in Article 35 of that Regulation'.

46 Moreover, the preliminary note in the Annex to Regulation No 740/2008, which states that Article 18 of Regulation No 1013/2006 applies to columns (c) and (d) in the Annex to Regulation No 1418/2007 by virtue of Article 1 of that regulation, must similarly be construed as meaning that the procedure referred to in Article 18 is to apply only where a category of waste is entered either in column (c) or in column (d), except where it is also entered in column (a) or (b), signifying that import of that waste is prohibited or that the prior written notification and consent procedure, as described in Article 35 of Regulation No 1013/2006, applies.

47 Lastly, it should be noted that – as the Advocate General observes in points 65 to 68 of his Opinion – the only way of construing Articles 36 and 37 of Regulation No 1013/2006, read in conjunction with Regulation No 1418/2007, which is consistent with the objectives pursued in this context by the EU legislation is to interpret them as meaning that an entry, in the Annex to Regulation No 1418/2007, signifying that the import of a particular category of waste to a particular third country is prohibited is sufficient to establish that the export of such waste from the European Union to that third country is prohibited and wholly to preclude the application of Article 18 of Regulation No 1013/2006.

48 As for the question whether, in this context, the provisions of EU law are sufficiently clear as to yield the constituent elements of the national law definition of an offence, in accordance with the principle of the legality of criminal offences and penalties, this falls – as the Advocate General pointed out in paragraph 71 of his Opinion – to be assessed by the referring court. In that regard, however, it should be borne in mind that that principle is a general principle of EU law, which is laid down, inter alia, in Article 49(1) of the Charter of Fundamental Rights of the European Union. This principle, which the Member States, in particular, are required to observe when they prescribe a penalty to punish failure to comply with provisions of EU law, implies that legislation must define clearly offences and the penalties which they attract. That requirement is satisfied where the individual concerned is able, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretative guidance given by the courts, to know which acts or omissions will make him criminally liable (see, to that effect, inter alia, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraphs 49 and 50; and Case C-546/09 *Aurubis Balgaria* [2011] ECR I-0000, paragraphs 41 and 42).

49 In the light of the foregoing, the answer to the question is that Articles 36(1)(f) and 37 of Regulation No 1013/2006, read in conjunction with Regulation No 1418/2007, must be interpreted as meaning that the export from the European Union to Lebanon of waste, intended for recovery, which falls within category B1120 in List B in Part 1 of Annex V to Regulation No 1013/2006, is prohibited.

Costs

50 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. The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable.

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

Articles 36(1)(f) and 37 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, read in conjunction with Commission Regulation (EC) No 1418/2007 of 29 November 2007 concerning the export for recovery of certain waste listed in Annex III or IIIA to Regulation No 1013/2006 to certain countries to which the OECD Decision on the control of transboundary movements of wastes does not apply, as amended by Commission Regulation (EC) No 740/2008 of 29 July 2008, must be interpreted as meaning that the export from the European Union to Lebanon of waste, intended for recovery, which falls within category B1120 in List B in Part 1 of Annex V to Regulation No 1013/2006 is prohibited.

[Signatures]

i — The name is the introductory part and in paragraphs 2, 24, 25, 26 and 41 has been replaced with letters following a request for anonymisation.