JUDGMENT OF THE COURT (Second Chamber)

7 September 2004 *

In Case C-1/03,

REFERENCE for a preliminary ruling under Article 234 EC

from the Cour d'appel de Bruxelles (Belgium), made by decision of 3 December 2002, registered at the Court on 3 January 2003, in the criminal proceedings before that court against

Paul Van de Walle,

Daniel Laurent,

Thierry Mersch

and

* Language of the case: French.

Texaco Belgium SA,

intervener:

Région de Bruxelles-Capitale,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet (Rapporteur), R. Schintgen, F. Macken and N. Colneric, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— P. Van de Walle, D. Laurent and Texaco Belgium SA, by M. Mahieu, avocat,

— T. Mersch, by O. Klees, avocat,

— Région de Bruxelles-Capitale, by E. Gillet, L. Levi and P. Boucquey, avocats,

— the Commission of the European Communities, by F. Simonetti and M. Konstantinidis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 1(a), (b) and (c) 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), (hereinafter 'Directive 75/442').

2 The reference was made in the course of proceedings brought against Mr Van de Walle, Mr Laurent and Mr Mersch, senior staff of Texaco Belgium SA ('Texaco'), and against Texaco itself (together 'Mr Van de Walle and Others'), who, as the result of an accidental leak of hydrocarbons from a service station under that company's sign, are charged with the offence of abandoning waste.

Legal framework

Community legislation

3 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;

...'

4 Annex I to Directive 75/442, entitled 'Categories of waste', refers in heading Q4 to 'materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap'; in heading Q7 to 'substances which no longer perform satisfactorily (e.g. contaminated acids, contaminated solvents, exhausted tempering salts, etc.)'; in heading Q14 to 'products for which the holder has no further use (e.g. agricultural, household, office, commercial and shop discards, etc.)' and, in heading Q15, to 'contaminated materials, substances or products resulting from remedial action with respect to land'.

5 The second paragraph of Article 4 of Directive 75/442 states: 'Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste'.

6 Article 8 of Directive 75/442 provides that Member States are to 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 disposal or recovery operations or that that holder carries out those operations himself.

7 Article 15 of Directive 75/442 states:

'In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by:

— the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9

and/or

— the previous holders or the producer of the product from which the waste came.'

National legislation

8 Article 2(1) of the Order of 7 March 1991 of the Council of the Brussels-Capital Region (*Moniteur belge* of 23 April 1991) ('the Order of 7 March 1991') defines

waste as 'a substance or object which the holder discards or intends or is required to discard'.

9 Annex I to the Order, which lists several categories of waste, refers in heading Q4 to 'materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the accident', in heading Q7 to 'substances which no longer perform satisfactorily', and in heading Q12 to 'contaminated materials'.

10 Annex III to the Order, entitled 'constituents which render waste hazardous', includes a heading C51, which refers to 'hydrocarbons and their oxygen, nitrogen or sulphur compounds not otherwise taken into account in this annex'.

11 Article 8 of the Order states:

'It is prohibited to abandon waste in a public or private area outside the sites authorised for that purpose by the competent public authority or without complying with the legislative provisions relating to the disposal of waste'.

12 Article 10 of the Order of 7 March 1991 provides:

'Anyone producing or holding waste shall be required to dispose of it or have it disposed of in accordance with the provisions of this Order, under conditions which restrict harmful effects on soil, flora, fauna, air and water and, in general, without adversely affecting the environment or human health.

The Executive [of the Brussels-Capital Region] shall ensure that the cost of disposing of waste is borne by the holder who has waste handled by a disposal undertaking or, failing that, by the previous holders or the producer of the product from which the waste came'.

13 Article 22 of the Order of 7 March 1991 subjects to a penalty anyone who abandons his own waste or that of others in breach of Article 8 of that Order.

The main action and the questions referred

14 The Brussels-Capital Region owns a building at 132 avenue du Pont de Luttre in Brussels (Belgium). The renovation of that building which it had undertaken in order to set up a social assistance centre had to be halted on 18 January 1993 as the result of the discovery that water saturated with hydrocarbons was leaking into the cellar of the building from the wall which separates that building from the adjacent building at 134 avenue du Pont de Luttre, where a Texaco service station was at that time located.

15 The service station was covered by a commercial lease between Texaco and the owner of the premises. Since 1988 it had been operated by a manager under an 'operating agreement' which provided that the land, building, equipment and movable property for the operation were made available to the manager by Texaco. The manager operated the service station on his own behalf but did not have the right to make changes to the premises without prior written permission from Texaco, which supplied the service station with petroleum products and, in addition, retained control over bookkeeping and supplies.

16 Following the discovery of the hydrocarbon leak, which was the result of defects in the service station's storage facilities, Texaco took the view that the station could no longer continue to operate and decided to terminate the management contract in April 1993, alleging serious negligence on the part of the manager. It subsequently terminated the commercial lease in June 1993.

17 Although disclaiming liability, Texaco proceeded to decontaminate the soil and replaced part of the storage facilities which gave rise to the hydrocarbon leak. It carried out no further activities on the site after May 1994. The Brussels-Capital Region took the view that decontamination had not been completed and paid for other remedial measures which it considered necessary in order to carry out its building plan.

18 Since Texaco's actions appeared to constitute infringements of the Order of 7 March 1991, and in particular Articles 8, 10 and 22 thereof, proceedings were brought against Mr Van de Walle, Texaco's managing director, Mr Laurent and Mr Mersch, officers of the company, and Texaco as a legal entity before the Tribunal correctionnel (Criminal Court) of Brussels. The Brussels-Capital Region claimed

damages in those proceedings. By judgment of 20 June 2001, that court acquitted the defendants, exonerated Texaco and stated that it was not competent to rule on the application by the party claiming damages.

19 The Ministère public (Public Prosecutor) and the party claiming damages appealed against that judgment before the court which has made the reference.

20 That court took the view that Article 22 of the Order of 7 March 1991 imposed penalties for failure to comply with the obligations set out in Article 8 thereof and not for failure to comply with the requirements of Article 10. It therefore considered that in order to be subject to criminal sanctions under Article 22, the actions of the accused must constitute abandonment of waste within the meaning of Article 8. It observed that Texaco had not rid itself of its waste by supplying it to the service station and that neither the petrol delivered nor the tanks which remained buried in the ground after the decontamination activities carried out by that undertaking could constitute waste within the meaning of Article 2(1) of the Order, that is to say, 'a substance or object which the holder discards or intends or is required to discard'.

21 The court was in doubt, however, as to whether subsoil contaminated as the result of an accidental spill of hydrocarbons could be considered waste and stated that it doubted that that classification was possible, since the land in question had not been excavated and treated. It also pointed out that legal opinion differs as to whether the accidental spill of a product which contaminates soil is comparable to the abandonment of waste.

22 Having noted that the definition of 'waste' in Article 2(1) of the Order of 7 March 1991 reproduces literally that in Directive 75/442 and that the Annex to the Order which lists categories of waste reproduces the terms used in Annex I to the Directive, the Cour d'appel of Brussels decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 1(a) of Council Directive 75/442/EEC ..., which defines waste as "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force", and Article 1(b) and (c) of the Directive, which defines "producer of waste" as "anyone whose activities produce waste ('original producer') and/or anyone who carried out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste" and "holder" as "the producer of the waste or the natural or legal person who is in possession of it", to be interpreted as being applicable to a petroleum company which produces hydrocarbons and sells them to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to the company, if such hydrocarbons seep into the ground, thus contaminating the soil and groundwater?

(2) Or must it be considered that the classification as waste within the meaning of the abovementioned provisions applies only if the contaminated soil has been excavated?'

The questions referred

23 By those two questions, which it is appropriate to consider together, the national court asks, first, whether hydrocarbons which are spilled unintentionally and cause soil and groundwater contamination may be considered to be waste within the meaning of Article 1(a) of Directive 75/442 and whether the soil thus contaminated may also be classified as waste within the meaning of that provision even when it has not been excavated, and secondly whether, in circumstances such as those in the main action, the petroleum undertaking which supplies the service station may be considered to be the producer or holder of such waste within the meaning of Article 1(b) and (c) of the Directive.

Observations submitted to the Court

24 The Brussels-Capital Region takes the view that Texaco satisfies the definition of 'holder of waste' inasmuch as it held the hydrocarbons at the outset, delivered them to the service station, closely controlled the station's operations and pumped water from the aquifer in order to clean the contaminated soil.

25 The hydrocarbons fall outside the classification as waste only until the service station discards them for some reason, at which point they become waste, including for the undertaking, such as Texaco, which produced and delivered them.

26 A petroleum undertaking which produced and sold products which have become waste must therefore be considered to be the holder of waste within the meaning of Directive 75/442 if it had access to the site where that waste was situated or had the right to take a decision as to how its client carried out its operations or to inspect the product's storage facilities which are the source of spills to land and groundwater. The petroleum undertaking which in fact dealt with some of that waste is the holder of waste.

27 As for the hydrocarbons in question in the main proceedings, which leaked from the service station's tanks, their producer or their holder discarded them. The hydrocarbons are specifically covered by heading Q4 of Annex I to Directive 75/442 and are, moreover, hazardous waste. They must therefore be considered to be waste within the meaning of the Directive.

28 Soil contaminated by hydrocarbons must also be classified as waste. That is clear from the terms of headings Q5, Q12 and Q13 of the Annex and from the obligation for the holder of those substances to discard them.

29 That obligation derives, inter alia, from the aim of Directive 75/442 to protect human health and the environment, which could not be achieved if the holder or producer of waste was not required to discard contaminated soil or if he merely buried contaminated material in the soil.

30 Mr Van de Walle and Others argue that Texaco delivered petroleum products which were sound at the time they were sold to the service station, an operation which cannot be regarded as the production of waste or as indicative of an intention to get rid of waste.

31 Mr Van de Walle and Others take the view that the Community legislature defined waste as any substance which the holder 'discards or intends or is required to discard' in order to include a subjective element beyond the objective element (registration of a waste in a catalogue on the basis of its characteristics or its degree of toxicity), confining the scope to situations where there is action, intention or obligation on the part of the holder to discard waste, by either disposal or recovery.

32 The particularity of the main action lies in the fact that neither Texaco nor the manager of the service station knew or was aware that hydrocarbons had leaked from the tanks and had permeated the surrounding water and land. It is thus not possible to identify any action, intention or obligation to discard those substances.

33 Furthermore, Texaco was not ordered to decontaminate the site until January 1993, after the discovery that hydrocarbons were being leaked. That order, which they maintain was arbitrary, should have been addressed to the operator of the service station who, as an independent manager, should have been considered the only person required to discard those substances. Moreover, Texaco has always insisted that the soil decontamination work it carried out was 'without prejudice'.

34 As regards the meaning of 'producer' and 'holder' of waste for the purposes of Community law, Mr Van de Walle and Others maintain that the wording of the question referred for a preliminary ruling and the statement of grounds in the judgment making the reference suggest that the Cour d'appel of Brussels takes the view that Texaco is neither the producer nor the holder of the waste at issue and that that court is concerned not with those definitions but solely to have the Court define what constitutes waste.

35 It is therefore only in the alternative, if the Court deems it necessary to consider what is meant by 'producer' and 'holder', that Mr Van de Walle and Others contend that Texaco merely delivered sound products to the service station and therefore did not cause to exist, create or produce waste. In the event that products are not used, it is the person who no longer uses those products who is the producer of the waste, not the person who delivered them at the outset. Therefore, it is only the manager of the service station who must, where relevant, be considered the producer of the waste and, moreover, its holder.

36 In that regard, several provisions in the service station's operating agreement, in particular Article 6(10) thereof, make clear that the manager was fully liable as an operator and independent trader and that he was solely liable for damage caused to third parties as the result of his operations. Article 2 of the agreement provided that responsibility for the operation of the service station was 'conferred' on the manager by Texaco. Under Article 6(2) of that agreement, the manager was required to 'maintain in perfect condition and at his own expense the property [conferred]' and to ascertain on a daily basis that the pumps and other equipment were functioning properly and immediately to advise Texaco of repairs envisaged. According to Article 5 of the agreement, stocks were the 'exclusive property [of the manager]', who was required to assume 'full responsibility' for them.

37 The Commission observes that it follows from heading Q4 of Annex I to Directive 75/442, which refers to 'materials spilled, lost or having undergone other mishap', that the Community legislature expressly opted for the Directive to cover the case where the holder of waste discards it accidentally. That is not incompatible with Article 1 of the Directive, which does not specify whether the action of 'discarding' must be 'intentional' or not. The holder may even, as in the main proceedings, not be aware that he has discarded a product.

38 Similarly, the wording of heading Q4, which likewise refers to 'any materials, equipment, etc., contaminated as a result of the mishap', shows that Directive 75/442 treats materials contaminated by waste in the same way as waste, so as to ensure that where materials which constitute waste are spilled by accident, the holder of those materials does not abandon the contaminated substances or objects but becomes responsible for disposing of them.

39 By contrast, soil contaminated by an accidental spillage of hydrocarbons, which like water and air forms part of the environment, does not lend itself to the recovery and disposal operations provided for under the Directive and can only be subjected to decontamination. As a general rule, therefore, soil contaminated by waste should not itself be considered to be waste.

40 However, a different conclusion is necessary when soil must be excavated for the purpose of decontamination. In that case, once it is excavated the soil is no longer an element of the environment but rather movable property which, because it is mixed with accidentally spilled materials that are classified as waste, must be treated in the same way as waste.

41 Finally, the person who had hydrocarbons spilled by accident in his possession at the time when they became waste, in this case the manager of the service station who bought them from Texaco, must be considered to be the 'holder'. The substances became waste when they leaked from the tanks. The petroleum undertaking is the producer of the hydrocarbons, but only the retailer, through his operations, 'produced' waste by accident.

The Court's reply

42 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 lists of substances and objects which can be classified as waste. However, the lists are 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 to that effect Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26, and Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraph 22).

43 The fact that Annex I to Directive 75/442, entitled 'Categories of waste', refers in heading Q4 to 'materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap' merely indicates that such materials may fall within the scope of 'waste'. It cannot suffice to classify as waste hydrocarbons which are spilled by accident and which contaminate soil and groundwater.

44 In those circumstances, it is necessary to consider whether that accidental spill of hydrocarbons is an act by which the holder 'discards' them.

45 First, as the Court has held, the verb 'to discard' must be interpreted in the light of the aim of Directive 75/442, which, in the wording of the third recital in the preamble, is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, and that of Article 174(2) EC, which states that Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. The verb 'to discard', which determines the scope of 'waste', 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).

46 Secondly, when the substance or object in question is a production residue, that is to say, a product which is not itself wanted for subsequent use and which the holder cannot economically re-use without prior processing, it must be considered to be a burden which the holder seeks to 'discard' (see to that effect *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, cited above, paragraphs 32 to 37).

47 It is clear that accidentally spilled hydrocarbons which cause soil and groundwater contamination are not a product which can be re-used without processing. Their marketing is very uncertain and, even if it were possible, implies preliminary operations would be uneconomical for their holder. Those hydrocarbons are therefore substances which the holder did not intend to produce and which he 'discards', albeit involuntarily, at the time of the production or distribution operations which relate to them.

48 Finally, 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. Article 4 of the Directive provides, inter alia, that Member States are to take the measures necessary to ensure that waste is recovered or disposed of without endangering human health and 'without risk to water, air, soil and plants and animals' and are to 'prohibit the abandonment, dumping or uncontrolled disposal of waste'. Pursuant to Article 8 of the Directive, Member States are to take the measures necessary to ensure that any holder of waste has it handled by an operator responsible for its recovery or disposal or ensures those operations himself. Article 15 of the Directive designates the operator who must bear the cost of disposing of waste 'in accordance with the "polluter pays" principle'.

49 If hydrocarbons which cause contamination are not considered to be waste on the ground that they were spilled by accident, their holder would be excluded from the obligations which Directive 75/442 requires Member States to impose on him, in contradiction to the prohibition on the abandonment, dumping or uncontrolled disposal of waste.

50 It follows that the holder of hydrocarbons which are accidentally spilled and which contaminate soil and groundwater 'discards' those substances, which must as a result be classified as waste within the meaning of Directive 75/442.

51 It should be pointed out that hydrocarbons spilled by accident are, moreover, considered to be hazardous waste under Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) and Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689 (OJ 1994 L 356, p. 14).

52 The same classification as 'waste' within the meaning of Directive 75/442 applies to soil contaminated as the result of an accidental spill of hydrocarbons. In that case, the hydrocarbons cannot be separated from the land which they have contaminated and cannot be recovered or disposed of unless that land is also subject to the necessary decontamination. That is the only interpretation which ensures compliance with the aims of protecting the natural environment and prohibiting the abandonment of waste pursued by the Directive. It is fully in accord with the aim of the Directive and heading Q4 of Annex I thereto, which, as pointed out, mentions 'any materials, equipment, etc., contaminated as a result of [materials spilled, lost or having undergone other mishap]' among the substances or objects which may be regarded as waste. The classification as waste in the case of land contaminated by hydrocarbons does indeed therefore depend on the obligation on the person who causes the accidental spill of those substances to discard them. It cannot result from the implementation of national laws governing the conditions of use, protection or decontamination of the land where the spill occurred.

53 Since contaminated soil is considered to be waste by the mere fact of its accidental contamination by hydrocarbons, its classification as waste is not dependent on other operations being carried out which are the responsibility of its owner or which the latter decides to undertake. The fact that soil is not excavated therefore has no bearing on its classification as waste.

54 As regards whether, in the circumstances of the main action, the petroleum undertaking supplying the service station can be considered to be the producer or holder of waste within the meaning of Article 1(b) and (c) of the Directive, under the division of functions provided for by Article 234 EC it is for the national court to apply to the individual case before it the rules of Community law as interpreted by the Court (Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11).

55 Article 1(c) of Directive 75/442 provides that the holder is 'the producer of the waste or the natural or legal person who is in possession of it'. The Directive therefore defines 'holder' broadly, without specifying whether the obligation to dispose of or recover waste is as a general rule a matter for the producer or the possessor of the waste, that is to say, the owner or the holder.

56 Article 8 of Directive 75/442 states that those obligations, which are the corollary to the prohibition on the abandonment, dumping or uncontrolled disposal of waste laid down in Article 4 of the Directive, are the responsibility of 'any holder of waste'.

57 In addition, Article 15 of Directive 75/442 provides that, in accordance with the principle of polluter pays, the cost of disposing of waste must be borne by the holder who has waste handled by an operator responsible for disposing of it and/or previous holders or the producer of the product from which the waste came. The Directive therefore does not preclude the possibility that, in certain cases, the cost of disposing of waste is to be borne by one or several previous holders, that is to say, one or more natural or legal persons who are neither the producers nor the possessors of the waste.

58 It follows from the provisions cited in the three preceding paragraphs that Directive 75/442 distinguishes between practical recovery or disposal operations, which it makes the responsibility of any 'holder of waste', whether producer or possessor, and the financial burden of those operations, which, in accordance with the principle of polluter pays, it imposes on the persons who cause the waste, whether they are holders or former holders of the waste or even producers of the product from which the waste came.

59 The hydrocarbons spilled by accident as the result of a leak from a service station's storage facilities had been bought by that service station to meet its operating needs. They are therefore in the possession of the service station's manager. Moreover, it is the manager who, for the purpose of his operations, had them in stock when they became waste and who may therefore be considered to be the person who 'produced' them within the meaning of Article 1(b) of Directive 75/442. Under those conditions, since he is at once the possessor and the producer of that waste, the service station manager must be considered to be its holder within the meaning of Article 1(c) of Directive 75/442.

60 Nevertheless, if in the main action, in the light of information which only the national court is in a position to assess, it appears that the poor condition of the service station's storage facilities and the leak of hydrocarbons can be attributed to a disregard of contractual obligations by the petroleum undertaking which supplies that service station, or to any actions which could render that undertaking liable, the activities of that undertaking could be considered to 'have produced waste' within the meaning of Article 1(b) of Directive 75/442 and it may accordingly be regarded as the holder of the waste.

61 In the light of all the foregoing considerations, the answer to the question referred by the national court must be that hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of Article 1(a) of Directive 75/442. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of Article 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking.

Costs

62 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) rules as follows:

Hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of Article 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking.

Signatures.