JUDGMENT OF THE COURT (Second Chamber)

11 November 2004 *

In Case C-457/02,

REFERENCE for a preliminary ruling under Article 234 EC, from the Tribunale di Terni (Italy), made by order of 20 November 2002, received at the Court on 18 December 2002, in the criminal proceedings against

Antonio Niselli,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann and J.-P. Puissochet (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 May 2004,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

— Mr Niselli, by L. Mattrella and E. Morigi, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,

— the Austrian Government, by E. Riedl, acting as Agent, and

— the Commission of the European Communities, by M. Kostantidinis and R. Amorosi, acting as Agents, assisted by G. Bambara, avvocato,

after hearing the Opinion of the Advocate General at the sitting on 10 June 2004,

gives the following

Judgment

1 The 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) and Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32), (hereinafter 'Directive 75/442').

2 The reference was made in the course of criminal proceedings against Mr Niselli, who is accused of having managed waste without the prior authorisation of the competent authority.

Legal framework

Community provisions

3 Directive 75/442 is intended to approximate the national laws concerning waste management.

4 The first subparagraph of Article 1(a) of the directive defines 'waste' as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

5 Annex I to Directive 75/442, entitled 'Categories of Waste', lists, among others, in point Q 1, 'production or consumption residues not otherwise specified below', in point Q 14, 'products for which the holder has no further use (e.g. agricultural, household, office, commercial and shop discards, etc.)' and, in point Q 16, 'any materials, substances or products which are not contained in the above categories'.

6 The second subparagraph of Article 1(a) of Directive 75/442 entrusted the Commission of the European Communities with the task of drawing up 'a list of

wastes belonging to the categories listed in Annex I' (hereinafter 'the list of wastes'). That is the object of Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (OJ 2000 L 226, p. 3). That list has been amended several times and particularly, most recently, by Council Decision 2001/573/EC of 23 July 2001 (OJ 2001 L 203, p. 18). The list of wastes entered into force on 1 January 2002. Chapter 17 of that list includes 'construction and demolition wastes (including excavated material from contaminated sites)'. Different types of metallic waste are listed under No 17 04 of that chapter. The introduction to the list of wastes states that it is a harmonised list of wastes which will be periodically reviewed, but that, however, 'the inclusion of a material in the list does not mean that the material is a waste in all circumstances. Materials are considered to be waste only where the definition of waste in Article 1(a) of Directive 75/442/EEC is met'.

7 Article 1(b) of Directive 75/442 defines 'producer' as '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'.

8 As regards 'holder', it is defined in Article 1(c) of Directive 75/442 as 'the producer of the waste or the natural or legal person who is in possession of it'.

9 Article 1(d) of Directive 75/442 defines waste 'management' as 'the collection, transport, recovery and disposal of waste, including the supervision of such operations and after-care of disposal sites'.

10 Article 1(e) and (f) define 'disposal' and 'recovery' of waste as any of the operations provided for in Annexes II A and II B respectively. Those annexes were adapted to scientific and technical progress by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32). Among the recovery operations listed in Annex II B are, in point R 4, 'recycling/recovery of metals and metal compounds' and, in point R 13, 'storage of wastes prior to one of the operations [mentioned in the said annex] (excluding temporary storage, pending collection, on the site where it is produced)'.

11 Article 3(1)(b) of Directive 75/442 provides, among other things, that Member States shall 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.

12 Article 4 of Directive 75/442 provides that Member States are to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular without risk to water, air, soil, plants and animals, and without adversely affecting the countryside or places of special interest. That article states that Member States are also to take the measures necessary to prohibit the abandonment, dumping or uncontrolled disposal of waste.

13 Articles 9 and 10 of Directive 75/442 provide that any establishment or undertaking which carries out waste disposal or recovery operations must obtain a permit from the competent authority.

14 Exemption from the permit requirement is nevertheless provided for, under certain conditions, in Article 11 of Directive 75/442.

National provisions

15 Directive 75/442 was transposed into Italian law by Legislative Decree No 22 of 5 February 1997 implementing Directive 91/156/EEC on waste, Directive 91/689/EEC on hazardous waste and Directive 94/62/EC on packaging and packaging waste (GURI, General Supplement No 38 of 15 February 1997), as amended by Legislative Decree No 389 of 8 November 1997 (GURI No 261 of 8 November 1997), (hereinafter 'Legislative Decree No 22/97').

16 Article 6(1)(a) of Legislative Decree No 22/97 defines 'waste' as 'any substance or object in the categories set out in Annex A which the holder discards or intends or is required to discard'. Annex A of that Legislative Decree reproduces the list of the 'Categories of Wastes' in Annex I to Directive 75/442. In addition, Annexes B, C and D to Legislative Decree No 22/97 list the waste disposal and recovery operations respectively in the same way as Annexes II A and II B to Directive 75/442, as well as dangerous waste within the meaning of Article 1(4) of Directive 91/689.

17 For the management of certain types of waste, Legislative Decree No 22/97 requires an administrative permit. In that case, the failure to obtain a permit is a criminal offence.

18 After the commencement of the criminal proceedings which are the subject of the main proceedings, Decree-Law No 138 of 8 July 2002 (GURI No 158 of 8 July 2002, hereinafter 'Decree-Law No 138/02'), which became Law No 178 of 8 August 2002 (GURI No 187 of 10 August 2002), was passed.

19 In Article 14 of Decree-Law No 138/02 there is an 'authentic interpretation' of the definition of 'waste' for the purposes of Legislative Decree No 22/97 which states as follows:

'1. The words "discards", "intends [to discard]" and "is required to discard" in Article 6(1)(a) of Legislative Decree [No 22/97] and subsequent amendments thereof ... shall be interpreted as follows:

(a) "discards": any conduct whereby, directly or indirectly, substances, materials or goods are disposed of or subjected to disposal or recovery, in accordance with Annexes B and C to Legislative Decree [No 22/97];

(b) "intends [to discard]": the intention to subject substances, materials or goods to disposal or recovery, in accordance with Annexes B and C to Legislative Decree [No 22/97];

(c) "is required to discard": the obligation to submit substances, materials or goods to recovery or disposal, required by a statutory provision, by a measure laid down by a public authority or by the nature of the substances, materials or goods themselves, or because they are included in the list of hazardous waste set forth in Annex D to Legislative Decree [No 22/97].

2. The provisions of paragraph 1(b) and (c) shall not apply to materials, goods or substances which are production or consumption residues where:

(a) they can be and are in fact and objectively reused in the same or a similar or different production or consumption cycle, without undergoing any prior treatment and without causing harm to the environment;

(b) they can be and are in fact and objectively reused in the same or a similar or different production or consumption cycle, after undergoing prior treatment, without requiring any of the recovery operations listed in Annex C to Legislative Decree [No 22/97].'

The main proceedings and the questions referred for a preliminary ruling

20 Mr Niselli, the person legally liable for the company ILFER SpA, was charged with the offence of managing waste without a permit. An articulated vehicle belonging to ILFER SpA was seized by the police whilst carrying ferrous materials but not the waste identification form required by Legislative Decree No 22/97. It appeared, also, that the vehicle was not entered on the national register of waste management undertakings, as required by that Legislative Decree.

21 According to the technical report submitted in the course of the proceedings, the materials seized came from the dismantling of machines and vehicles or from collecting discarded objects. Their common characteristics were their ferrous

composition, either pure or alloyed, and their partial contamination by organic substances such as paint, grease or fibres. They were products of various technological processes from which they had been withdrawn because they were no longer usable in them.

22 As regards the disposal of the criminal proceedings after the entry into force of Decree-Law No 138/02, the Tribunale penale di Terni (Criminal Court, Terni) is asking, in essence, whether the 'authentic interpretation' of 'waste' given in Article 14 of Decree-Law No 138/02 could be contrary to Directive 75/442. According to that interpretation, the facts with which Mr Niselli is charged no longer constitute an offence, because the scrap metal seized was intended to be reused and could not therefore be described as waste. However, if that interpretation is incompatible with Directive 75/442, the criminal proceedings must continue on the basis of the offence charged.

23 While noting that the Commission has initiated a procedure against the Italian Republic for failure to fulfil its obligations under Directive 75/442, the Tribunale penale di Terni decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. May the meaning of "waste" be governed by the following condition: that the words "discards", "intends" and "is required to discard", introduced into Italian law by Article 6(1)(a) of Legislative Decree [No 22/97], are to be interpreted as follows:

(a) "discards": any conduct whereby, directly or indirectly, substances, materials or goods are disposed of or subjected to disposal or recovery, in accordance with Annexes B and C to Legislative Decree [No 22/97];

(b) "intends to discard": the intention to subject substances, materials or goods to disposal or recovery, in accordance with Annexes B and C to Legislative Decree No [22/97];

(c) "is required to discard": the obligation to submit substances, materials or goods to recovery or disposal, required by a statutory provision, by a measure laid down by a public authority or by the nature of the materials, substances or goods themselves, or because they are included in the list of hazardous waste set forth in Annex D to Legislative Decree No [22/97]?

2. Is it possible to exclude definitively, from the definition of "waste", goods, substances and materials which are production or consumption residues where:

(a) they can be and are in fact and objectively reused in the same or a similar or different production or consumption cycle, without undergoing any prior treatment and without causing harm to the environment;

(b) they can be and are in fact and objectively reused in the same or a similar or different production or consumption cycle, after undergoing prior treatment without requiring any of the recycling operations listed in Annex C to Legislative Decree No 22/97, in force in Italy (which reproduces the wording of Annex II B to Directive 91/156/EEC)?'

The questions referred for a preliminary ruling

Admissibility

24 The Italian Government submits, first, that the interpretation of Community law requested of the Court is otiose since the difficulties of construction mentioned by the referring court do not arise in Italian law.

25 The Italian Government asserts, secondly, that the questions referred are inadmissible, on the ground that the national court is in reality suggesting that the Court of Justice give its ruling on the failure to fulfil obligations with which the Italian Republic is charged in the proceedings brought by the Commission and mentioned in the order for reference.

26 Those two arguments must be rejected. It is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law or the assessment of the validity of a Community rule that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 38 and 39).

27 That is not however the case here. First, it is clear from the case-file that the questions referred to the Court are directly connected to the subject-matter of the proceedings pending before the Tribunale penale di Terni. Secondly, the Commission's initiation of the procedure against the Italian Republic for failure to fulfil its obligations under Directive 75/442 does not render the questions referred devoid of purpose.

28 Without objecting to the reference to the Court of Justice, the Commission maintains in its written observations that the national court will not be able to refer to Directive 75/442 to determine the existence or degree of Mr Niselli's criminal liability should the Court find that Article 14 of Decree-Law No 138/02, which would preclude such liability, does not comply with that directive.

29 In that regard, it must be noted that a directive may indeed not of itself impose obligations on a private individual and may not therefore be relied on as such against him (see, among others, Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 20). Likewise, a directive cannot, of itself and independently of a national rule of law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, in particular, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 37).

30 However, in this case, it is clear that, at the time of the facts which gave rise to the criminal proceedings against Mr Niselli, they could, in an appropriate case, constitute offences under criminal law. In those circumstances, it is inappropriate to enquire into such consequences as might derive, for the application of Directive 75/442, from the principle that penalties must have a proper legal basis (see, to that effect, Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 43).

31 The reference for a preliminary ruling is therefore admissible.

Substance

The first question

32 By the first question, the national court is asking, in essence, whether the expressions 'discards', 'intends to discard' and 'is required to discard' in the first subparagraph of Article 1(a) of Directive 75/442 cover exhaustively the cases in which, either directly or indirectly, the holder of a substance or object intends it for or subjects it to a disposal or recovery operation mentioned in Annexes II A and II B to that directive, by way of reference from the Italian legislation, or intends or is required to do so by statute or a measure of the public authorities, or because of the very nature of the substance or object in question, or of its being in the list of hazardous waste.

33 The scope of the meaning of 'waste' depends on the meaning of the verb 'to discard'. That verb must be interpreted in light of the aim of Directive 75/442, which, according to its third recital, is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, and Article 174(2) EC, which provides 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 (see, among others, Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, (hereinafter '*Palin Granit*'), paragraphs 22 and 23).

34 No decisive criterion is, however, suggested by Directive 75/442 to determine the holder's intention of discarding a given substance or object. In the absence of Community provisions, Member States are free to choose the modes of proof of the various matters defined in the directives which they transpose, provided that the effectiveness of Community law is not thereby undermined (see, among others, Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraph 41).

35 According to the construction of the meaning of 'waste' set out by the national court, the intention to dispose of or to submit to recovery a substance or an object is to be regarded as the manifestation of the act of discarding it, or of the intention or of the obligation to 'discard' it within the meaning of the first subparagraph of Article 1(a) of Directive 75/442.

36 By defining the action of 'discarding' a substance or an object solely by reference to the putting in train of a disposal or recovery operation mentioned in Annexes II A and II B to Directive 75/442, that construction makes the characterisation as 'waste' depend on an operation which cannot itself be described as disposal or recovery unless it applies to 'waste'. Consequently, that construction does not clarify the meaning of 'waste'.

37 In that regard, the fact that a substance undergoes an operation referred to in Annexes II A or II B to Directive 75/442 does not justify the conclusion that that substance has been discarded and may therefore be regarded as waste (*Palin Granit*, cited above, paragraph 27). Thus, if the construction in question meant that any substance or any object which was subject to one of the types of operations mentioned in Annexes II A and II B to Directive 75/442 must be classified as 'waste',

it would lead to the classification as such of substances or objects which are not 'waste' within the meaning of that directive. For example, on that construction, fuel oil used in combustion is always 'waste', since it is subject, when it is burnt, to the operation in category R 1 of Annex II B to Directive 75/442.

38 But above all, if the construction set out by the national court meant that a substance or object which is discarded otherwise than as mentioned in Annexes II A and II B to Directive 75/442 is not 'waste', it would restrict the meaning of 'waste' arising from the first subparagraph of Article 1(a) of that directive. Thus, a substance or object not subject to a disposal or recovery requirement whose holder discards it by simple abandonment, without subjecting it to such an operation, would not be classified as 'waste' although it would be such within the meaning of Directive 75/442.

39 The fact that the abandonment of waste cannot be regarded as a method of disposal of such waste follows, in particular, from the second paragraph of Article 4 of Directive 75/442, by which 'the Member States shall take ... the measures necessary to prohibit the abandonment, dumping and uncontrolled disposal of waste'. That provision clearly distinguishes abandonment from disposal. It follows that abandonment and disposal of an object or substance are two ways, among others, of discarding it within the meaning of the first subparagraph of Article 1(a) of Directive 75/442.

40 The answer to the first question must therefore be that the definition of 'waste' in the first subparagraph of Article 1(a) of Directive 75/442 cannot be construed as

covering exclusively substances or objects intended for, or subjected to, the disposal or recovery operations mentioned in Annexes II A and II B to that directive or in the equivalent lists, or to which their holder intends or is required to subject them.

The second question

41 By the second question, the national court is asking, in essence, whether production or consumption residues can be excluded from the meaning of 'waste' in the first subparagraph of Article 1(a) of Directive 75/442 where they can be or are reused in the same or a similar or different production or consumption cycle, without undergoing any prior treatment and without causing harm to the environment, or after undergoing prior treatment without, however, requiring any of the recovery operations listed in Annex C to Decree-Law No 22/97, which transposes Annex II B to Directive 75/442 into Italian law word for word.

42 As the Italian Government points out, the interpretation which is the subject of the second question is intended to exclude, on certain conditions, reusable production or consumption residues from the meaning of 'waste'.

43 As the Court has held, the fact that a used substance is a production residue is, as a rule, evidence that it has been discarded or of an intention or requirement to discard it, within the meaning of Article 1(a) of Directive 75/442 (see *ARCO Chemie Nederland*, cited above, paragraph 84). The same appraisal must apply as regards consumption residues.

44 It is possible to consider, however, that goods, materials or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking does not wish to 'discard', within the meaning of the first subparagraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further prior processing. That approach is not, indeed, incompatible with the aims of Directive 75/442 because there is no reason to hold that the provisions of the directive, which are intended to regulate the disposal or recovery of waste, apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products (see *Palin Granit*, paragraphs 34 and 35).

45 However, having regard to the obligation to interpret the concept of waste widely in order to limit its inherent undesirable or harmful effects, recourse to the reasoning applicable to by-products should be limited to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any prior processing and as an integral part of the production process (see *Palin Granit*, paragraph 36).

46 In addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not that substance is waste for the purposes of Directive 75/442 is, therefore, the degree of likelihood that that substance will be reused without any prior processing. If, in addition to the mere possibility of reusing the substance, there is also a financial advantage for the holder in so doing, the likelihood of such reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to 'discard', but as a genuine product (see *Palin Granit*, paragraph 37).

47 It is clear from the foregoing that, in the light of the objectives of Directive 75/442, it is acceptable to classify goods, materials or raw materials, resulting from a process of manufacture or extraction the primary purpose of which is not their production, not as 'waste', but as by-products whose holder does not wish to 'discard' them within the meaning of the first subparagraph of Article 1(a) of that directive, provided that their reuse is a certainty, without any prior processing, and an integral part of the production process (see Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725).

48 However, the latter analysis is not valid as regards consumption residues which cannot be regarded as 'by-products' of a manufacturing or extraction process which are capable of being reused as an integral part of the production process.

49 Nor can a similar analysis be accepted with regard to such residues, which cannot be classified as second-hand goods reused definitely and in a comparable manner, without prior processing.

50 According to the interpretation resulting from a provision such as Article 14 of Decree-Law No 138/02 it is sufficient, for a production or consumption residue to escape classification as 'waste', that it is or could be reused in any production or consumption cycle, either without prior treatment and without harm to the environment, or after undergoing prior treatment without, however, requiring a recovery operation within the meaning of Annex II B to Directive 75/442.

51 Obviously, such an interpretation leads to the exclusion from classification as 'waste' of production or consumption residues which, however, come within the definition in the first subparagraph of Article 1(a) of Directive 75/442.

52 In that regard, materials such as those at issue in the main proceedings are not reused definitely and without prior processing as an integral part of the same process of production or use, but are substances or objects whose holders discarded them. According to Mr Niselli's evidence, the contentious materials were then sorted, and sometimes treated, and they constitute a secondary raw material to be used in steelmaking. In such a context, they must however continue to be classified as 'waste' until they have actually been recycled into steel products, that is to say, until the constitution of the finished products derived from the reprocessing for which they are intended. In the earlier phases, they cannot yet be regarded as recycled, since the reprocessing has not been concluded. Conversely, subject to the case where the products obtained are in their turn abandoned, the point at which the materials in question cease to be classified as 'waste' cannot be fixed at an industrial or commercial stage subsequent to their reprocessing into steel products, because, from that point, they can hardly be distinguished from other steel products made from primary raw materials (see, for the particular case of recycled packaging waste, Case C-444/00 *Mayer Parry Recycling* [2003] ECR I-6163, paragraphs 61 to 75).

53 Therefore, the answer to the second question must be that the meaning of 'waste' for the purposes of the first subparagraph of Article 1(a) of Directive 75/442 is not to be interpreted as excluding all production or consumption residues which can be or are reused in a cycle of production or consumption, either without prior treatment and without harm to the environment, or after undergoing prior treatment without, however, requiring a recovery operation within the meaning of Annex II B to that directive.

Costs

54 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:

1. **The definition of 'waste' in the first subparagraph 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 and by Commission Decision 96/350/EC of 24 May 1996, cannot be construed as covering exclusively substances or objects intended for, or subjected to, the disposal or recovery operations mentioned in Annexes II A and II B to that directive or in the equivalent lists, or to which their holder intends or is required to subject them.**

2. **The meaning of 'waste' for the purposes of the first subparagraph of Article 1(a) of Directive 75/442, as amended by Directive 91/156 and by Decision 96/350, is not to be interpreted as excluding all production or consumption residues which can be or are reused in a cycle of production or consumption, either without prior treatment and without harm to the environment, or after undergoing prior treatment without, however, requiring a recovery operation within the meaning of Annex II B to that directive.**

Signatures.