

OPINION OF ADVOCATE GENERAL JACOBS

delivered on 14 November 2002 ¹

1. In this case the Court is asked by the Netherlands Raad van State (Council of State) for a preliminary ruling on the correct criteria for distinguishing between operations for the disposal of waste and operations for its recovery for the purpose of 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 ('the Regulation').²

4. The present case concerns the correct classification for the purpose of the Regulation of waste intended to be shipped from the Netherlands to Belgium for use as fuel in cement kilns and as a raw material in the process for producing clinker in cement factories. The referring court asks in particular whether it is permissible to use a global assessment when classifying such a process, involving two distinct operations, as recovery or disposal.

2. It may be noted that since the Raad van State made its reference in the present case the Court has in its judgment in *ASA* ³ given some guidance on that distinction.

The relevant Community legislation

3. The Regulation lays down procedures to be followed where waste for recovery or disposal is transported from one Member State to another. The procedures vary depending on whether the waste is for recovery or for disposal.

The Waste Directive

5. Article 3(1) of Council Directive 75/442/EEC of 15 July 1975 on waste as amended⁴ ('the Waste Directive' or 'the

¹ — Original language: English

² — OJ 1993 L 30, p. 1.

³ — Case C-6/00 [2002] ECR I-1961; see also my Opinions delivered on 26 September 2002 in Case C-228/00 *Commission v Germany*, judgment of 13 February 2003, ECR I-1439, and Case C-458/00 *Commission v Luxembourg*, judgment of 13 February 2003, ECR I-1555.

⁴ — 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 by Council Directive 91/692/EEC of 23 December 1991, OJ 1991 L 377, p. 48.

Directive') requires Member States to take appropriate measures to encourage '(a) firstly, the prevention or reduction of waste production and its harmfulness' and '(b) secondly: (i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or (ii) the use of waste as a source of energy'.

appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.'

6. Article 5 of the Directive enshrines the principles of self-sufficiency and proximity. It provides as follows:

7. The Directive defines 'disposal' as 'any of the operations provided for in Annex IIA'⁵ and 'recovery' as 'any of the operations provided for in Annex IIB'.⁶

'1. Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. The network must enable the Community as a whole to become self sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste.

8. Annexes IIA and IIB to the Directive⁷ are headed 'Disposal operations' and 'Recovery operations' respectively. Each annex is prefaced by a note to the effect that it is intended to list the operations 'as they occur in practice' and that in accordance with Article 4⁸ 'waste must be [disposed of/recovered] without endangering human health and without the use of processes or methods likely to harm the environment'.

⁵ — Article 1(e).

⁶ — Article 1(f).

⁷ — As adapted by Commission Decision 96/350/EC of 24 May 1996 adapting Annexes IIA and IIB to Council Directive 75/442/EEC on waste, OJ 1996 L 135, p. 32.

⁸ — Which requires Member States to take the necessary measures to the same effect.

2. The network must also enable waste to be disposed of in one of the nearest

9. Annex IIA includes among the listed disposal operations:

‘D10 Incineration on land’.

10. Annex IIB includes among the listed recovery operations:

‘R1 Use principally as a fuel or other means to generate energy

R3 Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes)

R5 Recycling/reclamation of other inorganic materials [i.e. other than metals or metal compounds]

R11 Use of wastes obtained from any of the operations numbered R1 to R10.’

11. Article 7 of the Directive provides:

‘1. In order to attain the objectives referred to in Articles 3, 4 and 5, the competent authority or authorities referred to in Article 6 shall be required to draw up as soon as possible one or more waste management plans. Such plans shall relate in particular to:

— the type, quantity and origin of waste to be recovered or disposed of,

— general technical requirements,

— any special arrangements for particular wastes,

— suitable disposal sites or installations.

...

3. Member States may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans. They shall inform the Commission and the Member States of any such measures.⁹

The Regulation

12. The Regulation is based on Article 130s of the EC Treaty (now, after amendment, Article 175 EC). Its aim is to provide a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment.⁹

13. Title II of the Regulation is entitled 'Shipments of waste between Member States'. Chapters A and B of Title II lay down the procedures to be followed for the shipment of waste for disposal and of waste for recovery respectively.

14. The Regulation adopts the definitions of 'disposal' and 'recovery' used in the Directive.¹⁰

15. The procedure for shipments of waste for recovery varies according to the type of waste. Annexes II to IV to the Regulation classify specific waste in one of three lists.¹¹ Annex II contains the 'Green list of wastes', which 'should not normally present a risk to the environment if properly recovered in the country of destination'.¹² Annex III contains the 'Amber list of wastes' and Annex IV the 'Red list of wastes', regarded as particularly hazardous. Shipments for recovery of the wastes listed in Annex II are simply to be accompanied by a document containing prescribed information.¹³ Shipments of other waste (including the waste the shipment of which gave rise to the present proceedings) for recovery and shipments of waste for disposal are subject to the following procedure.

16. Where the producer or holder of waste, generally referred to as the notifier,¹⁴ intends to ship such waste from one Member State to another, he must notify the competent authority of destination and

⁹ — Case C-187/93 *Parliament v Council* [1994] ECR I-2857, paragraph 26 of the judgment.

¹⁰ — Article 2(i) and (k).

¹¹ — As adapted by Commission Decision 94/721/EC of 21 October 1994 adapting, pursuant to Article 42(3), Annexes II, III and IV to Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, OJ 1994 L 288, p. 36.

¹² — Recital 14 in the preamble to the Regulation.

¹³ — Articles 1(3) and 11 of the Regulation.

¹⁴ — Article 2(g).

send a copy of the notification to the competent authority of dispatch¹⁵ and to the consignee.¹⁶

17. Notification is to be effected by means of the consignment note to be issued by the authority of dispatch.¹⁷ The notifier is to complete the consignment note and, if requested by the competent authorities, supply additional information and documentation.¹⁸ He is to supply on the consignment note information with particular regard to a number of factors including (i) the source, composition and quantity of the waste and (ii) the operations involving disposal or recovery as referred to in Annex IIA or IIB to the Directive.¹⁹

18. In the case of shipments of waste for recovery, the consignment note must also include details of (i) the planned method of disposal for the residual waste after recycling has taken place; (ii) the amount of the recycled material in relation to the residual waste and (iii) the estimated value of the recycled material.²⁰

19. In the case of waste for disposal, the Member State of destination is responsible for granting authorisation for shipment. The Member State of dispatch²¹ has the right to raise objections and the Member State of destination may issue the authorisation only in the absence of any such objections.²² In the case of waste for recovery, the Member States of dispatch and destination²³ have the right to object to a shipment but, as a general rule,²⁴ no express authorisation is required.²⁵

20. The most significant difference between the procedures applying to the shipments of waste for recovery and for disposal lies in the grounds on which the various competent authorities concerned may oppose the proposed shipment.

21. In the case of waste for disposal, the objections must be based on Article 4(3).²⁶ Under that article, in particular, (i) Member States may prohibit generally or partially or object systematically to shipments of waste in order to implement the principles of proximity, priority for

15 — And, if relevant, of transit

16 — Articles 3(1) (waste for disposal) and 6(1) (waste for recovery).

17 — Articles 3(3) and 6(3).

18 — Articles 3(4) and 6(4).

19 — Articles 3(5) and 6(5), first and fifth indents.

20 — Article 6(5), sixth, seventh and eighth indents.

21 — And, if relevant, of transit.

22 — Articles 4(1) and 4(2).

23 — And, if relevant, of transit.

24 — Where the waste is listed in Annex IV or has not been assigned to Annex II, III or IV, the competent authorities concerned must give their consent in writing (Article 10).

25 — Article 7(1) and (2).

26 — Article 4(3)(b)(i).

recovery and self-sufficiency at Community and national levels in accordance with the Directive²⁷ and (ii) the competent authorities of dispatch and destination may raise reasoned objections to planned shipments if they are not in accordance with the Directive in order to implement the principle of self-sufficiency at Community and national levels.²⁸

...

— if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.'

22. In the case of waste for recovery, the objections are to be based on Article 7(4).²⁹ Article 7(4)(a)³⁰ lists five grounds on which the competent authorities of destination and dispatch may raise reasoned objections of which only the first and fifth are of relevance in the present case. Those grounds — set out in the first and fifth indents of Article 7(4)(a) — are as follows:

23. Article 28(1) of the Regulation provides that the notifier may use a general notification procedure where waste for disposal or recovery having the same physical and chemical characteristics is shipped periodically to the same consignee following the same route. Article 28(2) provides that under a general notification procedure, a single notification may cover several shipments of waste over a maximum period of one year.

— in accordance with Directive 75/442, in particular Article 7 thereof, or

The case-law of the Court

²⁷ — Article 4(3)(a)(i).

²⁸ — Article 4(3)(b)(i).

²⁹ — Article 7(2).

³⁰ — Article 7(4)(b) concerns the objections which may be raised by the competent authorities of transit, not relevant to the present case.

24. Two decisions of the Court are of particular interest in the context of the present case.

25. First, the Court ruled in *Dusseldorp*³¹ that the principles of self-sufficiency and proximity do not apply to waste for recovery; such waste should therefore be able to move freely between Member States for processing, provided that transport poses no threat to the environment.

The facts and the proceedings

28. It may be helpful to preface the summary of the facts underlying the main proceedings by explaining that cement is manufactured by heating raw materials (lime, sand/silica, a small proportion of alumina and generally iron oxide). When burned those materials produce cement clinker which consists mainly of calcium silicates and aluminates. The clinker is then milled to produce cement.

26. Second, the Court ruled in *ASA*³² that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources.

27. The Court also ruled in *ASA* that Articles 4(3) and 7(4) exhaustively list the cases in which Member States may object to a shipment of waste between Member States.³³

29. The main proceedings arise out of two notifications by Verol Recycling Limburg BV of its intention to ship waste from the Netherlands to Belgium. The first notification concerned 2 000 tonnes of a compact mixture of waste glue, sealant, resin and paint and waste containing silicon, with sawdust. The second notification concerned 1 000 tonnes of sediment with a low halogen content, with sawdust. In both cases the waste was to be used as fuel in cement kilns and as a raw material in the process for producing clinker in cement factories. In that process, the national court explains that the energy obtained from burning the waste is a substitute for energy obtained from burning primary raw materials, namely other fuel, and the ash residues from the incinerated waste are a substitute for primary raw materials, namely sand. More precisely, the organic component of the mixtures of waste at issue is incinerated and the residue of the

31 — Case C-203/96 [1998] ECR I-4075, paragraphs 33 and 34 of the judgment.

32 — Cited in note 3, paragraph 69 of the judgment.

33 — Paragraph 36 of the judgment.

inorganic component is used for the production of clinker. Thereafter nothing remains of the waste.

30. Verol notified the Netherlands competent authority, the Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Minister for Housing, Planning and the Environment), of the proposed shipments, using the general notification procedure provided under Article 28 of the Regulation and indicating that the waste was intended to be recovered. The consignment notes refer in each case to operations R1, R3 and R5 of Annex IIB to the Directive. The waste was to be shipped over a period of one year.

31. In his decisions made pursuant to Article 7(2) of the Regulation, the Minister referred, under the heading 'The Test' which precedes the operative part of the decision, to the Meerjarenplan Gevaarlijke Afvalstoffen II of June 1997 ('MJP GA II' — Long-term Plan for Hazardous Waste II) and in particular to the following text:

'Recovery by material reuse

Recovery by material reuse is possible for a number of waste streams to be incinerated,

by means of treatment or use in a production process (for example wastes to be incinerated with a high inorganic fraction in the manufacture of cement clinker).... Since it is not possible to develop well-founded generic criteria for the distinction between recovery by material reuse or disposal by incineration for hazardous waste to be incinerated, this will be reviewed from case to case on the basis of the details of the relevant waste stream and the proposed method of processing.'

32. The decision then stated that the fraction of the waste intended for material reuse, namely 30% in the case of one notification and 25-40% in the case of the other, did not justify categorisation of the proposed process as recovery by material reuse. The Minister appears by that statement to have decided that the proposed use of the incineration residue in clinker manufacture did not constitute recovery within the meaning of head R5 of Annex IIB. According to the order for reference, that decision was made on the basis of the Minister's understanding that an operation constitutes recovery by re-use only where material re-use amounts to 50% or more.

33. The Minister concluded the decisions by consenting to the planned shipments subject to the conditions that for each planned movement of waste with a chlorine content of 1% or less the waste to be exported had to have a calorific value of

over 11 500 kJ/kg and that for each planned movement of waste with a chlorine content of over 1% the waste to be exported had to have a calorific value of over 15 000 kJ/kg. The Minister based those conditions also on the MJP GA II, which as regards recovery with use principally as a fuel takes the calorific value linked to the chlorine content of the waste as the relevant criterion. For an operation to constitute recovery, hazardous waste with a chlorine content of 1% or less must have a minimum calorific value of 11 500 kJ/kg. For an operation to constitute recovery, hazardous waste with a chlorine content of over 1% must have a minimum calorific value of 15 000 kJ/kg.³⁴

34. It appears from the documents before the Court that the average calorific value of the waste in question was 16 000 kJ/kg, with a range from 800 to 30 000 kJ/kg, and the average chlorine content was less than 1%, with a range from 0 to 2%. Certain consignments presumably therefore did not satisfy the conditions imposed by the Minister and hence their export was unauthorised. In that context Verol states that, of the original consignments totalling 3 000 tonnes, it was able to export less than 1 400 tonnes. Of the remainder, some was processed in the Netherlands while the rest was not processed at all, but stored at some cost to Verol.

34 — By implication the waste to be shipped was regarded in national law as hazardous waste. It appears however that for the purposes of the Regulation the waste was classified under Annex III, Amber list.

35. Verol unsuccessfully lodged objections against the decisions and subsequently appealed to the Raad van State (Council of State), Administrative Appeal Section.

36. Verol contended before the national court that the Minister was wrong to attach the abovementioned conditions to its consent. In its view, the use in question of the waste in the cement industry in Belgium must be regarded unconditionally as recovery within the meaning of Article 1(f) of the Directive read in conjunction with Annex IIB thereto. It considers that the operation concerned is an operation R1 'Use principally as a fuel or other means to generate energy', R3 'Recycling/reclamation of organic substances which are not used as solvents' and R5 'Recycling/reclamation of other inorganic materials' within the meaning of that annex. Verol argues that the processing of the waste in the combined procedure results in the complete use of the waste and that in adopting his decision the Minister wrongly failed to take account of the efficiency of the combined procedure as a whole and instead took as a basis the nature and composition of the waste.

37. According to the national court however the Minister argued that such an assessment of the combined effect of the incineration of the waste and the processing of the ash residues into cement clinker was not possible in the light of the provisions of Annex IIB to the Directive.

38. In order to answer the question whether the Minister was authorised to raise an objection to the planned shipment of the waste if it did not satisfy the conditions laid down, the referring court considers that it will have to determine whether the process concerned must be regarded as a disposal or recovery operation within the meaning of Article 1(e) and (f) of the Directive read in conjunction with Annexes IIA and IIB thereto. The parties disagree *inter alia* as to whether this processing method must be regarded as a recovery operation within the meaning of R1, R3 and R5 of Annex IIB or as a disposal operation within the meaning of D10 of Annex IIA. The referring court considers that neither the Directive nor the case-law of the Court of Justice makes clear the distinction between R1, R3 and R5, on the one hand, and D10, on the other.

to rule out a combined assessment of (the efficiency of) operations in a process as a whole. Consequently, the question arises whether that process must be regarded as a recovery operation within the meaning of R1, R3 and R5 of Annex IIB to the Directive on account of the complete use of the waste employed therein.

40. In view of the foregoing the Council of State considers that it must refer the following questions to the Court of Justice for a preliminary ruling:

39. The national court adds that the parties do not dispute that in the process in question, in which no residual product remains, the waste is used completely as a fuel for cement kilns and as a raw material for the manufacture of cement clinker. In view of the wording of Article 1(f) of the Directive, under which 'recovery' means 'any of the operations provided for in Annex IIB',³⁵ it would not seem possible

'1. Must Directive 75/442/EEC of 15 July 1975 on waste (the Framework Directive) be interpreted as permitting a process for treating waste in which more than one operation is performed, as described above, to be assessed as a whole?

2. If so, does the process concerned constitute recovery within the meaning of R1, R3 and R5 of Annex IIB to the Framework Directive if it results in the complete use of the waste employed therein?'

35 — It may be noted that the Dutch version of the Directive refers to all operations provided for in Annex IIB ('alle in bijlage II B bedoelde handelingen'). While that difference in wording may have been of relevance to the national court's analysis of the provision, it is not in my view sufficiently different from, for example, the English and French versions, which refer to 'any operations...', to require separate analysis'.

41. The national court considers that, if the answer to question 1 is in the negative, it is necessary to assess whether the process concerned results in recovery or disposal on the basis of each operation involved therein. That raises the question whether the extent to which the waste contributes to the incineration process in the cement kilns and to the process for producing cement clinker is decisive in respect of the distinction between R1, R3 and R5, on the one hand, and D10, on the other. The extent to which the waste contributes to the incineration process can be measured on the basis of the calorific value linked to the chlorine content of the waste. The extent to which the (ash residues of the) waste contribute(s) to the production process can be measured on the basis of the inorganic content. It cannot be ruled out that an operation involving waste which makes a positive contribution both to the incineration process, that is to say that the waste has a calorific value of over 0 kJ/kg, and also to the manufacture of cement clinkers, that is to say that the inorganic content is over 0%, must be regarded as a recovery operation within the meaning of R1, R3 and R5 of Annex IIB to the Directive. Where, in a process, one operation must be regarded as recovery and another must be regarded as disposal, the question arises whether the process must be regarded as a whole as recovery or disposal.

following further questions to the Court of Justice for a preliminary ruling:

- ‘3. a. If the answer to question 1 is in the negative, is the extent (expressed as calorific values) to which the waste contributes to the incineration process or the extent (expressed as the level of material re-used) to which the ash residues from that waste contribute to the production process relevant as regards the classification of each individual operation as recovery or disposal (R1, R3 and R5 and D10 respectively)?
3. b. If so, on the basis of which criteria is it necessary to assess whether or not the contribution is sufficient for classification as recovery? In the absence of Community criteria in this respect is it possible to apply national criteria?

42. In the light of the foregoing the Council of State considers that it must refer the

4. If one operation must be classified as recovery and another operation as disposal, how must the process as a whole be regarded?’

43. Written observations have been lodged by Verol, the German, Netherlands and United Kingdom Governments and the Commission. The Netherlands and United Kingdom Governments and the Commission were represented at the hearing. The German Government's observations concern question 3b alone; those of the United Kingdom do not consider the questions referred individually and suggest a single composite answer thereto.

The first question — the correct approach to a combined procedure for treating waste

44. By its first question the referring court asks whether the Directive permits a process for treating waste in which more than one operation is performed to be assessed as a whole.

45. That question was prompted by the fact that the process to which the waste at issue was to be subject is a combined procedure involving incineration with energy recovery followed by use of the incineration residue. Verol notified that procedure as a combination of (i) use principally as a fuel or other means to generate energy under head R1 of Annex IIB, (ii) recycling/reclamation of organic substances which are not used as solvents under head R3 and (iii) recycling/

reclamation of non-metallic inorganic materials under head R5 (the latter two categories reflecting the fact that the waste contained both types of substance). The Minister appears to have assessed each of the two steps (incineration and use of residue) separately for the purpose of consenting to the proposed shipment, first deciding that the extent of re-use proposed was not sufficient to constitute recovery by material reuse and second imposing a condition as to minimum calorific value to be satisfied in order for the waste to be shipped for recovery by use principally as a fuel or other means to generate energy. The referring court's first question appears to be asking whether that approach to classifying a combined procedure such as that at issue was correct or whether, as Verol claims, the Minister should have made a global assessment of both steps which would have led to the conclusion that there was recovery of 100% of the waste.

46. The question is thus raised by the referring court in a relatively narrow context which arises only because national law or practice imposes a percentage threshold in order for an operation involving 'material reuse' to be classified as recovery for the purpose of the Regulation.

47. Both Verol and the Netherlands Government submit that a combined process

such as that at issue is to be assessed as a whole, while the Commission reaches the opposite conclusion.

48. Verol submits that what is at issue is a single technical process and hence a single recovery operation. That conclusion is not undermined by the fact that the operation as a whole is not described in Annex IIB: the annexes to the Directive are not exhaustive, as is clear from the note introducing them. The scheme of the annexes requires a global assessment of a process involving more than one operation.

49. The Netherlands Government in contrast considers that the lists in Annexes IIA and IIB are exhaustive. A process as described by the national court is a single operation within the meaning of Annex IIA or IIB provided that one of the actual operations involved in the process corresponds to one of the operations listed in Annex IIA or IIB. The Netherlands Government added at the hearing that in its view the national court's description of the process at issue is misleading: the incineration and the use of the residue in the clinker are simultaneous and not, as suggested in the order for reference, successive steps.

50. The Commission submits that it is the first operation to which waste is to be

subjected which determines whether the waste should be notified as intended for disposal or recovery for the purposes of the Regulation. In the present case, the national court states that the waste is to be used first as a fuel in cement kilns, where the energy generated will replace energy normally generated by raw materials. The Commission considers that that process is 'Use principally as a fuel' and hence recovery. It is possible that, as in the present case, that process will produce further, 'second generation' waste. Whether the use of that waste is recovery or disposal has no effect on the correct classification of the first process, although in accordance with Article 4 of the Directive Member States must 'ensure that waste is recovered or disposed of without... using processes or methods which could harm the environment'.

51. The Directive defines 'disposal' and 'recovery' as 'any of the operations provided for in Annex II [A/B]'. It seems clear therefore that a composite process will not constitute disposal or recovery within the meaning of the Directive unless that process accords with one of the descriptions under the heads of those annexes. In the case of a composite process which — as in the present case — cannot be accurately described as one of those listed operations, I concur with the Commission that it is the assessment of the first operation in the process which determines whether a ship-

ment of waste intended to be subjected to the process requires notification under the Regulation as waste for disposal or waste for recovery. I consider that that approach is correct for the following reasons.

52. As the United Kingdom submits, many recovery operations result in a residue of waste which must in turn be dealt with, whether by a further recovery operation or by disposal. The question how such a multi-step process should be classified for the purpose of the Regulation is consequently of some practical importance. It is perhaps not surprising therefore that the legislation itself envisages such processes.

53. The Directive, for example, anticipates that a recovery operation within the meaning of Annex IIB may be followed by a further recovery operation; indeed Annex IIB includes a category specifically tailored to such a situation, since head R11 provides as a separate category of recovery operation 'Use of wastes obtained from any of the operations numbered R1 to R10'.

54. The legislation also envisages that waste may correctly be regarded as des-

tined for recovery even where an initial recovery operation is to be followed by a disposal operation. That follows from the third indent of Article 3(1)(a) of the Directive, which requires Member States to 'take appropriate measures to encourage... the development of appropriate techniques for the final disposal of dangerous substances contained in waste destined for recovery.'

55. The Regulation also echoes that assumption, requiring in the case of waste intended for recovery that the notifier include on the consignment note information with regard to the planned method of disposal for the residual waste after recycling has taken place, the amount of the recycled material in relation to the residual waste and the estimated value of the recycled material.³⁶

56. The scheme of both the Directive and the Regulation thus suggests that whether waste is to be correctly classified as intended for disposal or recovery for the purposes of the Regulation is determined, as the Commission submits, by the correct classification of the first operation to which the waste is to be subject.

57. That analysis does not of course mean that the Member State of dispatch is in

36 — Sixth, seventh and eighth indents in Article 6(5).

effect powerless to prevent the export of waste destined ultimately for disposal, provided only that the disposal operation is preceded by a recovery operation: the fifth indent of Article 7(4)(a) of the Regulation provides that that Member State may object to the shipment of waste for recovery 'if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations'.

58. Finally I would note that the approach which I propose to adopt is not undermined by the Netherlands Government's assertion that in the present case the two operations at issue (incineration and use of the residue) in fact occur simultaneously rather than successively. While it may be correct that, in the high temperatures reached in cement kilns, the two operations would for practical purposes be more or less instantaneous, they can none the less for the purposes of analysis clearly be distinguished as separate steps: incineration of the organic component of the waste must logically precede use of the inorganic residue of that incineration. It appears moreover from the order for reference that that is the understanding of the national court.

59. I accordingly conclude that, where waste is to be subjected to a combined

process involving several identifiable separate operations, it is the first such operation which determines whether the waste is intended for disposal or recovery for the purpose of the Regulation.

The second question — the correct classification of the process at issue

60. By its second question the national court asks whether, in the event of an affirmative answer to the first question, the process concerned constitutes recovery within the meaning of heads R1, R3 and R5 of Annex IIB if it results in the complete use of the waste employed therein.

61. Since I propose answering the first question in the negative, the second question as put by the referring court does not strictly arise. However, it may be useful to say a few words.

62. It is clear from the order for reference that the national court's second question arises because of the requirement as a matter of national law or practice that a 'material reuse' operation may be classified as a recovery operation only if it results in reuse of at least 50% of the waste. On the basis of my proposed answer to the first

question, however, the correct assessment of a combined procedure such as that at issue will depend on the correct classification of the first stage of that procedure. In the present case, that stage involves incinerating the waste in kilns in a cement factory, thereby replacing fuel from other sources and hence conserving natural resources. For the reasons discussed in detail in my Opinion in *Commission v Germany*,³⁷ I am of the view that such an operation constitutes ‘Use principally as a fuel or other source of energy’ under head R1 of Annex IIB, provided that, first, the greater part of the waste is used as a fuel and, second, the energy generated thereby is principally used in the sense that the greater part of the energy generated thereby is used. It is thus clear that, in order for the requirements of head R1 to be satisfied, it is not necessary for all the waste to be used as a fuel.

The third question — the relevance and lawfulness of national criteria

63. By its third question, the national court raises a number of issues about the criteria imposed by Netherlands law and practice

for determining whether a given process constitutes recovery for the purpose of the Regulation.

64. In question 3a, the Court is asked whether the extent (expressed as calorific values) to which the waste contributes to the incineration process or the extent (expressed as the level of material re-used) to which the ash residues from that waste contribute to the production process is relevant as regards the classification of each individual operation as recovery or disposal (R1, R3 and R5 or D10).

65. The question whether the extent (expressed as calorific value) to which the waste contributes to the incineration process is relevant to the classification of the incineration as recovery under head R1 of Annex IIB or disposal under head D10 of Annex IIA also arose in *Commission v Germany*, and I have discussed it in depth in my Opinion in that case. I concluded that the only quantitative criterion imposed by the legislation on a recovery operation under head R1 was the requirement that the waste be ‘principally’ used as a fuel or other source of energy; I have explained above³⁸ what that requirement means in practice. Further quantitative criteria such

37 — Cited in note 3. See in particular paragraphs 54 to 67.

38 — See paragraph 62.

as the calorific value of the waste are in my view and on the basis of the law as it stands³⁹ irrelevant to the correct classification of the operation as recovery or disposal.

contribution of the waste to the incineration or production process is sufficient for classification as recovery. In so far as that question concerns the relevance of the contribution of the waste to the incineration, it has been answered above.⁴⁰ In so far as it concerns the relevance of the contribution of the waste to the production process, I have indicated⁴¹ why I do not consider it appropriate or necessary to address that issue in the present case.

66. In question 3a the referring court also asks whether the extent to which the ash residues from the waste contribute to the production process is relevant as regards the classification of the operation as recovery or disposal. That raises the broader question — of some general importance — how extensive (re-)use must be to constitute recovery; in order to answer that question the Court would have to lay down criteria to be satisfied in order for an operation to fall under head R3 or R5 (recycling/reclamation of certain organic and inorganic substances). The observations submitted to the Court in the present case however have generally not focussed on that issue. Since in any event in the light of my proposed answer to the first question an answer to this aspect of the third question is not necessary to enable the national court to resolve the dispute before it, I do not propose to consider it further.

68. In question 3b the national court also asks whether in the absence of Community criteria as to the contribution of the waste to the incineration or production it is possible to apply national criteria. I have addressed that question at some length in my Opinion in *Commission v Germany*,⁴² concluding that the answer is in the negative. As I stated in that Opinion, the unacceptable consequences of Member States being permitted to apply their own criteria in such a way are evident from the diverse minimum calorific values which, according to information before the Court, certain Member States require of waste in order for its incineration with recovery of heat generated to be classified as a recovery operation under head R1 in Annex IIB to the Directive. Those calorific values range from 5 000 kJ/kg in France to 21 000 kJ/kg in the United Kingdom. The application by different Member States of such wide-ranging thresholds would clearly run counter to

67. By question 3b the national court asks, first, on the basis of which criteria it is necessary to assess whether or not the

40 — See paragraph 62.

41 — See paragraph 66.

42 — See in particular paragraphs 43 to 51.

39 — See further paragraphs 68 and 69 below.

the objectives of both the Directive, whose aims include a 'common terminology... to improve the efficiency of waste management in the Community',⁴³ and the Regulation, which is built on the premiss that different Member States will apply the same procedures to waste intended for particular operations. As the Commission pointed out in *Commission v Germany*, if Member States were free to set their own divergent criteria determining which operations were to be classified as recovery operations, the impact of Article 7(4) of the Regulation, which exhaustively lists the cases in which Member States may object to shipments of waste for recovery,⁴⁴ would be much reduced.

amendments necessary for adapting the Annexes to the Directive to scientific and technical progress to be adopted in accordance with a prescribed procedure involving a committee composed of representatives of the Member States.⁴⁶ That document put forward a number of suggestions for limiting movements of waste to be incinerated. One of the options considered was the development of criteria for distinguishing more clearly between 'Incineration on land' under head D10 of Annex IIA and 'Use principally as a fuel or other means to generate energy' under head R1 of Annex IIB. One of the criteria discussed was calorific value: it was suggested that a calorific value of 17 000 kJ/kg be used as a limit value. However, it appears that a distinction based on that calorific value was not accepted by the majority of Member States.

69. That is not to say that a uniform criterion based on calorific value might not be a useful and workable means of distinguishing between recovery and disposal operations if set at Community level. However it appears that it has not been possible to agree such a criterion to date. In *Commission v Germany* the Court was referred to a working document submitted by the Commission to the Technical Adaptation Committee in 1999⁴⁵ pursuant to the Directive, which provides for the

70. I would finally add that, even though Article 7(4)(a) of the Regulation permits the Member State of dispatch to object to a proposed shipment 'in accordance with' Article 7 of the Directive, which requires Member States to draw up waste management plans, that provision does not confer an unfettered discretion to oppose any shipment not in accordance with such a plan: it is in my view clearly contrary to the scheme of the legislation as a whole for a Member State to incorporate in a waste management plan criteria for the distinc-

43 — See the third recital in the preamble to Directive 91/156.

44 — *ASA*, cited in note 3, paragraph 36 of the judgment.

45 — 28 January 1999, XIE3/KW D(99).

46 — Articles 17 and 18.

tion between disposal and recovery that conflict with the Directive.

The fourth question — the correct classification of a process involving a recovery operation and a disposal operation

recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations'. The Member State of dispatch will be in a position to make such an assessment since in accordance with the Regulation the consignment note must include information with regard to the planned method of disposal for the residual waste after recycling has taken place, the amount of the recycled material in relation to the residual waste and the estimated value of the recycled material.⁴⁷

71. By its fourth and final question the national court asks how, if one operation must be classified as recovery and another operation as disposal, the process as a whole must be regarded.

72. I have already stated in my proposed answer to the national court's first question that, where waste is to be subjected to a combined process involving several identifiable separate operations, it is the first such operation to which the waste will be subjected which determines whether the waste is intended for disposal or recovery for the purpose of the Regulation. More specifically — and as perhaps envisaged by the referring court — waste to be subjected to a recovery operation with the residue subsequently to be subjected to a disposal operation is to be notified under the Regulation as waste to be shipped for recovery. The Member State of dispatch may however object to such a shipment on the basis of the fifth indent of Article 7(4)(a) of the Regulation 'if the ratio of the

73. Verol and the Netherlands Government argue that a process involving both recovery and disposal operations should be classified as a recovery operation because of the priority accorded by the Directive to recovery. On the view that I have taken, that argument is not relevant. The Court has moreover met that point in its judgment in *ASA*,⁴⁸ stating that the principle of primacy of recovery of waste, which is intended to encourage recovery, applies by definition only to waste which is in fact intended for recovery and therefore does not prohibit scrutiny of the intended use by the competent authority of dispatch.

⁴⁷ — Sixth, seventh and eighth indents in Article 6(5).

⁴⁸ — Paragraph 45 of the judgment; see also paragraph 78 of my Opinion.

Conclusion

74. I am accordingly of the opinion that the questions referred for a preliminary ruling by the Raad van State, the Netherlands, should be answered as follows.

- (1) Where waste is to be subjected to a combined process involving several identifiable separate operations, it is the first such operation which determines whether the waste is intended for disposal or recovery for the purpose of 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.
- (2) An operation in which waste is incinerated in a process whereby it replaces fuel from other sources constitutes a recovery operation under head R1 of Annex IIB to Council Directive 75/442/EEC of 15 July 1975 on waste provided that, first, the greater part of the waste is used as a fuel and, second, the greater part of the energy generated thereby is used.