JUDGMENT OF THE COURT
18 December 1997 *

In Case C-129/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Belgian Conseil d'État for a preliminary ruling in the proceedings pending before that court between

Inter-Environnement Wallonie ASBL

and

Région Wallonne

on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) 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),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón (Rapporteur), Judges,

* Language of the case: French.

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Inter-Environnement Wallonie ASBL, by Jacques Sambon, of the Brussels Bar,

— the Belgian Government, by Jan Devadder, Senior Adviser in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same ministry, acting as Agents,

— the French Government, by Jean-François Dobelle, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and Romain Nadal, Assistant Foreign Affairs Secretary in that directorate, acting as Agents,

— the Netherlands Government, by Adriaan Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent;

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt QC, and

— the Commission of the European Communities, by Maria Condou-Durande, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Inter-Environnement Wallonie ASBL, represented by Jacques Sambon; the French Government, represented by Jean-François Dobelle and Romain Nadal; the Netherlands Government, represented by Johannes Steven van den Oosterkamp, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Derrick Wyatt QC; and the Commission, represented by Maria Condou Durande, at the hearing on 5 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 24 April 1997,

gives the following

Judgment

1 By judgment of 29 March 1996, received at the Court on 23 April 1996, the Belgian Conseil d'État referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) 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).

2 Those questions were raised in proceedings brought by Inter-Environnement Wallonie, a non-profit-making association, for annulment of the Order of the Walloon Regional Executive of 9 April 1992 on toxic or hazardous waste ('the Order').

The relevant Community provisions

3 The object of Directive 75/442 is to approximate the laws of the Member States on the disposal of waste. It has been amended by Directive 91/156.

4 Directive 75/442, as amended by Directive 91/156, defines waste in Article 1(a) as follows:

'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.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure.'

5 The list mentioned in that last provision was laid down in Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442 (OJ 1994 L 5, p. 15). Paragraph 3 of the introductory note to that list states, first, that the list is not exhaustive and, second, that the fact that a material appears in it is only relevant when the definition of waste has been satisfied.

6 Articles 9(1) and 10 of Directive 75/442, as amended, provide that any establishment or undertaking which carries out the operations specified in Annex IIA or Annex IIB must obtain a permit from the competent authority. Annex IIA concerns disposal operations whilst Annex IIB lists the operations which may lead to recovery.

7 Article 11 of Directive 75/442, as amended, provides an exception to the requirement of a permit:

'1. Without prejudice to Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste [OJ 1978 L 84, p. 43], as last amended by the Act of Accession of Spain and Portugal, the following may be exempted from the permit requirement imposed in Article 9 or Article 10:

(a) establishments or undertakings carrying out their own waste disposal at the place of production;

and

(b) establishments or undertakings that carry out waste recovery.

This exemption may apply only:

— if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirements,

and

— if the types or quantities of waste and methods of disposal or recovery are such that the conditions imposed in Article 4 are complied with.

2. The establishments or undertakings referred to in paragraph 1 shall be registered with the competent authorities.

(...)'

8 Article 4 of Directive 75/442, as amended, provides:

'Member States shall 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 and plants and animals,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

...'

9 According to the first indent of Article 2(1) of Directive 91/156, the Member States were to bring into force the laws, regulations and administrative provisions

necessary to comply with that directive not later than 1 April 1993 and forthwith to inform the Commission thereof. The second indent provides: 'When Member States adopt these measures, the measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.'

10 Article 1(3) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) refers, for the definition of waste, to Directive 75/442. Article 1(4) defines 'hazardous waste'.

11 Article 3 of Directive 91/689 provides:

'1. The derogation referred to in Article 11(1)(a) of Directive 75/442/EEC from the permit requirement for establishments or undertakings which carry out their own waste disposal shall not apply to hazardous waste covered by this Directive.

2. In accordance with Article 11(1)(b) of Directive 75/442/EEC, a Member State may waive Article 10 of that Directive for establishments or undertakings which recover waste covered by this Directive:

— if the Member State adopts general rules listing the type and quantity of waste and laying down specific conditions (limit values for the content of hazardous substances in the waste, emission limit values, type of activity) and other necessary requirements for carrying out different forms of recovery, and

— if the types or quantities of waste and methods of recovery are such that the conditions laid down in Article 4 of Directive 75/442/EEC are complied with.'

12 Article 11 of Directive 91/689 repealed Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43) with effect from 12 December 1993. However, Article 1 of Council Directive 94/31/EC of 27 June 1994 amending Directive 91/689 (OJ 1994 L 168, p. 28) deferred the repeal of Directive 78/319 until 27 June 1995.

The relevant national provisions

13 The Decree of the Walloon Regional Council of 5 July 1985 on waste, as amended by the Decree of 25 July 1991 ('the Decree'), defines waste at Article 3(1) as follows:

'waste: all substances or objects in the categories set out in Annex I which the holder discards or intends or is required to discard'.

14 Article 5(1) of the Order provides:

'Authorization is required for the setting-up and running of an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste which is not an integral part of an industrial production process ...'.

15 The preamble to the Order makes particular reference to the Decree, Directive 75/442, as amended, and to Directives 78/319 and 91/689. Article 86 of the Order states that it is to come into force on the day of its publication in the *Moniteur Belge*. Publication took place on 23 June 1992.

Facts of the case in the main proceedings

16 By application lodged on 21 August 1992, Inter-Environnement Wallonie requested the Belgian Conseil d'État to annul the Order in its entirety or, in the alternative, certain of its provisions.

17 In its order for reference, the Conseil d'État has already ruled on five of the six pleas raised by Inter-Environnement Wallonie and has annulled various provisions in the Order.

18 In its remaining plea, Inter-Environnement Wallonie maintains that Article 5(1) of the Order infringes, in particular, Article 11 of Directive 75/442, as amended, and Article 3 of Directive 91/689, inasmuch as it excludes from the permit system the operations of setting up and running an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste, where that installation forms 'an integral part of an industrial production process'.

19 In the first part of that plea, Inter-Environnement Wallonie claims that Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689, allows exemptions from the permit requirement for undertakings carrying out

waste recovery only on the conditions laid down by those provisions and only where those undertakings are registered with the competent authorities.

20 On that point, the Conseil d'État considers that Article 5(1) of the Order is indeed contrary to Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689.

21 Finding that the Order was adopted at a time when the period allowed by the directive for its transposition had not yet expired, the Conseil d'État questions to what extent a Member State may, during that period, adopt a measure contrary to the directive. It adds that a negative reply to that question, as proposed by Inter-Environnement Wallonie, would be incompatible with the rule that the validity of a measure is to be assessed at the time of its adoption.

22 In the second part of its plea, Inter-Environnement Wallonie claims that the exception in Article 5(1) of the Order is contrary to the Decree which, it states, does not provide for any derogation for operations forming part of an industrial process.

23 On that point, the Conseil d'État finds that Article 3(1) of the Decree and the annex to which it refers are intended to be a faithful transposition of Directive 75/442, as amended. While the case-law of the Court makes it clear that waste means any substances and objects which the holder discards or is required to discard without intending thereby to exclude their economic reutilization by other persons, it does not make it possible to establish whether a substance or object referred to in Article 1 of Directive 75/442, as amended, which directly or indirectly forms an integral part of an industrial production process is waste within the meaning of Article 1(a) of that directive.

24 In those circumstances, the Conseil d'État has referred the following questions to the Court for a preliminary ruling:

'(1) Do Articles 5 and 189 of the EEC Treaty preclude Member States from adopting a provision contrary to Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, before the period for transposing the latter has expired?

Do those same Treaty articles preclude Member States from adopting and bringing into force legislation which purports to transpose the abovementioned directive but whose provisions appear to be contrary to the requirements of that directive?

(2) Is a substance referred to in Annex I to Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste and which directly or indirectly forms an integral part of an industrial production process to be considered "waste" within the meaning of Article 1(a) of that directive?'

Question 2

25 By its second question, which it is appropriate to consider first, the national court is in essence asking whether a substance is excluded from the definition of waste in Article 1(a) of Directive 75/442, as amended, merely because it directly or indirectly forms an integral part of an industrial production process.

26 First of all, it follows from the wording of Article 1(a) of Directive 75/442, as amended, that the scope of the term 'waste' turns on the meaning of the term 'discard'.

27 It is also clear from the provisions of Directive 75/442, as amended, in particular from Article 4, Articles 8 to 12 and Annexes IIA and IIB, that the term 'discard' covers both disposal and recovery of a substance or object.

28 As the Advocate General has pointed out in paragraphs 58 to 61 of his Opinion, the list of categories of waste in Annex I to Directive 75/442, as amended, and the disposal and recovery operations listed in Annexes IIA and IIB to that directive demonstrate that the concept of waste does not in principle exclude any kind of residue, industrial by-product or other substance arising from production processes. This finding is further supported by the list of waste drawn up by the Commission in Decision 94/3.

29 First, Directive 75/442, as amended, applies, as is apparent in particular from Articles 9 to 11, not only to disposal and recovery of waste by specialist undertakings, but also to disposal and recovery of waste by the undertaking which produced them, at the place of production.

30 Second, while Article 4 of Directive 75/442, as amended, provides that waste is to be recovered or disposed of without endangering human health or using processes or methods which could harm the environment, there is nothing in that directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment.

31 Finally, it should be borne in mind that the Court has already held that the definition of waste in Article 1 of Directive 75/442, as amended, is not to be understood as excluding substances and objects which were capable of economic reutilization (Case C-359/88 *Zanetti and Others* [1990] ECR I-1509, paragraphs 12 and 13; C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraphs 22 and 23, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraphs 47 and 48).

32 It follows from all those considerations that substances forming part of an industrial process may constitute waste within the meaning of Article 1(a) of Directive 75/442, as amended.

33 That conclusion does not undermine the distinction which must be drawn, as the Belgian, German, Netherlands and United Kingdom Governments have correctly submitted, between waste recovery within the meaning of Directive 75/442, as amended, and normal industrial treatment of products which are not waste, no matter how difficult that distinction may be.

34 The answer to the second question must therefore be that a substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442, as amended, by the mere fact that it directly or indirectly forms an integral part of an industrial production process.

Question 1

35 By its first question, the national court is in substance asking whether Articles 5 and 189 of the EEC Treaty preclude the Member States from adopting measures contrary to Directive 91/156 during the period prescribed for its transposition.

36 According to Inter-Environnement Wallonie, it follows from the primacy of Community law and from Article 5 of the Treaty that, even where a Member State decides to transpose a Community directive before the end of the period prescribed therein, such transposition must be consistent with the directive. Consequently, since it chose to transpose Directive 91/156 on 9 April 1992, the Région Wallonne should have complied with that directive.

37 The Commission endorses that position and maintains that Articles 5 and 189 of the Treaty preclude Member States from adopting a provision contrary to Directive 91/156 during the period prescribed for its transposition. It states that in this respect it is irrelevant whether or not a particular measure is specifically intended to transpose the directive.

38 On the other hand, the Belgian, French and United Kingdom Governments consider that until the period prescribed for transposition of a directive has expired, the Member States remain free to adopt national rules which are at variance with it. The United Kingdom Government adds, however, that it would be contrary to Articles 5 and 189 of the Treaty for a Member State to adopt measures which would have the effect of making it impossible or excessively difficult for that State to transpose the directive correctly into national law.

39 The Netherlands Government is of the opinion that the adoption of a directive means that the Member States are no longer free to undertake anything which might make it more difficult to achieve the result prescribed. None the less, it considers that a Member State cannot be regarded as being in breach of Articles 5 and 189 of the Treaty where, as in the present case, it is not certain that the national provisions are inconsistent with the directive concerned.

40 It should be recalled at the outset that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the Treaty and by the directive itself (Case 51/76 *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraph 22; Case 152/84

Marshall v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 48, and Case 72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 55). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-106/89 *Marleasing* v *Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, and *Kraaijeveld*, cited above, paragraph 55).

41 The next point to note is that, in accordance with the second paragraph of Article 191 of the EEC Treaty, applicable at the material time, '[d]irectives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. It follows from that provision that a directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification.

42 Here, and in accordance with current practice, Directive 91/156 itself laid down a period by the end of which the laws, regulations and administrative provisions necessary for compliance are to have been brought into force.

43 Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period.

44 Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period.

45 Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.

46 It is for the national court to assess whether that is the case as regards the national provisions whose legality it is called upon to consider.

47 In making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.

48 For example, if the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time.

49 Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed.

50 The answer to the first question must therefore be that the second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive

91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

Costs

51 The costs incurred by the Belgian, German, French, Netherlands and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Belgian Conseil d'État by judgment of 29 March 1996, hereby rules:

1. A substance is not excluded from the definition of waste in 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, merely because it directly or indirectly forms an integral part of an industrial production process.

2. The second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

Rodríguez Iglesias Gulmann Ragnemalm

Schintgen Mancini Moitinho de Almeida

Kapteyn Murray Edward

Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 18 December 1997.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President