

JUDGMENT OF THE COURT (Sixth Chamber)
22 June 2000

In Case C-318/98,

REFERENCE to the Court under [Article 267 TFEU] by the Pretura Circondariale di Udine, Sezione Distaccata di Cividale del Friuli, Italy, for a preliminary ruling in the criminal proceedings before that court against

Giancarlo Fornasar,
Andrea Strizzolo,
Giancarlo Toso,
Lucio Mucchino,
Enzo Peressutti

and

Sante Chiarcosso,

on the interpretation of [Article 267 TFEU], Article 1(4) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377 p. 20) and Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689 (OJ 1994 L 356, p. 14),

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, P.J.G. Kapteyn and H. Ragnemalm (Rapporteur),
Judges,

Advocate General: G. Cosmas,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Messrs Muchino and Peressutti, by C. Pagano, of the Genoa Bar, and R. Cattarini, of the Monfalcone Bar,
- the German Government, by W.-D. Plessing, Ministerialrat at the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor at the same Ministry, acting as Agents,
- the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
- the Austrian Government, by C. Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European [Union], by P. Stancanelli and L. Ström, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Messrs Muchino and Peressutti, represented by C. Pagano; of the Italian Government, represented by L. Daniele, of the Trieste Bar; and of the Commission, represented by P. Stancanelli, at the hearing on 6 July 1999,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1999,

gives the following

Judgment

- 1 By order of 16 July 1998, received at the Court on 18 August 1998, the Pretura Circondariale di Udine, Sezione Distaccata di Cividale del Friuli, referred to the Court for a preliminary ruling under [Article 267 TFEU] six questions on the interpretation of Article 1(4) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) and Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Directive 91/689 (OJ 1994 L 356, p. 14).
- 2 Those questions were raised in criminal proceedings brought against Messrs Fornasar, Strizzolo, Toso, Mucchino, Peressutti and Chiarcosso, who were charged with having released 'toxic-harmful' waste under the description special waste contrary to the legislation in force at the material time.

[Union] rules

- 3 Under Article 5 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43), which was repealed with effect from 27 June 1995 by Article 11 of Directive 91/689, as amended by Council Directive 94/31/EC of 27 June 1994 (OJ 1994 L 168, p. 28), the Member States were to take the necessary measures to ensure that toxic and dangerous waste was disposed of without endangering human health and without harming the environment, and in particular, without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odours, and without adversely affecting the countryside or places of special interest.
- 4 Article 5(2) of Directive 78/319 required the Member States in particular to take the necessary steps to prohibit the abandonment and uncontrolled discharge, tipping or carriage of toxic or dangerous waste, as well as its consignment to

installations, establishments or undertakings other than those referred to in Article 9(1).

- 5 Directive 78/319 was repealed by Article 11 of Directive 91/689 with effect from 12 December 1993 and replaced by Directive 91/689. However, Article 11, as amended by Directive 94/31, postponed the repeal of Directive 78/319 to 27 June 1995.
- 6 Article 1(2) of Directive 91/689 provides that 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, 'Directive 75/442') is, subject to Directive 91/689, to apply to hazardous waste.
- 7 Article 4 of Directive 75/442, as amended, essentially reproduced Article 5 of Directive 78/319, in that the first paragraph of Article 4 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 and plants and animals, without causing a nuisance through noise or odours and without adversely affecting the countryside or places of special interest: The second paragraph of Article 4 of Directive 75/442 provides that Member States are also to take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.
- 8 Article 1(4) of Directive 91/689 provides:

'For the purpose of this Directive "hazardous waste" means:

- wastes featuring on a list to be drawn up in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC on the basis of Annexes I and II to this Directive, not later than six months before the date of implementation of this Directive. These wastes must have one or more of the properties listed in Annex III. The list shall take into account the origin and composition of the waste and, where necessary, limit values of

concentration. This list shall be periodically reviewed and if necessary [revised] by the same procedure,

- any other waste which is considered by a Member State to display any of the properties listed in Annex III. Such cases shall be notified to the Commission and reviewed in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC with a view to adaptation of the list.'
- 9 Annex I of Directive 91/689 is subdivided into Annexes I.A and I.B. Those annexes contain 18 and 22 categories or generic types of hazardous waste respectively, listed according to their nature or the activity which generated them. Annex II lists 51 constituents of the wastes in Annex I.B which render them hazardous when they have the properties described in Annex III, which sets out 14 properties which render wastes hazardous.
- 10 Decision 94/904 established a list of hazardous waste pursuant to Article 1(4) of Directive 91/689.

National rules

- 11 Article 7(4) of Legislative Decree No 22/97 of 5 February 1997 implementing Directive 91/156 on waste, Directive 91/689 on hazardous waste and European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365 p. 10) (GURI, supplemento ordinario No 33 of 15 February 1997), as amended by Legislative Decree No 389/97 of 8 November 1997 (GURI No 261 of 8 November 1997), provides:

'Hazardous waste is non-domestic waste specified in the list contained in Annex D on the basis of Annexes G, H and I'.

- 12 Annex D reproduces in full the list of hazardous wastes referred to in Article 1(4) of Directive 91/689 and adopted by Decision 94/904. Annexes G, H and I are

identical to Annexes I, II and III of Directive 91/689.

- 13 The national rules are supplemented by Ministerial Decree No 141 of 11 March 1998 regulating the disposal of waste and classification of hazardous waste disposed of by dumping (GURI No 108 of 12 May 1998).

The facts of the main proceedings and the questions referred to the Court

- 14 During a routine inspection carried out on 11 March 1994 at Verdeindustria Srl's waste tip, the smell of solvent from a heap of waste discharged by a lorry belonging to the firm of Chiarosso aroused the suspicions of police officers. The transportation documents described the waste discharged as special waste, which was neither toxic nor harmful, according to the definition in the law then in force in Italy. A number of tin cans and a drum with ICI markings indicating polyurethanes were discovered amongst that waste.
- 15 An expert's report was commissioned by the national court to ascertain the nature of the substances contained in the drum. The expert was asked to carry out analyses of the waste and to give a view as to whether or not it was classifiable as hazardous and whether the origin of the waste was of relevance for that classification.
- 16 The expert reached the conclusion that the drum contained diphenylmethane diisocyanate (hereinafter 'MDI') and an isomer thereof. The expert stated that isocyanates are extremely dangerous for human health. Very small concentrations of them in the air, of the order of one part per billion, can provoke very serious asthma attacks, sometimes with fatal results. According to the expert's findings, the substance should, in view of its composition, be regarded as intrinsically hazardous in the literal sense of the word and as such objectively harmful to the environment and to health.
- 17 According to the order for reference, MDI is a basic substance for the manufacture of many synthetic resins, which are subsequently used for the manufacture of car parts, furniture, plastics, coatings, paint components and so on. It thus has a very

broad range of uses for undertakings operating in different areas of manufacture.

- 18 During the investigation, the documents relating to the waste and the witness statements revealed that the entire load of waste discharged came from the Monfalcone works of Fincantieri - Cantieri Navali Italiani SpA (hereinafter 'Fincantieri'). This company's activities include shipbuilding, mechanical and related activities, including the construction, fitting out, repair and demolition of ships.
- 19 The national court points out that the exact origin within Fincantieri of the production process from which the substance derives cannot be identified with certainty. Nor does the type of substance found in the drum enable the actual use to which the substance was put to be established, owing to the large number of possible uses.
- 20 Following the analysis of the samples taken from the material seized, three officers of Fincantieri -the head of the transport undertakings and the two persons responsible for the discharge -were charged with dumping 'toxic- harmful' waste under the description special waste contrary to the rules in force at the material time.
- 21 The accused were charged on the basis of those rules. However, under Article 2 of the Italian Criminal Code which provides that 'no person may be punished for an action which, in accordance with a subsequent law, does not constitute an offence', the national court must ascertain whether the material seized may still be classified as hazardous waste under the current rules.
- 22 According to the expert's report produced for the national court, the substance at issue in this case is either a non-halogenated organic substance not employed as a solvent (No 20 in Annex G to Legislative Decree No 389/97, which corresponds to No 20 of Annex I.B of Directive 91/689), or other waste containing any of the constituents listed in Annex H to Legislative Decree No 389/97 and displaying any of the properties listed in Annex I to that Legislative Decree (No 40 of Annex G to Legislative Decree No 389/97, which corresponds to No 40 of Annex I.B to Directive 91/689), composed of isocyanates (No C37 of Annex H to Legislative Decree No 389/97 which corresponds to No C37 of Annex II to Directive

91/689) at a level of concentration such as to render it classifiable as harmful (No H5 of Annex I to Legislative Decree of 389/97, which corresponds to No H5 of Annex III to Directive 91/689).

- 23 The expert found that, bearing in mind the nature of the place from which the substance was removed for dumping, the only reasonable working hypothesis as to its use was that of local foaming for heat isolation purposes. The only heading of the national rules and the list of hazardous wastes under which the substance might fall was No 080402, 'Waste adhesives and sealants free of halogenated solvents', in group 0804, 'Wastes from the MFSU (manufacture, formulation, supply and use) of adhesive and sealants (including water-proofing products)'. He none the less observed that it would be excessive, from a technical point of view, to include foaming for heat isolation purposes under that heading. In any event, the available documents were not sufficient to prove that that was the original intended use of the substance. Therefore, it was not possible to identify the origin or genesis of the waste.
- 24 In order to ascertain whether the material seized can still be classified as hazardous waste under the rules currently in force, the Pretura Circondariale di Udine, Sezione Distaccata di Cividale del Friuli, decided to stay proceedings and to refer the following six questions to the Court for a preliminary ruling:
- (1) For the purposes of classifying waste as hazardous within the meaning of Article 1(4) of Council Directive 91/689/EEC and Council Decision 904/94, is it necessary in each particular case to identify the origin of the waste, referred to for purposes of classification by the list of hazardous waste adopted in that decision, or is it sufficient for such purposes that, by reason of its composition, the substance can only be used in theory in a given production process, or is derived as a final product from that process?
 - (2) Is the list adopted by Council Decision 904/94 exhaustive, so that waste which is not referred to in the list, but which nevertheless displays the characteristics referred to in Annexes I, II and III to Directive 91/689/EEC, is excluded?

- (3) If the Court finds that the list of hazardous waste is not exhaustive, must automatic addition of hazardous waste to the list be deemed to operate on the basis of Annexes I, II and III to Directive 91/689/EEC?
- (4) For the purposes of Article 1(4), second indent, of Directive 91/689/EEC, what procedure must an individual Member State follow in classifying as hazardous waste other than that on the list adopted by Council Decision 904/94 which exhibits one of the characteristics set out in Annex III to the directive? What body is competent to make the assessment and subsequently notify the Commission?
- (5) Can the judicial authorities of an individual Member State also be required to notify the Commission?
- (6) Under [Union] legislation, is diphenylmethane diisocyanate (MDI) to be classified as hazardous waste or not?

Admissibility and jurisdiction of the Court

- 25 Messrs Mucchino and Peressutti have raised a plea of inadmissibility. They claim that it is settled case-law that a [Union] directive may not by itself create obligations for an individual and that that principle should be firmly restated given that the case before the national court involves criminal liability.
- 26 They argue that, regardless of the Court's interpretation of the [Union] provisions, the national court must apply the national provision most favourable to the accused. According to Italian legal writing and case-law, the facts which gave rise to the criminal proceedings no longer amount to an offence as the law currently stands.
- 27 It must first of all be observed that it is settled case-law that it is solely for the national courts before which actions are brought, and which must bear the

responsibility for the subsequent judicial decision, to determine .in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Dismissal of a request from a national court is possible only where it is clear that the interpretation of [Union] law or the consideration of the validity of a [Union] rule requested by that court has no bearing on the real situation or on the subject-matter of the case (see in particular Case C-67/91 *Asociacion Espanola de Banca Privada and Others* [1992] ECR I-4785, paragraphs 25 and 26, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 38).

- 28 In this case, the national court has set out the reasons why it would be helpful to have the Court's replies to resolve the dispute before it and it is not apparent that those replies have no bearing on the real situation or on the subject-matter of the case in the main proceedings.
- 29 That being so, the first five questions must be held to be admissible.
- 30 By its sixth question, the national court is asking the Court whether MDI is classifiable as hazardous waste under [Union] law.
- 31 However, in proceedings under [Article 267 TFEU], which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (see Case 36/79 *Denkavit* [1979] ECR 3439, paragraph 12, and Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, paragraph 37).
- 32 The Court therefore has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the .rules of [Union] law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court (*Lirussi and Bizzaro*, paragraph 38). The same is true of the classification in a specific case of particular substances with respect to the list of hazardous wastes laid down by Decision 94/904 pursuant to Article 1(4) of Directive 91/689.

- 33 In those circumstances, it must be held that the Court does not have jurisdiction to reply to the sixth question.

The second, third, fourth and fifth questions

- 34 By its second, third, fourth and fifth questions, which it is appropriate to consider first, the national court is essentially asking whether Directive 91/689 prevents the Member States, including, for matters within their jurisdiction, the courts, from classifying as hazardous, waste other than that featuring on the list of hazardous waste laid down in Decision 94/904, and thus from adopting more stringent protective measures in order to prohibit the abandonment, dumping or uncontrolled disposal of such waste.
- 35 According to Messrs Mucchino and Peressutti, the Netherlands Government and the Commission, the list of 'hazardous waste' within the meaning of Directive 91/689 and Decision 94/904 must be considered to be exhaustive. The Commission considers that [Union] law precludes that list being supplemented automatically solely on the basis that waste is ascertained to fall within the scope of the annexes to Directive 91/689. That approach is in line with the requirement to use a precise and uniform definition of hazardous waste.
- 36 The German and Austrian Governments, on the other hand, argue that, having regard to the wording of the second indent of Article 1(4) of Directive 91/689, the list of hazardous waste laid down by Decision 94/904 cannot be exhaustive. On the contrary, the second indent indicates that other waste may also be classified as hazardous by the Member States if it has one of the properties listed in Annex III to Directive 91/689.
- 37 It must first of all be observed that Article 4 of Directive 75/442, which was adopted on the basis of [Article 192 TFEU], is intended to implement the precautionary principle and the principle that preventive action should be taken contained in [Article 191(2) TFEU]. By virtue of those principles, it is for the [Union] and the Member States to prevent, reduce, and, in so far as is possible, eliminate from the outset, the sources of pollution or nuisance by adopting measures of a nature such as to eliminate recognised risks (see *Lirussi and Bizzaro*,

paragraph 51).

- 38 It must be pointed out that, although the first paragraph of Article 4 of Directive 75/442 does not actually specify the measures which must be taken to ensure that waste is disposed of without endangering human health or harming the environment, it is none the less true that it is binding on the Member States as to the objective to be achieved, whilst leaving to the Member States a margin of discretion in assessing the need for such measures (Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 67).
- 39 Thus, a significant deterioration in the environment over a protracted period without any action being taken by the competent authorities in principle indicates that the Member State concerned is outside the limits of the discretion conferred on it by that provision (*Commission v Italy*, paragraph 68).
- 40 The second paragraph of Article 4 of Directive 75/442 supplements that provision with a specific obligation in that it requires the Member States to take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.
- 41 It must be borne in mind 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 288 TFEU] and by the directive itself (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 40).
- 42 That obligation to take all appropriate measures, whether general or particular, binds all the authorities of the Member States including, for matters within their jurisdiction, the courts (Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and *Inter-Environnement Wallonie*, paragraph 40).
- 43 As regards Directive 91/689, it must be borne in mind that the fifth recital of the preamble to that directive states that, in order to improve the effectiveness of the management of hazardous waste in the [Union], it is necessary to use a precise and

uniform definition of hazardous waste based on experience.

- 44 To that end, Article 1(3) of Directive 91/689 refers to the definition of waste laid down in Directive 75/442, and Article 1(4) defines hazardous waste. Decision 94/904 supplements Directive 91/689 and the annex thereto also refers to the definition of 'waste' in Article 1(a) of Directive 75/442.
- 45 The term 'hazardous waste' in Article 1(4) of Directive 91/689 must be considered to mean the waste featuring in the list drawn up in accordance with the procedure laid down by Article 18 of Directive 75/442, and any other waste which is considered by a Member State to display any of the properties listed in Annex III to Directive 91/689.
- 46 In that connection, it must be observed that the [Union] rules do not seek to effect complete harmonisation in the area of the environment. Even though [Article 191 TFEU] refers to certain [Union] objectives to be attained, both [Article 193 TFEU] and Directive 91/689 allow the Member States to introduce more stringent protective measures. Under [Article 191 TFEU], [Union] policy on the environment is to aim at a high level of protection, taking into account the diversity of situations in the various regions of the [Union].
- 47 Furthermore, Article 7 of Directive 91/689 provides that in cases of emergency or grave danger, Member States are to take all necessary steps, including, where appropriate, temporary derogations from that directive, to ensure that hazardous waste is so dealt with as not to constitute a threat to the population or the environment. The Member States are to inform the Commission of any such derogations.
- 48 It follows from the foregoing that, pursuant to Article 1(4) of Directive 91/689, the list provided for by that directive entitles the Member States to classify any other waste which a Member State considers to display one of the properties listed in Annex III to that directive as hazardous. Thus, such waste is considered hazardous only in the territory of the Member States which have adopted such a classification.

- 49 In that event, the Member States are bound to notify such cases to the Commission for review in accordance with the procedure laid down in Article 18 of Directive 75/442, with a view to adaptation of the list of hazardous waste. Accordingly, on the basis of experience, the Commission is called upon to examine the extent to which it is appropriate to supplement the general list of hazardous waste applicable to all Member States of the [Union] by adding to it waste considered hazardous by one or more Member States pursuant to the second indent of Article 1(4) of Directive 91/689.
- 50 The second indent of Article 1(4) of Directive 91/689 does not lay down the national procedure to be followed by a Member State or the competent body for the purpose of classifying waste as hazardous and notifying the Commission accordingly.
- 51 The reply to the second, third, fourth and fifth questions must therefore be that Directive 91/689 does not prevent the Member States, including, for matters within their jurisdiction, the courts, from classifying as hazardous waste other than that featuring on the list of hazardous waste laid down by Decision 94/904, and thus from adopting more stringent protective measures in order to prohibit the abandonment, dumping or uncontrolled disposal of such waste. If they do so, it is for the authorities of the Member State concerned which have competence under national law to notify the Commission of such cases in accordance with the second indent of Article 1(4) of Directive 91/689.

The first question

- 52 By its first question, the national court is essentially asking whether Article 1(4) of Directive 91/689 and Decision 94/904 must be interpreted as meaning that in a specific case it is a necessary precondition for waste to be classified as hazardous that its origin be determined.
- 53 The Commission contends that Article 1(4) of Directive 91/689 and Decision 94/904 must be interpreted as meaning that, in order for waste to be classified as hazardous, it is necessary to establish that that waste results from a manufacturing process or activity which appears on the [Union] list of hazardous waste.

- 54 The Netherlands Government, on the other hand, considers that, in order to classify waste as hazardous within the meaning of Article 1(4) of Directive 91/689 and Decision 94/904, there is no requirement for its exact origin to be established. The origin of waste is just one of the factors to be taken into consideration when deciding whether it is hazardous waste.
- 55 In that regard, suffice it to observe that, under Article 1(4) of Directive 91/689, the wastes on the list of 'hazardous waste' must have one or more of the properties listed in Annex III of that directive and that that list is to take into account the origin and composition of the waste and, where necessary, limit values of concentration.
- 56 It is clear on the wording alone of that provision that the decisive criterion, as regards the definition of 'hazardous waste', is whether the waste displays one or more of the properties listed in Annex III to Directive 91/689. Although the basis for inclusion in the list of 'hazardous waste' is indeed the origin of the waste, that does not mean that it is essential for its exact origin to be determined for it to be classified as hazardous. The origin of the waste is not the only criterion for classifying it as hazardous but constitutes one of the factors which the list of hazardous waste merely 'takes into account'.
- 57 In those circumstances, the answer to the first question must be that Article 1(4) of Directive 91/689 and Decision 94/904 must be interpreted as meaning that it is not a necessary precondition for waste to be classified, in a specific case, as hazardous, that its origin be determined.

Costs

- 58 The costs incurred by the Italian, German, Netherlands and Austrian Governments and by the Commission, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Pretura Circondariale di Udine, Sezione Distaccata di Cividale del Friuli, by order of 16 July 1998, hereby rules:

- 1. Council Directive 91/689/EEC of 12 December 1991 on hazardous waste does not prevent the Member States, including, for matters within their jurisdiction, the courts, from classifying as hazardous waste other than that featuring on the list of hazardous waste laid down by Council Decision 94/904/EC of 22 December 1994 establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689, and thus from adopting more stringent protective measures in order to prohibit the abandonment, dumping or uncontrolled disposal of such waste. If they do so, it is for the authorities of the Member State concerned which have competence under national law to notify the Commission of such cases in accordance with the second indent of Article 1(4) of Directive 91/689.**
- 2. Article 1(4) of Directive 91/689 and Decision 94/904 must be interpreted as meaning that it is not a necessary precondition for waste to be classified, in a specific case, as hazardous, that its origin be determined.**

Schintgen

Kapteyn

Ragnemalm

Delivered in open court in Luxembourg on 22 June 2000.

R. Grass

J.C. Moitinho de Almeida

Registrar

President of the Sixth Chamber