Case C-114/01

Proceedings against
AvestaPolarit Chrome Oy, formerly Outokumpu Chrome Oy

(Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland))

«(Approximation of laws – Directives 75/442/EEC and 91/156/EEC – Meaning of waste – Production residue – Mine – Use – Storage – Article 2(1)(b) – Meaning of other legislation – National legislation outside the framework of Directives 75/442/EEC and 91/156/EEC)»

Opinion of Advocate General Jacobs delivered on 10 April 2003

Judgment of the Court (Sixth Chamber), 11 September 2003

Summary of the Judgment

1.. *Environment – Waste – Directive 75/442, as amended by Directive 91/156 – Definition – Substance which has been discarded – Exception – Actual use of that substance for the principal activity*
(Council Directive 75/442, as amended by Directive 91/156)

2.. *Environment – Waste – Directive 75/442, as amended by Directive 91/156 – Other legislation within the meaning of Article 2(1)(b) – National legislation not constituting a measure of application of the directive – Included – Conditions*
(Council Directive 75/442, as amended by Directive 91/156, Arts 1(d), 2(1)(b) and 11)

1. Leftover rock and residual sand from ore-dressing operations from the operation of a mine may not be classified as waste within the meaning of Directive 75/442 on waste, as amended by Directive 91/156, if the holder uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose. see para. 43, operative part 1

2. In so far as it does not constitute a measure of application of Directive 75/442, as amended by Directive 91/156, and in particular Article 11 of that directive, national legislation must be regarded as other legislation within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force. see para. 61, operative part 2

JUDGMENT OF THE COURT (Sixth Chamber)
11 September 2003 (1)

((Approximation of laws – Directives 75/442/EEC and 91/156/EEC – Meaning of waste – Production residue – Mine – Use – Storage – Article 2(1)(b) – Meaning of other legislation – National legislation outside the framework of Directives 75/442/EEC and 91/156/EEC))

In Case C-114/01,

REFERENCE to the Court under Article 234 EC by the Korkein hallinto-oikeus (Finland) for a preliminary ruling in the proceedings brought before that court by

AvestaPolarit Chrome Oy, formerly Outokumpu Chrome Oy,

on the interpretation of Articles 1(a) and 2(1)(b) 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 (Sixth Chamber),,

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, R. Schintgen, V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— AvestaPolarit Chrome Oy, by A. Kukkonen, asianajaja,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the United Kingdom Government, by G. Amodeo, acting as Agent, and C. Vajda QC,

— the Commission of the European Communities, by R. Wainwright, I. Koskinen and P. Panayotopoulos, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of AvestaPolarit Chrome Oy, represented by A. Kukkonen; the Finnish Government, represented by T. Pynnä; the Netherlands Government, represented by N.A.J. Bel, acting as Agent; the United Kingdom Government, represented by C. Vajda; and the Commission, represented by R. Wainwright and I. Koskinen, at the hearing on 23 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1 By order of 5 March 2001, received at the Court on 14 March 2001, the Korkein hallinto-oikeus (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 1(a) and 2(1)(b) 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) (Directive 75/442).

2 Those questions arose in proceedings brought by Outokumpu Chrome Oy, now AvestaPolarit Chrome Oy (AvestaPolarit), which operates a mine whose principal product is chromium, against the conditions of operation of that mine imposed on it by Lapin ympäristökeskus (Lapland Environment Centre, the Environment Centre).

Community legislation

3 The first subparagraph of Article 1(a) of Directive 75/442 defines waste as any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

4 Article 1(c) of that directive defines the holder as the producer of the waste or the natural or legal person who is in possession of it.

5 Article 1(d) of the directive defines management as the collection, transport, recovery and disposal of waste, including the supervision of such operations and after-care of disposal sites.

6 Annex I to Directive 75/422, headed Categories of waste, includes, in point Q11, [r] esidues from raw materials extraction and processing (e.g. mining residues, oil field slops, etc.) and, in point Q16, [a]ny materials, substances or products which are not contained in the above categories.

7 The second subparagraph of Article 1(a) of Directive 75/442 gave the Commission the task of drawing up a list of wastes belonging to the categories listed in Annex I. Pursuant to that provision, the Commission, by 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), adopted a European Waste Catalogue (the EWC), which includes *inter alia*[w]aste resulting from exploration, mining, dressing and further treatment of minerals and quarrying. The introductory note to the EWC explains that the catalogue applies to all wastes, irrespective of whether they are destined for disposal or for recovery operations and that it is a harmonised, non-exhaustive list of wastes, that is to say, a list which will be periodically reviewed, but, however, the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances and [t]he entry [in the list] is only relevant when the definition of waste has been satisfied.

8 Article 2 of Directive 75/442 provides:

1. The following shall be excluded from the scope of this Directive:

(a) gaseous effluents emitted into the atmosphere;

(b) where they are already covered by other legislation:

(i) radioactive waste;

(ii) waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;

(iii) animal carcases and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming;

(iv) waste waters, with the exception of waste in liquid form;

(v) decommissioned explosives.

2. Specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of individual Directives.

9 In its original version, before the amendments introduced by Directive 91/156, Article 2 of Directive 75/442 read as follows:

1. Without prejudice to this Directive, Member States may adopt specific rules for particular categories of waste.

2. The following shall be excluded from the scope of this Directive:

(a) radioactive waste;

(b) waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries;

(c) animal carcases and the following agricultural waste: faecal matter and other substances used in farming;

(d) waste waters, with the exception of waste in liquid form;

(e) gaseous effluents emitted into the atmosphere;

(f) waste covered by specific Community rules.

10 Article 3(1) of Directive 75/442 provides *inter alia* that Member States are to take appropriate measures to encourage the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials. Article 4 of that directive states 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, and without adversely affecting the countryside.

11 Articles 9 and 10 of Directive 75/442 provide that any establishment or undertaking which carries out the waste disposal operations specified in Annex II A to that directive or the operations which may lead to recovery specified in Annex II B to that directive must obtain a permit from the competent authority. Those annexes were adapted to scientific and technical progress by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32).

12 Among the disposal operations listed in Annex II A are, in point D1, [d]eposit into or onto land (e.g. landfill, etc.), in point D12, [p]ermanent storage (e.g. emplacement of containers in a mine, etc.), and, in point D15, [s]torage pending any of the operations

[mentioned in the annex] (excluding temporary storage, pending collection, on the site where it is produced).

13 Among the recovery operations listed in Annex II B are, in point R4, [r]ecycling/reclamation of metals and metal compounds, in point R5, [r]ecycling/reclamation of other inorganic materials, and, in point R13, [s]torage of wastes pending any of the operations [mentioned in the annex] (excluding temporary storage, pending collection, on the site where it is produced).

14 Exemption from the permit requirement is, however, provided for in Article 11 of Directive 75/442, the first paragraph of which reads as follows: Without prejudice to Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste [(OJ 1978 L 84, p. 43)] ... 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 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.

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.

National legislation

15 The principal elements of the national legislation applicable at the time of the dispute in the main proceedings are described below.

16 Directive 75/442 was transposed into Finnish law by the Law on waste (1072/1993), whose aim is to prevent the production of waste, reduce its hazardous properties, and promote its recovery.

17 Point 1 of the first subparagraph of Paragraph 3 of that law defines waste as a substance or object which its holder has discarded or intends or is obliged to discard. That definition is complemented by a list of the substances or objects classified as waste in Annex I to the Regulation on waste (1390/1993). Among the 16 categories in that list, category Q11 contains residues resulting from the separation and processing of raw materials, such as mining residues and oilfield slops, and category Q16 relates to [o]ther materials, substances or products which their holder has discarded or intends or is obliged to discard.

18 Points 10 and 11 of the first subparagraph of Paragraph 3 of Law 1072/1993 define recovery as activity intended to recover and use the material or the energy contained in the waste and treatment as activity intended to neutralise or permanently deposit the

waste.

19 Decision 867/1996 of the Ministry of the Environment, which was adopted pursuant to Law 1072/1993 and lists the most common types of waste and hazardous waste, includes waste resulting from the exploration, extraction, dressing and other treatment of minerals, from stone processing, and from gravel production. According to the introduction to that list, the terminology used is based on the EWC and the list is only intended as guidance. An object or substance included in the list is waste only if it exhibits the characteristics referred to in point 1 of the first subparagraph of Paragraph 3 of Law 1072/1993.

20 Under the first subparagraph of Paragraph 42 of Law 1072/1993, a licence, called a waste licence, is required for the industrial or commercial recovery or treatment of waste, the commercial collection of dangerous waste, and other waste management activities defined by regulations. Under the transitional provisions in the third subparagraph of Paragraph 78 of Law 1072/1993, a waste licence is also required for old mines and ore-dressing plants which started operation before 1 January 1994, when that law entered into force, as is the case of the mine at issue in the main proceedings.

21 Mining is the subject of specific legislation, Law 503/1965 as amended by Law 208/1995 (the Law on mines). Mining operations are subject to authorisation. Under point 3 of the first subparagraph of Paragraph 23 of the Law on mines, a plan for the use of the mining area and its ancillary site, containing a study *inter alia* of the depositing of the products and by-products on the mining area and ancillary site, must be annexed to the application so that account may be taken not only of the requirements of the mining operation but also of the aspects concerning safety of the surrounding area and adverse effects.

22 Under the second subparagraph of Paragraph 40 of the Law on mines, a holder of mining rights may exploit, besides minerals, also other materials in the rock and soil of the mining area, if that is necessary for the proper operation of the mining works or the associated ore-dressing works or if those materials are obtained as by-products or waste in the extraction or dressing of minerals. Excavated soil, leftover rock and sand resulting from mining operations which is stored in the mining area or the ancillary site and which has a use in the mining operation or may be further processed is regarded as a by-product of mining operations.

23 The national court states that it follows from point 2 of the first subparagraph of Paragraph 1 of the Regulation on waste (294/1997) that the treatment or recovery by the operator on the spot or elsewhere of non-hazardous soil or rock waste resulting from mining operations does not require a waste licence, if the recovery or treatment procedure has been approved pursuant to the Law on mines.

24 A more general law, the Law on environmental licensing procedure (735/1991) in the version of Law 1712/1995, subjects to a licence called an environmental licence any plan concerning certain activities, *inter alia* where they contain aspects themselves subject to a waste licence. The environmental licence is then subject to the grant of a waste licence.

The main proceedings and the questions referred for a preliminary ruling

25 AvestaPolarit applied to the Environment Centre for an environmental licence, in order to be able to continue its mining and processing activity on the site at issue in the main proceedings, which had been operated for about 30 years and was due to change gradually from open-cast to underground mining from 2002.

26 The activity of the mine consists in extracting the raw product by boring and blasting and processing it by crushing, rough dressing and fine dressing. The annual capacity of the mine is 300 000 tonnes of rough-concentrate chromium, 450 000 tonnes of fine chromium products and 500 000 tonnes of other minerals. In one year's activity, leftover rock is about 8 000 000 tonnes on average and ore extracted about 1 100 000 tonnes.

27 The area around the mine is not the subject of a plan. It is surrounded by woodland and marshland. An area included in the national marshland conservation programme is partly within the mining site. The nearest dwelling house is 1.5 km from the mine. There are several settling ponds for the residual sand from ore-dressing. The surrounding land is part of the ancillary site, the definitive landscaping of which will be decided on when operation has ceased. About 100 million tonnes of leftover rock is already stored around the mine. It is envisaged that after 70 to 100 years part will be used to fill in the underground parts of the mine, but that the stacks will be landscaped before that. Part of the stacks could remain on the site indefinitely. Only a small proportion of the leftover rock, about 20%, will be processed into aggregates. The stacks already stored cannot be used for aggregates but may possibly be used as filling material in constructing breakwaters and embankments.

28 By decision of 16 June 1999, the Environment Centre granted the environmental licence sought, subject however to certain conditions connected with the fact that it regarded the leftover rock and ore-dressing sand as waste to which the procedures laid down by Law 1072/1993 applied. The Environment Centre considered in particular, in the grounds of its decision: Since the residues and by-products resulting from the mine are not as such immediately reused or consumed, they are to be regarded as waste within the meaning of the Law on waste. In so far as the residues and by-products to be discarded are recovered immediately as such (*inter alia* by returning them to the mine), they are not regarded as waste.Since the above waste is not treated or recovered in accordance with a plan approved under the Law on mines, the approval procedure under the Law on waste is applicable to it.

29 AvestaPolarit appealed to the Korkein hallinto-oikeus against that decision, seeking deletion on the ground of lack of legal basis of all the conditions attached to the licence concerning leftover rock and ore-dressing sand based on the classification of those materials as waste and of the places where they were stored as landfill sites. It submits that leftover rock and ore-dressing sand do not constitute waste within the meaning of point 1 of the first subparagraph of Paragraph 3 of Law 1072/1993, and puts forward a number of arguments to that effect.

30 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Are leftover rock resulting from the extraction of ore and/or ore-dressing sand resulting from the dressing of ore in mining operations to be regarded as waste within the meaning of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, having regard to points (a) to (d) below?

(a) What relevance, in deciding the above question, does it have that the leftover rock and ore-dressing sand is stored in the mining area or on the ancillary site? Is it relevant generally, with respect to falling within the definition of waste, whether the said by-products of mining operations are stored in the mining area, on the ancillary site or further away?

(b) What relevance does it have, in assessing the matter, that the leftover rock is the same

as regards its composition as the basic rock from which it is quarried, and that it does not change its composition regardless of how long it is kept and how it is kept? Should ore-dressing sand which results from the ore-dressing process perhaps be assessed differently from leftover rock in this respect?

(c) What relevance does it have, in assessing the matter, that leftover rock is harmless to human health and the environment, but that, according to the view of the environmental licence authorities, substances harmful to health and the environment dissolve from ore-dressing sand? To what extent generally is importance to be attached to the possible effect of leftover rock and ore-dressing sand on health and the environment in assessing whether they are waste?

(d) What relevance does it have, in assessing the matter, that leftover rock and ore-dressing sand are not intended to be discarded? Leftover rock and ore-dressing sand may be re-used without special processing measures, for example for supporting mine galleries, and leftover rock also for landscaping the mine after it has ceased operation. Minerals may in future with the development of technology be recovered from ore-dressing sand for utilisation. To what extent should attention be paid to how definite plans the person carrying on mining operations has for such utilisation and to how soon after the leftover rock and ore-dressing sand has been tipped on the mining area or the ancillary site the utilisation would take place?

(2) If the answer to the first question is that leftover rock and/or ore-dressing sand is to be regarded as waste within the meaning of Article 1(a) of the Council Directive on waste, it is further necessary to obtain an answer to the following supplementary questions:

(a) Does other legislation within the meaning of Article 2(1)(b) of the Waste Directive (91/156/EEC), waste covered by which is excluded from the scope of the directive, and which under point (ii) concerns *inter alia* waste resulting from prospecting, extraction, treatment and storage of mineral resources, mean exclusively the European Community's own legislation? Or may national legislation too, such as certain provisions of the Law on mines and the Regulation on waste in force in Finland, be other legislation within the meaning of the Waste Directive?

(b)

If other legislation means also national legislation, does that mean exclusively national legislation which was already in force at the time of entry into force of the Waste Directive 91/156/EEC or also that enacted only afterwards?

(c)

If other legislation means also national legislation, do fundamental European Community provisions relating to environmental protection or the principles of the Waste Directive set requirements for national legislation concerning the level of environmental protection as a condition for disapplying the rules of the Waste Directive? What sort of requirements could those be?

The first question

31 With respect to the first question, the Korkein hallinto-oikeus previously referred a largely similar question in Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533 (*Palin Granit*).

32 In that judgment, which concerned not leftover rock and ore-dressing sand from a

mining operation but leftover stone from a granite quarry, the Court held that:

— the holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Directive 75/442;

the holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Directive 75/442;

— the place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste.

the place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste.

33 The Court reached those conclusions on the basis of the following considerations in particular:

22 ... the scope of the term waste turns on the meaning of the term discard (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26).

...

27 ... The application of an operation listed in Annex II A or II B to Directive 75/442 ... does not, of itself, justify the classification of that substance as waste.

...

29 ... In its judgment in *Vessoso and Zanetti* (Joined Cases C-206/88 and C-207/88 [1990] ECR I-1461, paragraph 9), the Court held that the concept of waste does not exclude substances and objects which are capable of economic reutilisation. In Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 52, the Court also stated that the system of supervision and control established by Directive 75/442 ... is intended to cover all objects and substances discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or reuse.

30 Neither the fact that the leftover stone has undergone a treatment operation referred to in Directive 75/442 nor the fact that it can be reused thus suffices to show whether that stone is waste for the purposes of Directive 75/442.

31 There are other considerations which are more decisive.

32 At paragraphs 83 to 87 of the judgment in [Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475], the Court pointed out the importance of determining whether the substance is a production residue, that is to say, a product not in itself sought for a subsequent use. As the Commission observes, in the case at issue in the main proceedings the production of leftover stone is not Palin Granit's primary objective. The leftover stone is only a secondary product and the undertaking seeks to limit the quantity produced. According to its ordinary meaning, waste is what falls away when one processes a material or an object and is not the end-product which the manufacturing process directly seeks to produce.

33 Therefore, it appears that leftover stone from extraction processes which is not the product primarily sought by the operator of a granite quarry falls, in principle, into the category of [r]esidues from raw materials extraction and processing under head Q 11 of Annex I to Directive 75/442.

34 One counter-argument to challenge that analysis is that goods, materials or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking does not wish to discard, within the meaning of the first paragraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse.

35 Such an interpretation would not be incompatible with the aims of Directive 75/442. There is no reason to hold that the provisions of Directive 75/442 which are intended to regulate the disposal or recovery of waste apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products.

36 However, having regard to the obligation ... to interpret the concept of waste widely in order to limit its inherent risks and pollution, the reasoning applicable to by-products should be confined to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process.

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

38 In the case at issue ... the only foreseeable reuses of leftover stone in its existing state, for example in embankment work or in the construction of harbours and breakwaters, necessitate, in most cases, potentially long-term storage operations which constitute a burden to the holder and are also potentially the cause of precisely the environmental pollution which Directive 75/442 seeks to reduce. The reuse is therefore not certain and is only foreseeable in the longer term, with the result that the leftover stone can only be regarded as extraction residue which its holder intends or is required to discard within the meaning of Directive 75/442, and thus falls within the scope of head Q 11 of Annex I to that directive.

34 In the light of those considerations, it is clear that leftover rock and residual sand from ore-dressing, such as that from the mine operated by AvestaPolarit, constitute [r] esidues from raw materials extraction and processing under head Q 11 of Annex I to Directive 75/442 (see *Palin Granit*, paragraphs 32 and 33).

35 It remains to examine whether such residues are to be classified as waste on the ground that their holder discards or intends or is obliged to discard them, within the meaning of the first subparagraph of Article 1(a) of Directive 75/442. If not, those residues could, as AvestaPolarit submits, be classified as by-products which do not fall within the scope of that directive.

36 In this respect, a distinction must be drawn between residues which are used without first being processed in the production process for the necessary filling in of the underground galleries, on the one hand, and other residues, on the other.

37 The former are being used in that case as a material in the industrial mining process proper and cannot be regarded as substances which the holder discards or intends to discard, since, on the contrary, he needs them for his principal activity.

38 Only if such use of those residues were prohibited, in particular for reasons of safety or protection of the environment, and the galleries had to be sealed and supported by some other process, would it have to be considered that the holder is obliged to discard those residues and that they constitute waste.

39 Outside such a case, if a mining operator can identify physically the residues which will actually be used in the galleries and provides the competent authority with sufficient guarantees of that use, those residues may not be regarded as waste. In this respect, it is for the competent authority to assess whether the period during which the residues will be stored before being returned to the mine is so long that those guarantees cannot in fact be provided.

40 As regards the residues whose use is not necessary in the production process for filling in the galleries, they must in any event be regarded in their entirety as waste.

41 That is true not only for the leftover rock and ore-dressing sand whose use for construction operations or other purposes is uncertain (see *Palin Granit*, paragraphs 37 and 38), but also for the leftover rock which will be processed into aggregates, since, even if such use is probable, it requires precisely an operation for recovery of a substance which is not used as such either in the process of mining production or for the final use envisaged (see *Palin Granit*, paragraph 36).

42 That is also true for the leftover rock accumulated in the form of stacks which will remain on the site indefinitely, and for the ore-dressing sand which will remain in the old settling ponds. Those residues will not be used for the production process, and cannot be used or marketed in any other way without prior processing. They are therefore waste which the holder discards. If they are landscaped, that constitutes merely an environment-friendly manner of dealing with them, not a stage in the production process.

43 The answer to the national court's first question must therefore be that, in a situation such as that at issue in the main proceedings, the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine discards or intends to discard those substances, which must consequently be classified as waste within the meaning of Directive 75/442, unless he uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose.

The second question

44 By part (a) of its second question, the national court essentially asks whether the term other legislation in Article 2(1)(b) of Directive 75/442 refers solely to Community legislation, or to national legislation such as certain provisions of the Law on mines and the Regulation on waste (294/1997).

45 In view of the account of national law and the facts in the main proceedings, the question could appear purely theoretical. As noted in paragraph 21 above, the Law on

mines makes mining operations subject to authorisation and an application must include *inter alia* a study of the depositing of the products and by-products on the mining area and ancillary site, so that when the application is treated account may be taken not only of the requirements of the mining operation but also of the aspects concerning safety of the surrounding area and adverse effects. Moreover, as described in paragraphs 20 and 23 above, the treatment of waste from the mining operation specifically requires a waste licence, consistently with the provisions of Articles 9 and 10 of Directive 75/442, with the exception of non-hazardous soil or rock waste which is treated by the operator in accordance with a procedure which has been approved pursuant to the Law on mines. Such a procedure of exemption from authorisation is itself provided for in Article 11 of Directive 75/442 in the cases and under the conditions noted in paragraph 14 above. Consequently, if the procedures approved pursuant to the Law on mines are applied in those cases and under those conditions, the relevant provisions of the Law on mines and the Regulation on waste (294/1997) cannot be other legislation within the meaning of Article 2(1)(b) of Directive 75/442, but measures of application of that directive.

46 It appears possible that that is so in the case in the main proceedings. However, on the hypothesis that the exemption from a waste licence takes place in a different context from that provided for in Article 11 of Directive 75/442, the Court will examine the question below.

47 Article 2(2) of Directive 75/442 expressly provides that individual directives may regulate the management of certain categories of waste. It says that those directives may contain specific rules for particular instances or supplementing those in Directive 75/442. That means that the Community expressly reserved the possibility of enacting specific rules or more detailed ones than those in Directive 75/442 for certain categories of waste not defined in advance. That was the basis on which Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances (OJ 1991 L 78, p. 38) and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20), for example, were adopted.

48 However, in contrast to what is expressly laid down in respect of the categories of waste listed in Article 2(1) of Directive 75/442, the categories of waste which are the subject of individual directives under Article 2(2) remain subject overall to Directive 75/442, even if individual rules derogating from its provisions may be adopted on certain aspects and supplementary rules may be adopted with a view to more extensive harmonisation of the management of the waste in question. Consequently, the scope of the legislation referred to in paragraph 1(b) and the rules referred to in paragraph 2 of Article 2 of Directive 75/442 differs: the former excludes altogether the categories of waste in question, which are defined in advance, from the scope of Directive 75/442, while the latter leave the categories of waste in question subject in principle to that directive. The argument of the German, Austrian and United Kingdom Governments that paragraphs 1(b) and 2 of Article 2 of Directive 75/442 would be redundant if it were considered that the former may refer to Community legislation is thus unfounded. It should be observed, moreover, that several items of Community legislation organising the management of categories of waste since referred to in paragraph 1(b), mentioned by the Advocate General in point 66 of his Opinion, existed even before the adoption of Directive 91/156.

49 That conclusion does not, however, exclude the possibility that the expression other legislation in Article 2(1)(b) of Directive 75/442 may also refer, under certain conditions (see paragraphs 52 and 58 to 60 below), to national legislation. It should be observed on this point that where the Community legislature intended to refer in this field to a

particular type of legislation, Community or national, it did so in precise terms. Thus Article 2(2) of Directive 75/442 refers precisely to directives, Article 2(1) of that directive, in the original version prior to the amendments made by Directive 91/156, referred to specific rules adopted by the Member States, and Article 2(2)(f) of that version referred to specific Community rules.

50 Such an interpretation is not contrary in any way to the purpose of Directive 75/442. In its original version, most of the categories of waste now referred to in Article 2(1)(b) were purely and simply excluded from the scope of the directive. That was also the case in the Commission proposals which eventually resulted in Directive 91/156, presented by the Commission on 16 August 1988 and 23 November 1989 (OJ 1988 C 295, p. 3, and OJ 1989 C 326, p. 6). Having regard to the very special characteristics of the waste in question, the Community legislature could prefer, when adopting Directive 91/156 and pending the enactment of new Community legislation to meet the specific features of the management of that waste, to let national legislation apply which was itself suited to those features, rather than to subject the waste in question to the general scheme of Directive 75/442. However, to avoid the management of that waste not being subject to any legislation in certain situations, as previously, it adopted a rule that, in the absence of specific Community legislation and, alternatively, specific national legislation, Directive 75/442 applies.

51 The arguments put forward against that interpretation by the Finnish and Netherlands Governments and the Commission cannot be accepted. Thus, while the fifth recital in the preamble to Directive 91/156 states that any disparity between Member States' laws on waste disposal and recovery can affect the quality of the environment and interfere which the functioning of the internal market, such an observation does not mean that the Community legislature could not consider that, while harmonisation of the management of most categories of waste was necessary, for certain particular categories (simply excluded from the scope of Directive 75/442 in its original version) the national authorities could, pending the adoption of specific Community legislation, retain the possibility of regulating that management outside the framework laid down by the directive, but in the absence of such action by a Member State it then had to organise that management within that framework.

52 However, to be regarded as other legislation within the meaning of Article 2(1)(b) of Directive 75/442 covering a category of waste listed in that provision, national legislation must not merely relate to the substances or objects in question from — for instance — an industrial point of view, but must contain precise provisions organising their management as waste within the meaning of Article 1(d) of the directive. Otherwise, the management of that waste would be organised neither on the basis of Directive 75/442 nor on the basis of national legislation independent of the directive, which would be contrary both to the wording of Article 2(1)(b) of the directive, which requires that the national legislation in question should cover the waste as such, and to the consideration expressed in the fourth recital in the preamble to Directive 91/156, which states that in order to achieve a high level of environmental protection, the Member States must, in addition to taking action to ensure the responsible removal and recovery of waste, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and reused, taking into consideration existing or potential market opportunities for recovered waste.

53 So, in the main proceedings, it will be for the national court to make sure if necessary, if it considers disapplying the national provisions adopted in application of Directive 75/442, that the alternative provisions of the Law on mines relied on for that purpose concern the management of mining waste and apply to the waste from the mine operated by AvestaPolarit. In the light of the documents in the case, the Court

understands that that may be the case, with respect to non-hazardous soil and rock waste, if AvestaPolarit uses a procedure approved pursuant to that law.

54 By part (b) of its second question, the national court asks essentially whether Article 2 (1)(b) of Directive 75/442 must be interpreted as meaning that other legislation within the meaning of that provision must have entered into force before 1 April 1993, the date of entry into force of Directive 91/156, or whether it may also have entered into force after that date.

55 It does not follow expressly from the wording of the provision in question that it refers only to national legislation existing on the date of entry into force of Directive 91/156. The words already covered by other legislation in that provision may just as well have a material as a temporal meaning. Furthermore, the term already is not used in all the language versions of Directive 75/442.

56 In accordance with Article 5 EC, first, in areas which do not fall within its exclusive competence, which is the case at this stage as regards the environment, the Community is to take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community and, second, action by the Community must not go beyond what is necessary to achieve the objectives of the Treaty.

57 Consequently, since when adopting Directive 91/156 the Community legislature considered it appropriate that, until specific Community rules were adopted on the management of certain individual categories of waste, the authorities of the Member States should retain the option of ensuring that management outside the framework laid down by Directive 75/442, and since it neither expressly excluded the possibility of that option being used on the basis of national legislation subsequent to the entry into force of Directive 91/156 nor set out considerations enabling a distinction to be drawn between such national legislation and legislation prior to that entry into force, Article 2 (1)(b) of Directive 75/442 must be interpreted as meaning that other legislation within the meaning of that provision may have entered into force either before or after 1 April 1993, the date of entry into force of Directive 91/156.

58 By part (c) of its second question, the national court essentially asks whether Article 2 (1)(b) of Directive 75/442 must be interpreted as meaning that other legislation within the meaning of that provision must comply with particular requirements as to the level of protection of the environment.

59 As stated in paragraph 52 above, for national legislation to be regarded as other legislation within the meaning of Article 2(1)(b) of Directive 75/442, it must contain precise provisions organising the management of the waste in question within the meaning of Article 1(d) of that directive. Moreover, the second paragraph of Article 10 EC imposes an obligation on Member States to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. With respect to the management of waste of the same type, a level of protection of the environment which differed noticeably because some was managed within the framework of Directive 75/442 and some outside that framework could jeopardise the objectives of the Community in the field of the environment as defined in Article 174 EC, and more particularly the objectives of Directive 75/442 itself. Such national legislation must therefore pursue the same objectives as that directive and result in a level of protection of the environment which is at least equivalent to that resulting from the measures taken in application of the directive, even if the detailed terms of that national legislation diverge from those of the directive.

60 In the main proceedings, it will thus be for the national court if need be, if it considers disapplying the national provisions taken in application of Directive 95/442, to make sure that the alternative provisions of the Law on mines relied on for that purpose result, as regards the management of mining waste, in a level of protection of the environment which is equivalent at least. Account must be taken here of the fourth recital in the preamble to Directive 91/156, which states that in order to achieve a high level of environmental protection, the Member States must, in addition to taking action to ensure the responsible removal and recovery of waste, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and reused, taking into consideration existing or potential market opportunities for recovered waste, and more particularly of the objectives defined in Articles 3(1) and 4 of Directive 75/442.

61 The answer to the second question must therefore be that, in so far as it does not constitute a measure of application of Directive 75/442, in particular Article 11 of that directive, national legislation must be regarded as other legislation within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force.

Costs

62 The costs incurred by the Finnish, German, Netherlands, Austrian and United Kingdom 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 Korkein hallinto-oikeus by order of 5 March 2001, hereby rules:

1. In a situation such as that at issue in the main proceedings, the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine discards or intends to discard those substances, which must consequently be classified as waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, unless he uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose.

2. In so far as it does not constitute a measure of application of Directive 75/442, as amended by Directive 91/156, and in particular Article 11 of that directive, national legislation must be regarded as other legislation within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass J.-P. Puissochet

Registrar President of the Sixth Chamber

---

1 – Language of the case: Finnish.