



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 30 January 2020¹

Case C-654/18

Interseroh Dienstleistungs GmbH
v
SAA Sonderabfallagentur Baden-Württemberg GmbH

(Request for a preliminary ruling from the Verwaltungsgericht (Administrative Court, Stuttgart, Germany))

(Request for a preliminary ruling — Environment — Waste — Transport of waste within the European Union — Regulation (EC) No 1013/2006 — Classification of mixture of paper wastes — Basel Convention — Control procedure applied to ‘Green’ listed waste — Classification of mixture of paper wastes containing impurities)

1. By this request for a preliminary ruling the Verwaltungsgericht (Administrative Court, Stuttgart, Germany) seeks guidance on the interpretation of Regulation (EC) No 1013/2006 on shipments of waste.² It wishes to ascertain whether a waste stream composed principally of paper products should be categorised as so-called ‘green’ waste and therefore subject to the flexible control procedure provided in that regulation. The referring court also asks whether such waste can still be categorised as ‘green’ if it contains up to 10% impurities.

Legal Framework

The Basel Convention

2. The scope of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal³ is defined in Article 1. Under Article 1(1)(a) “hazardous wastes” are subject to the rules on transboundary movement.⁴ Article 1(2) states that wastes belonging to any category in Annex II are also subject to the rules on transboundary movement: they fall within a broad category of ‘other wastes’ for the purposes of the Basel Convention.⁵

¹ Original language: English.

² Regulation of the European Parliament and of the Council of 14 June 2006 (OJ 2006 L 190, p. 1). That Regulation has been amended a number of times. The most recent changes were introduced by Commission Regulation (EU) 2015/2002 of 10 November 2015 (OJ 2015 L 294, p. 1).

³ Signed at Basel on 22 March 1989, approved on behalf of the Community by Council Decision 93/98/EEC of 1 February 1993 (OJ 1993 L 39, p. 1) (‘the Basel Convention’).

⁴ Annex I lists the categories of wastes that are in principle to be controlled as hazardous, while Annex III lists the characteristics that are designated ‘hazardous’. These include explosive characteristics, flammability, acute poisonousness and infectious substance.

⁵ Annex II covers categories of wastes requiring special consideration. It includes wastes collected from households and residues arising from the incineration of household wastes. Radioactive wastes and wastes which derive from the normal operation of a ship are excluded from the Convention’s scope.

3. Article 2(8) specifies that “environmentally sound management of hazardous wastes or other wastes” means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes’.

4. The Basel Convention was amended to include Annex IX which came into effect on 6 November 1998. The opening paragraph to that Annex states, ‘wastes contained [therein] will not be wastes covered by Article 1, paragraph 1 (a), of [the] Convention unless they contain Annex I material to an extent causing them to exhibit an Annex III characteristic’. Section B3 to the Convention covers ‘wastes containing principally organic constituents, which may contain metals and inorganic materials’. Code B3020 concerns ‘Paper, paperboard and paper product wastes’.⁶

Decision of the OECD

5. The Member States were authorised by the Council to vote on behalf of the (then) Community in favour of Decision of the OECD Council, C(2001)107/final, concerning the revision of Decision C(92)39/final on the control of transboundary movements of wastes destined for recovery operations (‘the OECD Decision’).⁷ That Decision became binding on the Member States and the Community on completion of the necessary Community procedures.

6. Chapter II, Part B sets out a two-tiered system of controls to be applied to transboundary movements of waste. Point 2(a) states that the ‘Green control procedure’ applies to the wastes listed in Annex IX of the Basel Convention (“Green” listed wastes).⁸

7. Under point 4(a) of Chapter II, Part B, a Member country maintains a right ‘to control on an exceptional basis, certain wastes differently, in conformity with domestic legislation and the rules of international law, in order to protect human health and the environment’. In accordance with point 4(b), a Member country may regulate ‘Green’ listed waste as if it were subject to the stricter requirements of the Amber control procedure.⁹

8. Point 8 of Chapter II, Part B states that ‘a mixture of wastes, for which no individual entry exists, shall be subject to the following control procedure:

- (i) a mixture of two or more [“Green” listed wastes] shall be subject to the Green control procedure, provided the composition of this mixture does not impair its environmentally sound recovery;
- (ii) a mixture of a [“Green” listed waste] and more than a *de minimis* amount of an Amber waste or a mixture of two or more Amber wastes shall be subject to the Amber control procedure, provided the composition of this mixture does not impair its environmentally sound recovery’.

9. Part C is entitled ‘Green control procedure’. It states “Transboundary movements of wastes subject to the Green control procedure shall be subject to all existing controls normally applied in commercial transactions.

⁶ See point 20 below.

⁷ Decision of the OECD Council, C(2001)107/final, concerning the revision of Decision C(92)39/final on the control of transboundary movements of wastes destined for recovery operations. An addendum to that Decision, C(2001)107/ADD1, which includes the notification and movement documents and the instructions as to how to complete them, was adopted by the Council on 28 February 2002. The addendum was subsequently incorporated into the Decision as Section C of Appendix 8 and the complete version of the Decision was issued in May 2002 as C(2001)107/final. A further amendment was later introduced by Decision C(2004)20: see <https://www.oecd.org/environment/waste/30654501.pdf>.

⁸ Appendix 3 lists the wastes subject to the Green control procedure. That list includes wastes listed in Annex IX of the Basel Convention.

⁹ Wastes subject to the Amber control procedure are listed in Annex II to the Basel Convention (‘wastes requiring special consideration’) and Annex VIII (wastes that are characterised as hazardous for the purposes of that Convention).

Regardless of whether or not wastes are included on the list of wastes subject to the Green Control Procedure (Appendix 3), they may not be subject to the Green control procedure if they are contaminated by other materials to an extent which (a) increases the risks associated with the wastes sufficiently to render them appropriate for submission to the amber control procedure, when taking into account the criteria in Appendix 6 to this Decision, or (b) prevents the recovery of the wastes in an environmentally sound manner'.¹⁰

Regulation No 1013/2006

10. The following statements are made in the recitals to Regulation No 1013/2006.

- ‘The main and predominant objective and component of [Regulation No 1013/2006] is the protection of the environment, its effects on international trade being only incidental.’¹¹
- By adopting a regulation on shipments of waste, the Council established rules to curtail and to control such movements designed, inter alia, to make the existing EU system for the supervision and control of waste movements comply with the requirements of the Basel Convention.¹²
- It is necessary to incorporate into EU legislation the content of the “OECD Decision”.¹³
- It is important to organise and regulate the supervision and control of shipments of waste in a way which takes account of the need to preserve, protect and improve the quality of the environment and human health and which promotes a more uniform application of the Regulation throughout the European Union.¹⁴
- Although the supervision and control of shipments of waste within a Member State is a matter for that Member State, national systems concerning shipments of waste should take account of the need for coherence with the Community system in order to ensure a high level of protection of the environment and human health.¹⁵
- In the case of shipments of waste destined for disposal operations and waste not listed in, inter alia, Annex III or IIIA destined for recovery operations, it is appropriate to ensure optimum supervision and control by requiring prior written consent to such shipments. Such a procedure should in turn entail prior notification, which enables the competent authorities to be duly informed so that they can take all necessary measures for the protection of human health and the environment. It should also enable those authorities to raise reasoned objections to such a shipment.¹⁶
- In the case of shipments of waste listed in Annex III, IIIA or IIIB destined for recovery operations, it is appropriate to ensure a minimum level of supervision and control by requiring such shipments to be accompanied by certain information.¹⁷

10 Appendix 6 sets out the criteria for making an assessment in accordance with the OECD risk-based approach. These include whether the waste normally exhibits hazardous characteristics listed in Appendix 2 to the OECD Decision, whether it is typically contaminated, the nature of its physical state, the degree of difficulty of clean-up in cases of accidental spillage or mismanagement and the economic value of the waste.

11 Recital 1.

12 Recital 3.

13 Recital 5.

14 Recital 7.

15 Recital 13.

16 Recital 14.

17 Recital 15.

- In considering the mixtures of wastes to be added in Annex IIIA, the following information should be considered, inter alia: the properties of the waste, such as its possible hazardous characteristics, its potential for contamination and its physical state; the management aspects, such as the technological capacity to recover the waste, and the environmental benefits arising from the recovery operation, including whether the environmentally sound management of the waste may be impaired.¹⁸

11. Article 1(1) provides that Regulation No 1013/2006 establishes procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination. Pursuant to Article 1(2)(a), the regulation applies to, inter alia, shipments of waste between Member States.

12. Article 2 contains a series of definitions, of which the following are pertinent:

“waste” means any substance or object in the categories set out in Annex I to Directive 2006/12/EC on waste¹⁹ which the holder discards or intends to discard.^[20]

“hazardous waste” means waste which is defined as such in accordance with [Directive 91/689/EEC].^[21]

“mixtures of wastes” means waste that results from an intentional or unintentional mixing of two or more different wastes and for which mixture no single entry exists in Annexes III, IIIB, IV and IVA. Waste shipped in a single shipment of wastes, consisting of two or more wastes, where each waste is separated, is not a mixture of wastes.^[22]

...

“recovery” is as defined in Article 1(1)(f) of [Directive 2006/12].^[23]

...

“environmentally sound management” means taking all practicable steps to ensure that waste is managed in a manner that will protect human health and the environment against adverse effects which may result from such waste.^[24]

...

“Basel Convention” means the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.^[25]

18 Recital 39.

19 Directive of the European Parliament and of the Council of 5 April 2006 (OJ 2006 L 114, p. 9). Annex I to that directive lists 16 categories of waste which include the following: ‘products for which the holder has no further use (e.g. agricultural, household, office commercial and shop discards, etc.)’ and (as a final category) ‘any materials, substances or products which are not contained in the above mentioned categories’.

20 Article 2(1).

21 Article 2(2). Council Directive of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) states that hazardous waste displays one or more of the properties listed in Annex III to that directive, entitled ‘properties of wastes which render them hazardous’. The properties listed include explosive substances, oxidising substances, highly flammable substances, toxic, harmful, corrosive, irritant, carcinogenic, toxic to reproduction, mutagenic and eco-toxic substances. Directive 91/689/EEC was subsequently repealed and replaced by Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

22 Article 2(3).

23 Article 2(6). Article 1(1)(f) of Directive 2006/12 cross refers to Annex II B to that directive. Certain recovery operations such as recycling/reclamation of organic substances which are not used as solvents and the recycling/reclamation of other inorganic materials are listed therein.

24 Article 2(8).

25 Article 2(16).

“OECD Decision” means Decision C(2001)107/final of the OECD Council concerning the revision of Decision C(92)39/final on the control of transboundary movements of wastes destined for recovery operations.^[26]

13. Article 3 is the opening provision of Title II (‘Shipments within the Community with or without transit through third countries’). Article 3(1)(a) provides that shipments of all wastes destined for disposal operations are subject to the prior notification procedure in Article 4 (I interject: a procedure that is both administratively time-consuming and relatively costly).²⁷ In accordance with Article 3(1)(b), certain wastes destined for recovery are also subject to that procedure. These include ‘wastes not classified under one single entry in either Annex III, IIIB, IV or IVA’ and ‘mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA’.²⁸ Article 3(2) states that the general information requirements laid down in Article 18 (a less onerous procedure) apply to wastes destined for recovery listed in Annex III or IIIB, and to ‘mixtures, not classified under one single entry in Annex III, of two or more wastes listed in Annex III, provided that the composition of these mixtures does not impair their environmentally sound recovery and provided that such mixtures are listed in Annex IIIA, in accordance with Article 58’.²⁹ All waste covered by Article 3(2) is ‘Green’ listed waste.

14. Article 4 is entitled ‘Notification’ and applies where the notifier intends to ship waste as referred to in Article 3(1)(a) or (b). The notifier is required to submit a prior written notification to and through the competent authority of dispatch. The notifier must provide notification and movement documents as stipulated in the Regulation, conclude a contract with the consignee, establish a financial guarantee or equivalent insurance and make a notification for the purposes of Article 4 (‘the prior notification procedure’).

15. Article 18 contains the ‘general information requirements’ and states that waste referred to in, *inter alia*, Article 3(2) is subject to the procedural requirements set out therein. The person who arranges the shipment under the jurisdiction of the country of dispatch is to ensure that the waste is accompanied by the document specified in Annex VII to the regulation. That document is to be signed by that person and by the recovery facility (or the laboratory) and the consignee when the waste is received (‘the Green control procedure’).³⁰

16. Article 28(1) provides that, ‘if the competent authorities of dispatch and of destination cannot agree on the classification as regards the distinction between waste and non-waste, the subject matter shall be treated as if it were waste. This shall be without prejudice to the right of the country of destination to deal with the shipped material in accordance with its national legislation, following arrival of the shipped material and where such legislation is in accordance with [European Union] or international law’. Pursuant to Article 28(2), ‘if the competent authorities of dispatch and of destination cannot agree on the classification of the notified waste as being listed in Annex III, IIIA, IIIB or IV, the waste shall be regarded as listed in Annex IV’. Waste that is listed in Annex IV is subject to the procedure of prior written notification and consent laid down in Article 4.³¹

²⁶ Article 2(17).

²⁷ See point 14 below.

²⁸ See respectively Article 3(1)(b)(iii) and (iv) and points 18 to 20 below.

²⁹ Article 3(2) applies where the amount of wastes shipped exceeds 20 kg. See further Article 18 and Article 58.

³⁰ See Article 18(1)(a) and (b) respectively. The form which comprises Annex VII to the regulation is entitled ‘Information accompanying shipments of waste as referred to in Article 3(2) and (4)’. In order to assist the tracking of shipments of waste that fall within the scope of Article 18, it is necessary to include information on the consignment, such as the details of the person arranging the shipment and the importer/consignee; the carriers; when the person arranging shipment is not the producer or the collector, information about the producer or the collector; and the identification or classification of the waste stream at issue.

³¹ See point 14 above.

17. Article 58 provides for amendment to the Annexes to Regulation No 1013/2006. Under Article 58(1), the Commission is empowered to adopt delegated acts to amend, inter alia, Annexes III and IIIA to take account of changes agreed under the Basel Convention and the OECD Decision.

18. Annex III lists certain categories of wastes subject to the Green control procedure laid down in Article 18. The preamble to Annex III states, ‘regardless of whether or not wastes are included on this list, they may not be subject to the general information requirements laid down in Article 18 if they are contaminated by other materials to an extent which:

- (a) increases the risks associated with the wastes sufficiently to render them appropriate for submission to the procedure of prior written notification and consent, when taking into account the hazardous characteristics listed in Annex III to[Directive 91/689];³² or
- (b) prevents the recovery of the wastes in an environmentally sound manner.’

Part I of the list provides that the wastes listed in Annex IX to the Basel Convention are subject to the Green control procedure in Article 18 of the regulation.³³

19. Annex IIIA is entitled ‘Mixtures of two or more wastes listed in Annex III and not classified under one single entry as referred to in Article 3(2)’. The preamble to Annex IIIA is expressed in the same terms as that of Annex III. Point 3(g) lists ‘mixtures of wastes classified under Basel entry (sic) B3020 restricted to unbleached paper or paperboard or of corrugated paper or paperboard, other paper or paperboard, made mainly of bleached chemical pulp, not coloured in the mass, paper or paperboard made mainly of mechanical pulp (for example, newspapers, journals and similar printed matter)’.

20. Part 1 of Annex V, List B, incorporates Annex IX to the Basel Convention into the text of Regulation No 1013/2006. Code B3020 is worded as follows:

‘Paper, paperboard and paper product wastes

The following materials, provided they are not mixed with hazardous wastes:

Waste and scrap of paper or paperboard of:

- unbleached paper or paperboard or of corrugated paper or paperboard
- other paper or paperboard, made mainly of bleached chemical pulp, not coloured in the mass
- paper or paperboard made mainly of mechanical pulp (for example, newspapers, journals and similar printed matter)
- other, including but not limited to
 1. laminated paperboard;
 2. unsorted scrap.’

³² See Article 2(2) set out in point 12 above.

³³ Annex V to Regulation No. 1013/2006 includes List B.

Background facts, procedure and questions referred

21. Interseroh Dienstleistungs GmbH ('Interseroh') collects used sales packaging (lightweight packaging) from private final consumers throughout Germany which it then consigns to recovery. It ships the prepared waste paper across the border for recycling in a paper factory in Hoogezand (Netherlands). New paper and new paperboard is produced from the waste paper. The Netherlands purchaser, ESKA Graphic Board BV ('ESKA') stipulates that the waste paper must meet the following specifications. It should be composed of at least 90% used, residue-drained, system-compatible paper, paperboard or cardboard (PPC) articles and PPC-based combinations, with the exception of liquid packaging board including packaging parts such as labels etc. Also, the waste stream must contain no more than 10% impurities ('the mixture of wastes at issue').³⁴

22. On 20 May 2015, the Raad van State (Council of State, Netherlands) ruled in proceedings involving ESKA that a waste paper mixture, regardless of the presence of impurities, comes under Basel Code B3020. Accordingly, any such mixture of wastes constituted 'Green' listed waste and came within the list of wastes subject to the Green control procedure under Article 18 of Regulation No 1013/2006. It did so on the basis of the Dutch language version of Basel Code B3020.

23. Interseroh had previously operated on the basis that the cross border shipments of such waste was subject to the more onerous prior notification procedure under Article 4 of Regulation No 101/2006. However, as a result of the judgment of the Raad van State of 20 May 2015, it took the view that the Green control procedure under Article 18 of that regulation should apply on the grounds that the waste which it shipped to the Netherlands for recovery should be classified under Basel Code B3020 as 'Green' listed waste.

24. The competent national authority in the 'Land' of Baden-Württemberg in Germany, the SAA Sonderabfallagentur Baden-Württemberg GmbH ('the SBW'), disputes that view. It does so on the basis of the German version of Basel Code B3020.

25. On 1 June 2016, Interseroh brought an action before the referring court seeking a declaration that it is entitled to ship the mixture of wastes at issue to other EU Member States in accordance with the Green control procedure under Article 18 of Regulation No 1013/2006. Accordingly, the referring court wishes to ascertain whether the wastes at issue should be classified as 'Green' listed waste for the purposes of that regulation and has referred the following questions to the Court:

'(1) Is Article 3(2) of [Regulation No 1013/2006],

according to which shipments of the following wastes destined for recovery are to be subject to the general information requirements laid down in Article 18, if the amount of waste shipped exceeds 20 kg:

- (a) waste listed in Annex III or IIIB;
- (b) mixtures, not classified under one single entry in Annex III, of two or more wastes listed in Annex III, provided that the composition of these mixtures does not impair their environmentally sound recovery and provided that such mixtures are listed in Annex IIIA, in accordance with Article 58,

³⁴ Those impurities are specified as no metallic and mineral impurities with a piece weight of more than 100g; liquid packaging board less than 4%; Plastic articles less than 3%; Metals less than 0.5%; Other impurities (glass, metal, plastics (e.g. foils, cups, bags), foreign materials (e.g. rubber, stones, wood, textiles)) less than 3.5%.

to be interpreted as meaning that mixtures of paper, paperboard and paper product wastes, which — being composed in such a way that the fractions of the waste considered individually — come within the first three indents of entry B3020 of Annex IX to the Basel Convention, and which also contain up to 10% impurities, come under Basel Code B3020 and are accordingly subject to the general information requirements laid down in Article 18, and not to the notification requirement under Article 4?

If Question 1 is answered in the negative:

(2) Is Article 3(2) of [Regulation No 1013/2006],

according to which shipments of the following wastes destined for recovery are to be subject to the general information requirements laid down in Article 18, if the amount of waste shipped exceeds 20 kg:

- (a) waste listed in Annex III or IIIB;
- (b) mixtures, not classified under one single entry in Annex III, of two or more wastes listed in Annex III, provided that the composition of these mixtures does not impair their environmentally sound recovery and provided that such mixtures are listed in Annex IIIA, in accordance with Article 58,

to be interpreted as meaning that mixtures of paper, paperboard and paper product wastes, which — being composed in such a way that the fractions of the waste considered individually — come within the first three indents of entry B3020 of Annex IX to the Basel Convention, and which also contain up to 10% impurities, are not covered by point 3(g) of Annex IIIA and accordingly are subject, not to the general information requirements laid down in Article 18, but instead to the notification requirement under Article 4?

26. Written observations were submitted by Interseroh, the SBW, the Governments of the Netherlands and Poland and the European Commission. Interseroh, the SWB and the Commission attended the hearing on 18 September 2019 and made oral submissions.

Assessment

Preliminary remarks

27. It is common ground that the waste paper which Interseroh ships from Germany to the Netherlands is made up of a mixture of wastes and therefore falls within the scope of Regulation No 1013/2006.³⁵ As the referring court states, at least 90% of that mixture is made up of what can be described generically as paper, paperboard and paper product wastes. The waste also includes a maximum of 10% impurities.³⁶ It is also not in dispute that the mixture of wastes at issue is destined for recovery for the purposes of that regulation.

28. There is nothing in the order for reference to suggest that the mixture of wastes at issue contains hazardous waste as defined within the relevant EU rules.³⁷

³⁵ Article 1(1) and (2)(a) of Regulation No 1013/2006.

³⁶ See point 21 above.

³⁷ See point 12 above.

29. By the two questions posed the referring court asks in essence whether that waste can be classified as ‘Green’ listed waste for the purposes of Regulation No 1013/2006? Which provisions of that regulation apply to the mixture of wastes at issue? Is that waste subject to the more burdensome and costly prior notification procedure laid down in Article 4 or does the less onerous Green control procedure provided for in Article 18 of Regulation No 1013/2006 apply?

30. I shall therefore deal with the referring court’s questions together.

Regulation No 1013/2006

31. The overriding aim of Regulation No 1013/2006 is the protection of the environment. The overall procedural framework provided in Article 3 of Regulation No 1013/2006 is that the usual process is for shipments of wastes to be subject to the prior notification procedure.³⁸ Thus, the default or normal control procedure is that Article 4 applies in order to ensure optimum supervision and control to protect the environment and human health.

32. However, Article 3(2) makes specific provision for ‘Green’ listed waste destined for recovery. Waste listed in Annex III or mixtures which are not classified under one single entry (in that Annex) of waste two or more wastes listed (as defined in Annex IIIA) are to be subject to the Green control procedure, if their composition does not impair their environmentally sound recovery. Thus, for such wastes a lesser level of supervision and control is appropriate and the procedure in Article 18 of the regulation should accordingly apply.³⁹

33. Should the mixture of wastes at issue be classified as ‘Green’ listed waste for the purposes of Regulation No 1013/2006?

34. There are three strands to answering that question. First, does the mixture of wastes at issue fall within Annex III to that Regulation? Second, if it does not, is it covered by Annex IIIA thereof? Third, given that in reality no waste stream is totally free from impurities, what level of contamination of waste which would otherwise qualify as ‘Green’ listed waste should result in that waste no longer qualifying for Article 18 treatment but instead requiring prior notification under Article 4?

Annex III to Regulation No 1013/2006

35. Interseroh argues that the mixture of wastes at issue falls within the general heading of Code B3020 as it comprises paper, paperboard and paper waste products. However, it is common ground that the wastes that Interseroh shipped from Germany to the Netherlands were made up of a *mixture* of paper wastes (as well as up to 10% impurities). In the light of the referring court’s finding that that waste comprises a mixture of wastes covered by indents one to three of Code B3020, I cannot agree with Interseroh’s submission.

36. In accordance with the definition in Article 2(3), a mixture of wastes covers waste that results from intentional or unintentional mixing of two or more different wastes and for which *no single entry exists* in, inter alia, Annex III. Article 3(2) states that for a mixture of wastes not classified in that Annex *under one single entry* to qualify as ‘Green’ listed waste, it must be composed of two or more wastes listed in Annex III and be listed as a mixture in Annex IIIA.

³⁸ Article 3(1)(a) of Regulation No 1013/2006.

³⁹ Recital 15 to Regulation No 1013/2006.

37. Part I of Annex III states that the wastes listed in Annex IX to the Basel Convention are subject to the Green control procedure. Annex IX of that Convention is listed in Annex V to Regulation No 1013/2006. Accordingly, Code B3020 of the Basel Convention concerning paper, paperboard and paper products wastes is incorporated into that regulation. The first three indents of Code B3020 cover ‘waste and scrap of paper or paperboard’ of, respectively: ‘unbleached paper or paperboard or of corrugated paper or paperboard’; ‘other paper or paperboard, made mainly of bleached chemical pulp, not coloured in the mass’; and ‘paper or paperboard made mainly of mechanical pulp (for example, newspapers, journals and similar printed matter)’.

38. The first three indents of Code B3020 thus cover specific categories of paper wastes. For the waste stream in question to fall within Annex III, it would be necessary to demonstrate that it falls within one specific indent of Code B3020. That follows from reading the words in Annex III in conjunction with the text of Article 3(2)(b), which designates shipments of wastes that are eligible for the Green control procedure as including ‘mixtures, *not classified under one single entry* in Annex III, of two or more wastes listed in Annex III ... provided that such mixtures are listed in Annex IIIA ...’⁴⁰ It is thus plain that Annex III does *not* cover mixtures of wastes, because these do not fit within the categories listed.⁴¹

39. A more difficult question is whether the mixture of wastes at issue falls within the fourth indent of Code B3020. That indent is drawn in less precise terms than the first three indents and covers ‘other’, which includes but is not limited to laminated paperboard⁴² and unsorted scrap. It cannot be denied that the word ‘other’ suggests a potentially broad category.

40. However, a number of arguments militate against interpreting ‘other’ so broadly that the mixture of waste at issue would fall within that category. A high level of protection of the environment and human health are amongst the aims of Regulation No 1013/2006.⁴³ If the word ‘other’ were to be construed as meaning ‘additional’ or ‘further’ categories of waste it would turn the objectives and the scheme of that regulation on its head.

41. The referring court has pointed out that the fourth indent of Code B3020 as it is reproduced in Annex V to Regulation No 1013/2006 differs as between the various language versions.⁴⁴ It is settled case-law that where that occurs in relation to an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.⁴⁵

42. The term ‘waste’ is defined in Directive 2006/12 and that definition is also used in Regulation No 1013/2006.⁴⁶ Waste is not synonymous with ‘scrap’, which should be given its ordinary meaning and interpreted according to the objectives of Regulation No 1013/2006. Within the context of Annex III and establishing what qualifies as ‘Green’ listed waste, the word ‘scrap’ connotes a ‘fragment

40 My emphasis.

41 Judgment of 5 July 2018, *Mast-Jägermeister v EUIPO*, C-217/17 P, EU:C:2018:534, paragraph 48.

42 The Commission’s guidance states that beverage cartons such as TetraPak can be classified as laminated paperboard: see ‘Frequently asked questions (FAQs) on Regulation (EC) No 1013/2006 on shipments of waste’, p. 19.

43 Recitals 1 and 13 to Regulation No 1013/2006.

44 In its order for reference, the referring court states: ‘according to the wording of the German-language version, point 2 of the fourth indent covers “nicht sortierten Ausschuss” (“unsorted scrap”) and not “nicht sortierte Abfälle” (“unsorted waste”), as the [Raad van State] held on the basis of the Dutch-language version (“ongesorteerd afval”). The term “scrap” is not synonymous with the terms “waste” or “mixture”. In addition, a distinction is drawn in the French-language version between “mélange de déchets” and “rebut non triés”, just as in the English-language version between “mixture of wastes” and “unsorted scrap”. The terms “scrap” and “waste” are therefore not synonymous. Since, in the Dutch-language version of the heading of Basel Code B3020, the term “waste” is not used, but it instead reads “papier, karton en papierproducten”, the term “afval” in point 2 of the fourth indent in the Dutch-language version does not cover the entire entry, but only what does not come under the first three indents’. See points 22 and 24 above and footnote 47 below.

45 Judgment of 3 April 2008, *Endendijk*, C-187/07, EU:C:2008:197, paragraphs 22 to 24.

46 See Article 2(1) of Regulation No 1013/2006.

or remnant' or 'detached pieces', as might arise, for example, in the production process of paper, paperboard and paper product wastes within Code B3020. That reading is consistent with the objectives expressed in recital 15 to Regulation No 1013/2006 when allowing such wastes to be subject to the simpler Green control procedure laid down in Article 18.⁴⁷

43. The scheme of that regulation indicates that *mixtures* of waste not classified under one single entry in Annex III *only* qualify as 'Green' listed waste if they fall within the exhaustive listing in Annex IIIA, which is entitled 'Mixtures of two or more wastes listed in Annex III and not classified as a single entry as referred to in Article 3(2)'. Annex IIIA would have no purpose if the fourth indent of Code B3020 regulated such waste streams.

44. The legislative history shows that the Annexes to Regulation No 1013/2006 were amended in order to take account of scientific and technical progress. Certain provisions, including Annexes III and IIIA, were amended as a result of changes agreed under the Basel Convention and the OECD Decision.⁴⁸ By Regulation (EU) No 664/2011⁴⁹ the Commission gave effect, inter alia, to the United Kingdom's request that mixtures of wastes classified under Basel Code B3020 be considered for inclusion in Annex IIIA to Regulation No 1013/2006.⁵⁰ Following the changes introduced to Regulation No 1013/2006 by the Commission, express provision was made for mixtures comprised of waste falling under specific categories within a particular Basel Code.

45. Those legislative changes suggest that the scheme of Regulation No 1013/2006 is designed to ensure that Annex III does *not* cover mixtures of wastes that fall within two or more specific categories within a particular Basel Code. I add for the sake of good order that the preamble to Annex III indicates that the legislature took into account that waste within its scope which is subject to the Green control procedure may also contain a level of contamination. I shall examine that issue further below.⁵¹

46. Finally, Interseroh submits further that the word 'other' should be afforded a broad interpretation because Code B3020 of the Basel Convention is based on point 47.07 of the harmonised system of nomenclature 'HSN' which applies to the cross-border movement of goods for the purposes of international customs law.⁵² Within the context of that system, 'other' is interpreted broadly.

47. That submission is fundamentally flawed. It fails to take account of the fact that the objectives of Regulation No 1013/2006 and the HSN are not the same. Recital 1 explains very clearly that the predominant aim of Regulation No 1013/2006 is environmental protection, and that its effects on international trade are only incidental. It follows that the HSN is simply irrelevant to interpreting the fourth indent of Code B3020 for the purposes of Regulation No 1013/2006.

48. I therefore conclude that the mixture of wastes at issue does not fall within Annex III to Regulation No 1013/2006.

47 The Netherlands Government suggests in its written observations that the Dutch language version of Annex IX to the Basel Convention can be read as though the fourth indent applies to unsorted waste rather than scrap as a distinct form of waste.

48 Article 1 of Regulation 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny (OJ 2009 L 87, p. 109). See Point 3.9 in the Annex to that Regulation under the heading 'Regulation (EC) No 1013/2006 of the European Parliament on shipments of waste' and the subheading 'Amendment of Annexes'.

49 Commission Regulation (EU) No 664/2011 of 11 July 2011 amending Regulation (EC) No 1013/2006 of the European Parliament on shipments of waste in Annex IIIA thereto (OJ 2011 L 182, p. 2).

50 Recital 2 to of Regulation No 664/2011: see also Article 1.

51 See point 57 et seq below.

52 The harmonised system of nomenclature for the classification of goods allows participating countries to classify traded goods on a common basis for customs purposes. See the Nomenclature appended to the International Convention on Harmonised Commodity Description and Coding System adopted in June 1983 which entered into force in January 1988. The latest version was amended by the Customs Cooperation Council Recommendation of 27 June 2014 and entered into force on 1 January 2017. See *HS Convention: World Customs*, published at http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx, and *HSN: World Customs Organisation*, published at <http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition.aspx>.

Annex IIIA to Regulation No 1013/2006

49. Does the mixture of wastes at issue fall within Annex IIIA to Regulation No 1013/2006?

50. In my view, the reply to that question should be ‘no’, for the following reasons.

51. I read point 3(g) of Annex IIIA as covering mixtures of wastes which are composed of materials that fall within indents one to three of Code B3020. Put a different way, point 3(g) of Annex IIIA covers mixtures of ‘waste made up of materials that would fall within one of the first three indents of Code B3020 (and would therefore be covered by Annex III) if they were not in a combined form (that is, if they were not a *mixture*). That reading is consistent with the heading of Annex IIIA (‘Mixtures of two or more wastes listed in Annex III and not classified under one single entry as referred to in Article 3(2)’). It is also consistent with the legislative scheme which is based on the premiss that the Basel Convention and the OECD Decision are the main pillars of Regulation No 1013/2006.⁵³ Those international instruments reflect the fact that the ‘Green’ listed wastes (of which ‘paper, paperboard and waste products’ form a category) should be subject to the Green control procedure, rather than the prior notification procedure normally applied under Article 4 of Regulation No 1013/2006. If other wastes which are *not* classified under Code B3020 (here, wastes constituting up to 10% impurities)⁵⁴ are mixed with wastes falling within that code, the resulting waste stream would not in principle fall within point 3(g) of Annex IIIA.⁵⁵

52. That is because the wording of the preamble to Annex IIIA mirrors that of the introduction to Annex III. It states that notwithstanding that a mixture of wastes is included on the list set out therein, it may not be subject to the Green control procedure *if it is contaminated by other materials*. The level of contamination is not defined precisely. Two alternative criteria are set out which, if triggered, exclude the waste stream from being treated under the Green control procedure. First, it is necessary for the competent authorities to establish whether the level of contamination by impurities increases the risks associated with the wastes to an extent that it renders appropriate the prior notification procedure for hazardous waste laid down in what was Annex III to Directive 91/689. Second, the Green control procedure under Article 18 cannot apply in cases where the contamination levels are such as to prevent the recovery of wastes in an environmentally sound manner.⁵⁶

53. The presence of those two alternative criteria shows that the EU legislature was aware that it is technically difficult (if not impossible) to ensure that any waste stream is totally pure. Application of the two criteria is intended to address the situation in which ‘Green’ listed waste is contaminated by other materials.

54. The mixture of wastes at issue here is precisely such a composite form of waste.⁵⁷ Do the 10% impurities that comprise part of that mixture of wastes preclude it from being shipped under the Article 18 procedure?

55. In my view, point 3(g) of Annex IIIA only allows a mixture of wastes such as that at issue to benefit from the Green control procedure if it can be demonstrated that a risk mentioned in paragraph (a) of the preamble is *not* present (that is, a risk because the waste in question has hazardous characteristics) and that the presence of impurities does *not* prevent recovery of the wastes at issue in an environmentally sound manner (as specified by paragraph (b) of the preamble).

⁵³ See the Commission’s proposal for a Regulation of the European Parliament and of the Council on shipments of waste, COM(2003) 379 final, p. 5.

⁵⁴ See point 21 above.

⁵⁵ Judgment of 21 June 2007, *Omni Metal Service*, C-259/05, EU:C:2007:363, paragraph 35.

⁵⁶ Annex III (a) and (b) — see point 68 below.

⁵⁷ See point 28 above.

56. So, what level of contamination of a mixture of ‘Green’ listed wastes precludes the use of the Article 18 procedure?

Contamination and mixtures of ‘Green’ listed wastes

57. Interseroh argues that the mixture of wastes at issue should be able to benefit from the Green control procedure. The SBW, the Netherlands and Poland disagree. The Commission submits that as Regulation No 1013/2006 does not fix specific thresholds for the levels of impurities that may be tolerated in ‘Green’ listed wastes, that is a matter for the national authorities to determine on a case-by-case basis.

58. The test laid down in the preamble to both Annex III and Annex IIIA is whether the wastes are ‘contaminated by other materials’ *to an extent which*: (a) ‘increases the risks associated with the wastes sufficiently to render them appropriate for submission to [the prior notification procedure] ...’ or (b) ‘prevents the recovery of the wastes in an environmentally sound manner’.

59. Whether either of those conditions is met is essentially a question of fact. Some or all of the following factors will be relevant: (i) the type of impurities; (ii) the properties of the wastes that comprise the impurities and whether they are hazardous; (iii) the amount of impurities; and (iv) the available technology.⁵⁸

60. The facilities available in the Member State of destination for recovery of such wastes in an environmentally sound manner may also vary between the EU Member States.

61. The referring court has described the impurities at issue here in its order for reference. It clearly indicates that the impurities amount to a maximum of 10% of the mixtures of wastes. However, the order for reference does not record any factual finding as to whether those wastes could be recovered in an environmentally sound manner in the Netherlands, the Member State of destination.

62. In its written submissions the Netherlands Government helpfully points out that in addition to the ‘Green’ listed waste, the mixture of wastes at issue constitutes a composite of staples, paper clips — metal/plastic, sticky binding tape, plastic envelope windows and metal parts from folders. There would also be remnants of food (for example in cardboard pizza boxes). In the Netherlands, a level of 2% of impurities is acceptable in practice. Above that threshold, the paper wastes do not lend themselves to being treated as pulp and additional pre-treatment is necessary. In such cases it would be necessary for the competent authorities to make an initial examination of the manner of recovery to establish whether the prior notification procedure should be invoked.

63. It is settled case-law that EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where EU provisions are intended specifically to give effect to an international agreement concluded by the European Union.⁵⁹ The title of Basel Code B3 (of which Code B3020 is part) reads as follows: ‘Wastes containing principally organic constituents, which may contain metals and inorganic materials’. Those words read together with the preamble to Annexes III and IIIA to Regulation No 1013/2006 suggest to me that the legislature considered that wastes might be suitable for the Green control procedure under Article 18, even where impurities are present.

⁵⁸ Recital 39 to Regulation No 1013/2006.

⁵⁹ Judgment of 8 September 2015, *Philips Lighting Poland and Philips Lighting v Council*, C-511/13 P, EU:C:2015:553, paragraph 60.

64. In any particular case, it will nevertheless be necessary to determine whether the level of impurities in a mixture of ‘Green’ listed wastes prevents the recovery of the wastes in question in an environmentally sound manner. That is in principle an issue of fact that it will fall to the national competent authorities (and perhaps, if litigation then ensues, to national courts) to determine, rather than this Court.⁶⁰ But how are those authorities meant to know what maximum level of impurities that actually means?

65. The Commission is correct in pointing out that the legislation is silent on that point.

66. The OECD Guidance Manual for the control of transboundary movements of recoverable wastes⁶¹ states that a ‘mixture of Green waste and more than a *de minimis* amount of an Amber waste [62] ... shall be subject to the Amber control procedure. The interpretation of the term “a *de minimis* amount”, in the absence of internationally accepted criteria, is to be defined according to national regulations and procedures’.

67. The Latin expression ‘*de minimis*’ means literally ‘about minimal things’. It appears in the legal context in the expression ‘*de minimis non curat lex*’ — ‘the law does not concern itself with trifles’. Something that is *de minimis* is so insignificant that it can be disregarded.

68. In my view the presence of impurities at a level of 10% cannot be readily be classified as trifling or insignificant. I do not think that it can be *assumed* that the presence of that level of impurities would not cause difficulties for the recovery of the mixture of wastes at issue in an environmentally sound manner.⁶³ It will, however, be open to Interseroh to adduce the necessary scientific evidence to satisfy the SWB that the mixture of wastes that it wishes to ship does not fall foul of either paragraph (a) or paragraph (b) of the preamble to Annex IIIA of Regulation No 1013/2006.

69. What then is the appropriate level?

70. The aims of Regulation No 1013/2006 include promoting a uniform application of the rules and coherence throughout the European Union.⁶⁴ It therefore seems to me that the appropriate level of impurities that may be tolerated should not be established merely by a case-by-case approach.

71. The Commission has powers to adopt delegated legislation under Article 58(1)(a) of Regulation No 1013/2006. In so doing the Commission is assisted by a committee which can advise on matters of technical progress — something that would be both relevant and helpful in setting the levels of impurities that may be tolerated.

60 Judgment of 6 September 2018, *Alpenrind and Others*, C-527/16, EU:C:2018:669, paragraph 68.

61 Published at <https://www.oecd.org/env/waste/guidance-manual-control-transboundary-movements-recoverable-wastes.pdf>.

62 See point 7 and footnote 9 above.

63 See recital 3 to Regulation No 1013/2006. See also the account of the debate in Council of 2 March 2004 2003/0139 COD ‘requirements for dealing with mixtures of non-hazardous “green” waste. There is a risk that the mixture of different types of non-hazardous “green” waste would impair its environmentally sound recovery. A majority of delegations considered that a precautionary approach might justify treating such mixtures as hazardous “amber” listed waste as proposed by the Commission. Others maintained that mixed green waste should only comply with the OECD Decision according to which: “a mixture of two or more Green wastes shall be subject to the Green control procedure, provided the composition of this mixture does not impair its environmentally sound recovery”’.

64 Recitals 7 and 13 to Regulation No 1013/2006.

72. The Commission has indeed recognised, in its guidance on 'Frequently asked questions on Regulation (EC) 1013/2006 on shipments of waste', that establishing what is a tolerable level of contamination is a matter that is due (perhaps, overdue) for examination:

'Some Member States take the view that, in the spirit of a harmonised approach, the basic principle for Green Listed wastes should be a minor contamination, independently from the following recovery operation or the fact whether the operation will take place in an EU Member State with best available technology or in a non-OECD country with low environmental standards since, in their opinion, the concept for classification of Green Listed would be tremendously undermined, if the final destination and type of recovery were the decisive factors. However, it should be noted that [Regulation No 1013/2006] does not prescribe any procedure of how to assess these criteria nor is [there] any binding legislation or EC guidance in place.'⁶⁵

73. In order to set appropriate rules as to what level of contamination may be tolerated, it would be necessary to take account of the views of stakeholders and industry experts as well as information on scientific and technical progress and the opinions of the competent authorities of the Member States. That is not a task for this Court to attempt to perform in the context of the preliminary reference procedure.

74. Unless and until there is an appropriate legislative initiative, Article 28 of Regulation No 1013/2006 will apply where the competent authorities of the Member State of dispatch and the Member State of destination cannot agree on the classification of a particular consignment of wastes (and hence on whether the more flexible Green control procedure in Article 18 may be used). As a result, that waste will be regarded as being listed in Annex IV and accordingly will be subject to the (more onerous) procedure of prior notification and consent laid down in Article 4.

Conclusion

75. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Verwaltungsgericht (Administrative Court, Stuttgart, Germany) as follows:

- Annex III to Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, which cross refers to Code B3020 listed in Annex V thereto, does not apply to mixtures of wastes as defined in Articles 2(3) and 3(2) of that regulation.
- Point 3(g) of Annex IIIA to Regulation No 1013/2006 does not apply to mixtures of wastes which contain a level of impurities up to a maximum of 10% if those mixtures trigger the alternative exclusion criteria laid down in paragraphs (a) and (b) of the preamble to Annex IIIA thereof.
- Mixtures of wastes containing a level of impurities up to a maximum of 10% will only fall within the scope of the procedure laid down in Article 18 of Regulation No 1013/2006 where the shipper adduces the necessary evidence to satisfy the competent national authorities that the alternative exclusion criteria laid down in paragraphs (a) and (b) of the preamble to Annex IIIA thereof are not triggered.
- Article 28 of Regulation No 1013/2006 will apply where the competent authorities of the Member State of dispatch and the Member State of destination cannot agree on the classification of a particular consignment of waste. In those circumstances, the waste in question will be regarded as listed in Annex IV and will therefore be subject to the procedure of prior notification and consent laid down in Article 4.

⁶⁵ The Commission's guidance is set out in 'Frequently asked questions (FAQ) on Regulation (EC) 1013/2006 on shipments of waste', p. 33 (full text available at ec.europa.eu/environment/waste/shipments/pdf/faq.pdf).