

OPINION OF ADVOCATE GENERAL
ALBER
delivered on 4 July 2002 ¹

Table of contents

I — Introduction	I-6167
II — Legal context	I-6168
A — Community law	I-6168
(1) The Waste Directive	I-6168
(2) The Packaging Directive	I-6169
(3) Divergences between the various language versions	I-6170
B — National rules	I-6171
III — Facts of the main proceedings	I-6172
IV — Order for reference	I-6173
V — Arguments of the parties	I-6174
A — Mayer Parry Recycling Limited	I-6174
B — The Environment Agency	I-6176
C — Corus UK Limited	I-6178
D — The Danish Government	I-6178
E — The Netherlands Government	I-6179
F — The Austrian Government	I-6180
G — The United Kingdom Government	I-6181
H — The Commission	I-6184
VI — Legal assessment	I-6184
A — The relationship between the Waste Directive and the Packaging Directive ..	I-6184

¹ — Original language: German.

B — The relationship between the concept of waste and recycling	I-6187
C — The order in which the two questions referred for a preliminary ruling should be dealt with	I-6190
D — The second question referred for a preliminary ruling	I-6190
(1) Preliminary remarks	I-6190
(a) Recycling in Community law	I-6190
(b) Recycling in the Packaging Directive's legislative context	I-6191
(i) High level of environmental protection	I-6192
(ii) No distortion of competition in the internal market	I-6192
(c) Evolution of the concept of recycling in the legislative process	I-6193
(d) Subsequent evolution	I-6194
(2) Interpretation of Article 3(7) of the Packaging Directive	I-6195
(a) Waste materials	I-6195
(b) Reprocessing for the original purpose or another purpose	I-6197
(c) Production process	I-6197
(3) Classification of the operation carried out by MPR	I-6197
(4) Classification of the operation carried out by the steel producers	I-6200
E — The first question	I-6201
VII — Conclusion	I-6203

I — Introduction

1. In the present proceedings, the High Court of Justice in London seeks a preliminary ruling from the Court of Justice on the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste²

(‘the Waste Directive’) and European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste³ (‘the Packaging Directive’). The point at issue is essentially whether the treatment (sorting, cleaning, cutting, crushing, separating and/or baling) by the claimant in the main proceedings, Mayer Parry Recycling Limited (‘MPR’), of packaging waste made of metal amounts to complete recycling so that, after its processing, the scrap metal is no longer to be classified as waste.

2 — 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 amending Directive 75/442 (OJ 1991 L 78, p. 32) and by Commission Decision 96/350/EC of 24 May 1996 adapting Annexes IIA and IIB to Directive 75/442 (OJ 1996 L 135, p. 32).

3 — OJ 1994 L 365, p. 10.

2. MPR would like to be accredited as a reprocessor entitled to issue Packaging Waste Recovery Notes ('PRNs') (as to the significance of PRNs, see point 19 below). That right has been granted by one of the defendants in the main proceedings, the Environment Agency, which has competence for England and Wales, to the steel-makers which melt down the material processed by MPR and produce ingots, sheets or coils from it.

Annex I which the holder discards or intends or is required to discard.'

4. Annex I to the Waste Directive specifies, under point Q5, 'materials contaminated or soiled as a result of planned actions (e.g. residues from cleaning operations, packing materials, containers, etc.)'. The annex also contains two sweep-up points: Q1 'Production or consumption residues not otherwise specified below' and Q16 'Any materials, substances or products which are not contained in the above categories'.

II — Legal context

A — *Community law*

(1) The Waste Directive

3. Article 1 of the Waste Directive provides:

5. For the concept of recovery, Article 1(f) refers to the operations provided for in Annex IIB. That annex lists, under point R3, 'recycling/reclamation of metals and metal compounds'.

6. Article 3(1) of the Waste Directive sets the following objectives for the Member States:

'For the purposes of this Directive:

(a) "waste" shall mean any substance or object in the categories set out in

'(a) firstly, the prevention or reduction of waste production and its harmfulness,...

(b) secondly:

6. “recovery” shall mean any of the applicable operations provided for in Annex IIB to Directive 75/442/EEC;

(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials,

7. “recycling” shall mean the reprocessing in a production process of the waste materials for the original purpose or for other purposes including organic recycling but excluding energy recovery’.

or

(ii) the use of waste as a source of energy.’

8. Article 6(1) of the Packaging Directive imposes the following obligation for the recovery of packaging waste:

(2) The Packaging Directive

‘In order to comply with the objectives of this Directive, Member States shall take the necessary measures to attain the following targets covering the whole of their territory:

7. Article 3 of the Packaging Directive contains, *inter alia*, the following definitions:

‘2. “packaging waste” shall mean any packaging or packaging material covered by the definition of waste in Directive 75/442/EEC, excluding production residues;

(a) no later than five years from the date by which this Directive must be implemented in national law, between 50% as a minimum and 65% as a maximum by weight of the packaging waste will be recovered;

...

(b) within this general target, and with the same time-limit, between 25% as a

minimum and 45% as a maximum by weight of the totality of packaging materials contained in packaging waste will be recycled with a minimum of 15% by weight for each packaging material.'

languages and Dutch, words cognate with the word 'recycling' ('recyclage', 'reciclado', 'riciclo' and so forth) are likewise to be found in both provisions. In other languages, words not cognate with 'recycling', but which are the same in both directives, are chosen.

9. In accordance with Article 8, in order to achieve the recovery rate the Member States must set up systems for the return and/or collection and also the recovery of packaging waste.

(3) Divergences between the various language versions

12. Only in the German, Swedish and Finnish versions do different terms appear in the foregoing provisions of the Waste and Packaging Directives. Thus, in German the Waste Directive refers to 'Rückführung' and the Packaging Directive to 'stoffliche Verwertung'. In the German version of the Commission's proposal for the Packaging Directive, the word 'Recycling' was added in brackets after the term 'stoffliche Verwertung', but it was dropped in the subsequent legislative process.

10. At the heart of these proceedings is the concept of recycling within the meaning of the Packaging and Waste Directives. It is accordingly necessary at this early stage to point out some terminological differences in the various language versions of both directives.

11. The term 'recycling' is used in the English version of both Article 3(1)(b)(i) of the Waste Directive and Article 3(7) of the Packaging Directive. In the Romance

13. Finally, in Directive 2000/53/EC of the European Parliament and of the Commission of 18 September 2000 on end-of-life vehicles ('Directive 2000/53'),⁴ which admittedly is not directly relevant to the present case but is referred to by some parties for the purpose of comparison, the German version too speaks of 'recycling'.

4 — OJ 2000 L 269, p. 34.

14. Since only a small proportion of the language versions thus contain different terms in the two directives, it cannot be concluded from the difference in choice of words in those versions alone that the terms have different meanings. In the remainder of this Opinion, the terms 'stoffliche Verwertung', 'Rückführung' and 'Recycling' are therefore understood linguistically as synonyms. That does not preclude, however, that 'recycling' for the purpose of the Waste Directive and for the purpose of the Packaging Directive have different meanings in accordance with their respective definitions, as remains to be examined.

16. Under the Regulations producers must be registered, take steps to recover and recycle specified quantities of packaging waste and furnish certificates of compliance in respect of their recovery and recycling obligations. It is a criminal offence to contravene those requirements.

17. Producers may also, and in practice generally do, satisfy their obligations by being a member of a registered scheme.

B — *National rules*

15. Article 6(1) of the Packaging Directive was transposed into national law by the Producer Responsibility Obligations (Packaging Waste) Regulations 1997 ('the Regulations'). The Regulations require producers of packaging waste to recycle or recover by other means specific quantities of such waste. 'Recovery' and 'recycling' have the same definitions in the Regulations as in the Packaging Directive.

18. The British environment agencies have issued guidance in 'Producer Responsibility Obligations 1997: Guidance on evidence of compliance and voluntary accreditation of reprocessors', which is known as 'the Orange Book'. The Orange Book document sets out in greater detail the requirements of the environment agencies with regard to evidence that producers have complied with their recovery and recycling obligations and provides for a voluntary system of accreditation for reprocessors entitled to issue PRNs.

19. A reprocessor certifies in a PRN the amount of packaging waste from the United Kingdom accepted by him, whether it is to be recycled or recovered and which

recovery operations are to be applied to the material. Through the submission of PRNs, a producer can demonstrate to the Environment Agency that the packaging waste which he has delivered (or had delivered on his behalf) to an accredited reprocessor has been duly recycled or recovered. PRNs are tradeable and have an economic value (£10 to £15 per tonne in 2000 in the case of the metal packaging waste at issue here).

20. The Environment Agency accredits the businesses listed in paragraph 3 of Annex D to the Orange Book; for metals (aluminium and steel), businesses producing ingots, sheets or coils from packaging waste are accredited as reproducers.

21. Accreditation is thus granted in respect of the point in the materials cycle at which a new product is made that is indistinguishable from one made from primary raw materials. That is intended to facilitate the administrative process and ensure that PRNs are not issued twice in the course of the processing of the same material.

III — Facts of the main proceedings

22. MPR obtains — generally against payment — scrap metal, including packaging

waste, from industrial and other sources. It processes the scrap so that it meets the Grade 3B specification developed by the industry. That essentially requires the following processing steps: visual inspection, radiation testing, shredding into fist-sized pieces, several sorting processes to separate out foreign substances (for example plastics, non-ferrous metals, glass or stones), and further visual inspection. Around 4.1% of Grade 3B material is metal from packaging waste. MPR then sells the Grade 3B material to steelworks, which produce ingots, sheets or coils of steel from it. Grade 3B material is highly efficient because of its high iron content, its high density and its large surface area. It sells for around £60 per tonne.

23. The parties to the main proceedings disagree as to the extent to which the Grade 3B material produced by MPR still contains organic and inorganic impurities; the figures range from 2%-3% (MPR — non-free contaminants) up to 7% (the Environment Agency). The impurities include remaining surface coatings such as paint or oil, non-metallic materials and undesirable chemical elements. Because of its potential pollutant content, Grade 3B material is required to be kept under cover or on a hard standing with drainage to a sump. The impurities are not removed until the steel-production stage.

24. Steel producers are subject to the Integrated Pollution Control regime laid down by the Environmental Protection Act 1990. Under that regime, the processes used by them must meet certain environmental standards and require authorisation. On the other hand, they are exempt from licensing under national waste management legislation.

which (when received by that undertaking) constitute “waste” within the meaning of Article 1(a) of Council Directive 75/442/EEC on waste, as amended by Council Directive 91/156/EEC and Commission Decision 96/350/EC, by means of sorting, cleaning, cutting, crushing, separating and/or baling so as to render those materials suitable for use as a feedstock in a furnace in order to produce ingots, sheets or coils of steel:

25. In November 1998 MPR applied for accreditation as a reprocessor entitled to issue PRNs. By letter dated 15 November 1999, the Environment Agency refused that application. MPR then commenced proceedings before the High Court, seeking, *inter alia*, annulment of that decision and a declaration that it performs recovery and recycling within the meaning of the Packaging Directive.

(1) Have those materials been recycled, and do they cease to be waste, for the purposes of Council Directive 75/442, when they have been:

(a) rendered suitable for use as a feedstock, or

IV — Order for reference

26. By order of 9 November 2000, the High Court stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

(b) used by a steelmaker so as to produce ingots, sheets or coils of steel?

‘Where an undertaking deals with packaging materials including ferrous metals,

(2) Have those materials been “recycled” for the purposes of European Parliament and Council Directive 94/62/EC

on packaging and packaging waste when they have been:

(a) rendered suitable for use as a feed-stock, or

(b) used by a steelmaker so as to produce ingots, sheets or coils of steel?

scrap, which is not waste but a secondary raw material; the Packaging Directive must be interpreted consistently with the Waste Directive; since Grade 3B scrap is not waste, the processing by MPR must also be regarded as complete recycling for the purposes of the Packaging Directive.

29. With regard to the Community law framework, MPR explains that four principal common features of the Waste Directive and the Packaging Directive can be identified.

V — Arguments of the parties

27. Observations have been submitted to the Court of Justice by the following parties: MPR; the Environment Agency; Corus UK Limited ('Corus'), a steel producer which has intervened in the main proceedings in support of the Environment Agency's position; the United Kingdom, Netherlands, Danish and Austrian Governments; and the Commission.

30. First, the terms 'waste', 'recovery' and 'recycling' have the same meaning in both directives, recycling being a particular form of recovery. Recovery operations for the purposes of the directives can only be carried out on waste. Second, the decisive factor for the definition of waste is that the person holding the material discards it. Third, the directives pursue the objective of conserving raw materials through waste recovery. Fourth, a distinction is drawn between physical recovery and energy recovery.

A — *Mayer Parry Recycling Limited*

28. MPR puts interpretation of the Waste Directive to the fore and argues in summary as follows: it recovers packaging waste and produces Grade 3B ferrous

31. MPR also explains the economic significance of eligibility to issue PRNs, a right enjoyed by the person who carries out the recycling. Since MPR's processing of the

scrap metal enables it to be used by steel producers in the same way as a primary raw material, MPR's Grade 3B material is not waste but a secondary raw material. The steel producers therefore do not recover any waste and if only for that reason cannot be regarded as recyclers.

33. MPR contests, on the other hand, the approach put forward by the Environment Agency, according to which recovery is not completed until later, that is to say when one can no longer tell whether a product has been made from waste or from primary raw materials. That argument, which is based on the definition of recycling in the Packaging Directive, is not tenable. The Packaging Directive is subordinate to the Waste Directive and cannot define the concept of recovery in a manner that diverges from the Waste Directive.

32. In its observations on the first question referred for a preliminary ruling, MPR derives the following guiding principles from the case-law of the Court of Justice or the Opinions of Advocates General. It is for the national court to determine in the light of all the circumstances whether material is waste.⁵ In deciding whether it is waste, the decisive factor is whether the holder discards it.⁶ Waste recovery is to be distinguished from normal industrial treatment of products.⁷ Recovery has been completed if the recovered substance can be used directly in a production process as a secondary raw material.⁸

34. In Article 3(7) of the Packaging Directive which defines recycling, the focus placed on reprocessing in a production process serves to distinguish recycling from energy recovery. The process applied by MPR constitutes a production process in any event, in that a secondary raw material, namely Grade 3B scrap, is produced. That material is not waste because it has an economic value and there would be no risk of its being discarded.

5 — MPR refers to the Opinions of Advocate General Jacobs in Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, point 56, and Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, points 69 and 70, and to the judgment in Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraphs 51, 65 to 71, 73, 88 and 97.

6 — Opinion in *Inter-Environnement Wallonie*, cited in footnote 5, points 26, 27 and 60, Opinion in *Tombesi*, cited in footnote 5, points 50 and 51, and judgment in *ARCO Chemie*, cited in footnote 5, paragraphs 34, 36, 46 and 47.

7 — Judgment in *Inter-Environnement Wallonie*, cited in footnote 5, paragraph 33.

8 — Opinion in *Tombesi*, cited in footnote 5, points 53 and 54, Opinion in *Inter-Environnement Wallonie*, cited in footnote 5, point 78, and judgment in *ARCO Chemie*, cited in footnote 5, paragraphs 93 and 94.

35. MPR suggests the following factors in particular for distinguishing a secondary raw material from waste: the substance's suitability for reutilisation with or without further pre-treatment, its economic value and the environmental hazards posed by it. In MPR's view, it is for the referring court to determine the extent to which those criteria are met.

36. Should the Court of Justice none the less wish to consider the matter, MPR contends that Grade 3B material meets the criteria for secondary raw materials. It can be used directly for steel production, just as iron ore, without further treatment. No special environmental protection measures are required either for its storage and transportation or when it is used to produce steel.

37. MPR submits with regard to the second question that materials which have been completely recovered and are no longer waste for the purposes of the Waste Directive are also to be regarded as recycled for the purposes of the Packaging Directive.

B — *The Environment Agency*

38. The Environment Agency agrees with MPR that the same understanding of the terms 'waste' and 'recovery' underlies both directives. It takes the view, however, in contrast to MPR, that the treatment carried out by MPR does not amount to complete recycling. It is not until the Grade 3B material has been melted down and the steelmaker has produced ingots, sheets or coils of steel that recycling is completed and waste ceases to be present.

39. With regard to the relationship between the two questions referred for a preliminary ruling, the Environment Agency states that the two directives must be interpreted together. The Packaging Directive merely makes clearer what is to be understood by recycling as a particular form of recovery. Article 2(2) of the Waste Directive expressly allows special directives for particular categories of waste such as packaging waste. Since both directives pursue the objective of encouraging waste recovery, the same definition of 'recovery' is to be used as a basis. After complete recycling for the purposes of the Packaging Directive, the recovered material can equally no longer be regarded as waste for the purposes of the Waste Directive.

40. With regard to the first question, the Environment Agency stresses first of all that the Court of Justice should answer the question itself. The assessment as to when waste has been completely recovered cannot be left to the Member States, as MPR submits, since that runs counter to the objective of harmonisation of laws throughout the Community. The concepts of waste and recovery are sufficiently specific to be of direct application without being further defined by national law.

41. The Environment Agency also refers to the case-law stating that the concept of

waste is to be interpreted broadly⁹ and to the objectives of the Waste Directive, namely to avoid waste, encourage recovery and prohibit the uncontrolled disposal of waste.

42. The Waste Directive does not lay down when material ceases to be waste. In any event, that does not happen simply because waste comes into the possession of the person who wishes to recover material or carry out some other treatment. The fact that waste is subjected to one of the recovery operations specified in Annex IIB to the Waste Directive may mean that it ceases to be waste, but that is not necessarily the case, as the Court has held.¹⁰

43. MPR does not carry out recycling, but only pre-processing in that it sorts the waste and changes its composition. MPR is consequently a waste producer within the meaning of Article 1(b) of the Waste Directive. The treatment carried out by MPR is not reprocessing in a production process under Article 3(7) of the Packaging Directive. Equally, in Directive 2000/53 the corresponding treatment of end-of-life cars is regarded as pre-treatment and not as recycling.

44. The Environment Agency contests MPR's argument that Grade 3B scrap constitutes a secondary raw material and has therefore been recycled. Recovery does not always have the aim of extracting secondary raw materials. Nor, under the Court's case-law, does a material cease to be waste by being transformed into a secondary raw material. Its suitability for use as a raw material does not preclude its classification as waste.

45. In addition, the Environment Agency disputes MPR's assertion that no special environmental protection controls are required when dealing with Grade 3B material. Steel producers who process Grade 3B scrap are subject to Integrated Pollution Control.

46. Moreover, the Court, in contrast to certain Advocates General, has regarded the environmental protection requirements for dealing with a material or the environmental hazards posed by the material as likewise not determining whether it is classified as waste.¹¹

9 — Judgment in *ARCO Chemie*, cited in footnote 5, paragraphs 34 to 40.

10 — Judgment in *ARCO Chemie*, cited in footnote 5, paragraphs 89, 95, 96 and 97.

11 — The Environment Agency refers in particular to the judgments in *Inter-Environnement Wallonie*, cited in footnote 5, paragraph 30, and in *ARCO Chemie*, cited in footnote 5, paragraphs 64 to 69.

47. On the basis of its answer to the first question, the Environment Agency suggests in answer to the second question that the packaging waste has been recycled only when ingots, sheets or coils of steel have been produced.

packaging or for other production purposes. This requirement is met only by Corus's products, and not MPR's upstream products. In the absence of Community provisions, the mode of proof of recycling can be laid down by the Member States.

C — *Corus UK Limited*

48. In Corus's submission, only the second question need be answered. In that connection, it is for the Member State to select the point at which materials may be regarded as completely recycled and decide whether or not they are still waste, in so far as the objectives of the Packaging Directive are thereby observed.

51. Income from the issue of PRNs is used by the undertakings carrying out the recycling to expand capacity. This helps to increase the recycling rate for metal packaging waste which is still very low. MPR, on the other hand, has no corresponding commercial interest in the recovery of packaging waste as such waste forms only a very small part of its throughput. If MPR were entitled to issue PRNs, there would be a risk that it would process large amounts of Grade 3B scrap and then only store it.

49. The United Kingdom has settled on a correct and perfectly justifiable point in time for completion of recycling by focusing on the production of ingots, sheets and coils by the steelmaker. Grade 3B scrap, on the other hand, is to be regarded as waste.

D — *The Danish Government*

50. The question whether material has been recycled is to be decided on the basis of the Packaging Directive alone. The answer turns on whether the material can be used again in the manufacture of

52. The Danish Government essentially agrees with the submissions of the Environment Agency. The concept of waste is, in its view, to be interpreted broadly in order to ensure that the waste stream and waste disposal and recovery are monitored. As soon as material ceases to be waste it is no longer subject to corresponding controls. In

particular, Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community¹² ceases to apply. In accordance with the case-law, the economic value of material or its recoverability is irrelevant to the definition of waste.

as waste, as the Court has held,¹⁵ *a fortiori* pre-treatment does not lead to that result.

E — *The Netherlands Government*

53. The scrap metal processed by MPR is waste. The 'reprocessing' referred to in the definition of recycling presupposes an alteration in the material's composition which makes it immediately usable again. That precondition is not met until the steelmaker makes its products.

54. In Denmark, gathering and sorting are taken to be not recovery but pre-treatment. Corresponding pre-treatment may or must also take place in some circumstances before waste is disposed of, as shown by, for example, Article 6 of Council Directive 1999/31/EC of 26 April 1999 on the land-fill of waste¹³ and Article 6 of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste.¹⁴

55. If not even complete recovery necessarily deprives material of its classification

56. The Netherlands Government states with regard to the first question that the point in time at which material is recycled coincides with the point in time at which it ceases to be waste. In *Arco Chemie*, the Court laid stress on the importance of the idea of discarding to the concept of waste.¹⁶ That concept must be interpreted in a manner consistent with the objectives of the Waste Directive and therefore broadly.

57. Under the Waste Directive, there recycling takes place not only where waste is used in a production process but also in the case of recovery with the objective of extracting secondary raw materials. Whether a secondary raw material with the same characteristics as a primary raw material has been created from the waste depends on whether the holder of the material produced discards it.

12 — OJ 1993 L 30, p. 1.

13 — OJ 1999 L 182, p. 1.

14 — OJ 2000 L 332, p. 91.

15 — Judgment in *ARCO Chemie*, cited in footnote 5, paragraph 96.

16 — Cited in footnote 5, paragraphs 36 to 41.

58. In that regard, account is to be taken of the following cumulative criteria: the material's composition must be such as to enable it to be used in the same way as the corresponding primary raw material; it must not contain more impurities than the primary raw material; it must be capable of being used without further pre-treatment; its use must not give rise to any higher environmental risk than use of the primary raw material; the use must not consist merely of a recovery process; and the material must not have a negative economic value.

raw materials are achieved only through actual use in a production process. Furthermore, that is the only way of ensuring that no double-counting occurs in relation to meeting the recycling rates under Article 6 of the Packaging Directive.

F — *The Austrian Government*

59. The answer to the first question should therefore be that packaging waste that includes metals is recycled for the purpose of the Waste Directive and no longer waste when the criteria set out above are met and the material is thus suitable for use as a raw material.

61. In its examination of the first question the Austrian Government points out that recycling is defined not in the Waste Directive but in the Packaging Directive. Directive 2000/53 also contains a definition in similar terms. Those definitions focus on use in a production process and are narrower than the concept of recovery under the Waste Directive.

60. The Netherlands Government submits with regard to the second question that 'recycling' in the Packaging Directive has a different meaning from 'recycling' in the Waste Directive. Waste is not recycled within the meaning of the Packaging Directive until it has been reused in a production process, hence in the present case on the production of ingots, sheets and coils of steel. The objectives of saving energy and

62. With regard to the concept of waste, the Austrian Government refers to the findings of the Court in *Arco Chemie*.¹⁷ The point at which recovery is completed is determined by the following criteria: the material is normally used for the purpose in question and there is a market for it;

¹⁷ — Cited in footnote 5, paragraphs 40, 41 and 97.

quality criteria exist which take account of its characteristics as waste; it does not give rise to any higher environmental risk than comparable raw materials.

might occur in a number of stages. It is necessary to avoid recovery operations in respect of the same material being taken into account more than once for the purposes of the recycling rate under Article 6(1)(b) of the Packaging Directive. Recycling is carried out in the present case by the steel producers.

63. The Austrian Government adds in relation to the second question that recycling need not be effected in one step. At every step it must be examined whether there is, or perhaps only appears to be, recovery.

67. MPR's treatment of the waste does not correspond to the definition of recycling in Article 3(7) of the Packaging Directive. Sorting, cleaning, crushing and baling do not constitute production processes.

64. In summary, MPR carries out waste recovery, but only as a step preliminary to recycling within the meaning of the Packaging Directive.

68. Nor is reprocessing involved, since the waste retains its essential characteristics and does not become a new product. Reprocessing presupposes a use similar to the original use, that is to say melting down in the place of the primary raw material and the production of ingots, sheets and coils of steel. The pre-treatment carried out by MPR for that use is not itself reprocessing. Only this view meets the objective laid down in Article 6(2) of the Packaging Directive of manufacturing packaging or other products from recycled packaging material where possible.

G — *The United Kingdom Government*

65. The United Kingdom Government states that only the second question needs to be answered in order to dispose of the main proceedings and it therefore focuses its observations on that question.

66. It points out that packaging waste can be recycled only once, even though this

69. The United Kingdom Government underpins that view by drawing a compari-

son with Directive 2000/53, which contains provisions similar to those of the Packaging Directive.

covery', refers only to the 'applicable operations' provided for in Annex IIB to the Waste Directive.¹⁸

70. It contests the interpretation put forward by MPR under which the Packaging and Waste Directives are read as one. The Waste Directive does not establish any definitions which are to apply to all other legislation in this field; on the contrary, the definitions in Article 1 of the Waste Directive are expressly stated to be for the purposes of that directive.

73. It is apparent from Annex IIB to the Waste Directive that waste can pass through several recovery steps. Metallic waste could for example be stored first of all (R 12) and the metal could later be reclaimed (R 3). Recycling, on the other hand, is possible only once, for the reasons stated. Only such operations listed in Annex IIB to the Waste Directive as constitute recycling can be applicable operations within the meaning of Article 3(6) of the Packaging Directive.

71. When the Community legislature wishes to use in other legal measures the same definitions as in the Waste Directive, it does so by express reference. The Packaging Directive contains some such references; as for the remainder, the terms used in it are to be interpreted autonomously.

74. The Packaging Directive contains independent definitions of the terms 'recycling', 'energy recovery' and 'organic recycling' (Article 3(7), (8) and (9)). Other forms of recovery are not mentioned. Only the types of recovery expressly mentioned are applicable operations under the Packaging Directive. Of those, only recycling is applicable to metals.

72. Article 2(2) of the Waste Directive expressly envisages the adoption of special rules, such as the Packaging Directive. The Packaging Directive contains independent definitions of the terms 'recycling' and 'recovery'. Article 3(6), which defines 're-

18 — The language versions diverge. While the German version and some others, for example the Spanish version, refer generally to the operations provided for in Annex IIB to the Waste Directive ('die Maßnahmen', 'cualquiera de las operaciones'), other language versions have a restriction added (for example 'applicable operations', 'opérations applicables', 'pertinenti operazioni', 'toepasselijke handelingen').

75. It is not sufficient for MPR to carry out a recovery operation under Annex IIB to the Waste Directive; rather, it must carry out an applicable operation under the Packaging Directive, namely recycling.

76. In order to ensure that the recovery of packaging waste is recorded in accordance with uniform standards throughout the Community, it is necessary to have a clearly definable criterion determining when material is completely recovered. To that extent the Member States are left with no discretion. The most suitable point in time is when the scrap metal is melted down again.

77. The Packaging Directive has the objective of actual reprocessing. As long as packaging waste has only been prepared for reprocessing, actual use, namely the melting down, is not ensured.

78. A substance is to be regarded as recycled packaging material for the purposes of Article 6(1)(b) of the Packaging Directive if two conditions are met: the packaging material must have been packag-

ing waste and it must have been recycled. It is irrelevant whether the material has ceased at any point in time to be waste within the meaning of the Waste Directive.

79. The United Kingdom Government concludes from all the foregoing considerations that it is inappropriate to read the two directives together in the absence of appropriate references in the Packaging Directive.

80. The United Kingdom Government makes further observations on the first question in the alternative only. Unlike the Packaging Directive, the Waste Directive allows the Member States a margin of appreciation in determining what constitutes a recovery operation.¹⁹ It cannot be concluded from the fact that material has been recovered within the meaning of the Waste Directive that it has undergone an applicable recovery operation under the Packaging Directive.

81. The Court has confirmed that the concept of recovery under the Waste Directive needs to be defined more precisely by national implementing legislation.²⁰ The Packaging Directive, on the other hand, allows only three types of recovery (recycling, energy recovery and organic recycling)

19 — The United Kingdom Government refers to the Opinion in *Tombesi*, cited in footnote 5, point 56.

20 — Judgments in *Inter-Environnement Wallonie*, cited in footnote 5, paragraph 33, and in *ARCO Chemie*, cited in footnote 5, paragraph 70.

and to that extent confers no margin of appreciation on the Member States.

stance can still be waste even after complete recovery. That applies *a fortiori* where recovery consists of mere sorting and pre-treatment for subsequent use as a secondary raw material.

82. Nor can the Packaging Directive have retroactively altered the meaning of the Waste Directive which was enacted first. It would be contrary to the principle of legal certainty to wish to ascribe to the Waste Directive a new and different meaning following adoption of the Packaging Directive.

85. The Commission deduces from the arguments of the parties before the national court that Grade 3B scrap still contains impurities which are not removed until it is melted down and that special environmental protection precautions are required for handling the material. This shows that it is waste.

H — *The Commission*

83. The Commission is essentially of the same view as the Environment Agency. The terms 'waste' and 'recovery' have the same meaning in the Waste Directive and the Packaging Directive. The special definition of recycling in the Packaging Directive takes account of the objectives of that directive (priority of recycling over energy recovery).

86. Finally, the Commission stresses the importance of a clear definition of waste for, by way of example, the application of Regulation No 259/93, even if that regulation is not of direct relevance to the present case.

VI — Legal assessment

84. It is true that MPR's activity is a step in the material's recovery, but recovery is not completed until the material is processed in the furnace. Only then is there no longer waste. Nor is that conclusion in any way altered by the fact that MPR's products have an economic value. A processed sub-

A — *The relationship between the Waste Directive and the Packaging Directive*

87. The parties hold differing views as to the relationship between the two directives

and between the terms 'waste', 'recovery' and 'recycling' used in them.

88. A majority is of the opinion that the directives are to be read together and that the respective terms have the same meaning in each. Most of the proponents of this view therefore consider it necessary to answer both questions referred for a preliminary ruling. Since, in their submission, the same understanding of the relevant terms underlies both directives, the answers proposed by them to both questions correspond. With the exception of MPR, they consider that MPR's activity constitutes not complete recycling but pre-treatment or some other recovery operation and that the Grade 3B scrap produced is waste. MPR arrives at the opposite result.

89. The United Kingdom Government and Corus, on the other hand, are of the view that the Packaging Directive is to be interpreted and applied independently and that only the second question referred for a preliminary ruling is relevant to the decision in the main proceedings.

90. In that regard, it must be stated first of all that the Waste Directive introduced in 1975 the first basic rules for harmonisation of national laws in the field of waste disposal. In this area of the law which was then just beginning to develop the Community confined itself in the directive to a few vague framework provisions.

91. Above all, what is actually waste was not laid down precisely. It is true that the Waste Directive was substantially reformulated in 1991.²¹ However, the definition of waste remained almost unchanged. The definition has time and again confronted the Court with difficult questions of interpretation, to which it has not always been possible to find satisfactory answers.

92. In 1991 Article 2(2) was also introduced, which expressly envisages the laying down in further directives of specific rules concerning particular instances, or of supplementary rules, for the management of individual categories of waste. The Packaging Directive constitutes such special supplementary legislation.

93. It is true that Article 2(2) reads like an enabling power. However, such a power is not actually required. The power to adopt directives in the field of waste management arises directly from the EC Treaty, in the case of the Packaging Directive from Article 100a (now, after amendment, Article 95 EC). Even without Article 2(2) of the Waste Directive it would have been open to the Community to adopt further special directives relating to waste.

21 — See footnote 2 above.

94. There is accordingly no order of precedence as between the provisions of the two directives in the sense of the Waste Directive ranking above the Packaging Directive. On the contrary, they are equal-ranking measures of secondary legislation which are directly founded on the Treaty. At the same time the Packaging Directive forms a special legislative measure for the category of waste covered by it which overrides the Waste Directive if their provisions conflict.

95. That of course does not mean that the Waste Directive is irrelevant to the handling of packaging waste. First, the Packaging Directive refers on numerous occasions to the Waste Directive. Through reference to them, definitions in the Waste Directive are also applicable to the matters covered by the Packaging Directive. In that way, account is taken of the objective, set out in the third recital in the preamble of Directive 91/156 amending the Waste Directive,²² of having a basis of common terminology for Community waste law.

96. Corresponding references appear in relation to the definition of packaging waste in Article 3(2) of the Packaging

Directive and of recovery in Article 3(6). On the other hand, recycling is defined in Article 3(7) without any reference to the Waste Directive.

97. Second, packaging waste is simultaneously waste within the meaning of the Waste Directive, as is in any event clear from the definition in Article 3(2) of the Packaging Directive. In so far as the Packaging Directive contains no divergent provisions, all other relevant waste-law provisions therefore also apply to packaging waste. The Community did not wish, by the Packaging Directive, to establish a self-contained set of rules for packaging waste and to take this category of waste outside the scope of other provisions of waste law.

98. Thus, the Packaging Directive contains detailed provisions on the recovery of packaging waste but not, for example, on its disposal or its transfrontier shipment. Articles 4 and 5 of the Waste Directive and Regulation No 259/93 are consequently also to be observed when handling packaging waste.

99. Finally, the principles of the Waste Directive are to be observed when inter-

²² — Cited in footnote 2.

preting the Packaging Directive in so far as the overall Community strategy for waste management finds expression in the former.²³ The Packaging Directive itself also fits into that overall strategy.

B — *The relationship between the concept of waste and recycling*

100. Both directives thus essentially pursue the same objectives, namely, first, the prevention and reduction of waste production²⁴ and, second, the recovery of waste instead of its disposal.²⁵ This ultimately assists in the prudent and rational utilisation of natural resources, as required by the third indent of Article 174(1) EC.

102. The relationship between classification as waste and the carrying out of a recycling operation is of crucial importance for deciding the case. It is not in dispute that the material which MPR processes is packaging waste. If the material were to cease to be packaging waste as a result of the recycling, that would turn exclusively on the interpretation of the Packaging Directive, which constitutes special legislation for the recycling of packaging waste.

103. In the view of the Court, a complete recovery operation under Annex IIB does not necessarily deprive a substance of its classification as waste.²⁶ Rather, that fact is only one of the factors to be taken into consideration for the purpose of determining whether the substance constitutes waste. However, this finding cannot automatically be applied to the case of recycling.

101. Of course, the Packaging Directive goes further than the Waste Directive in so far as it sets quantitative objectives for the proportion of packaging waste that is to be recovered and recycled.

104. It is true that, theoretically, it cannot be ruled out that a substance obtained by a recycling operation also constitutes waste. If, for instance, there were no demand for the recycled material in the foreseeable future and the storage costs exceeded the proceeds which might be obtained later, it

23 — See the seventh recital in the preamble to the Packaging Directive.

24 — See in particular Article 3(1)(a) of the Waste Directive and Article 1(2) of the Packaging Directive.

25 — See in particular Article 3(1)(b) of the Waste Directive and Article 1(2) of the Packaging Directive.

26 — Judgment in *ARCO Chemie*, cited in footnote 5, paragraphs 94 and 95.

would be conceivable that the recycling undertaking would wish to discard its products. In practice, however, it would probably be extremely rare for a holder of material recycled at considerable expense to intend to discard it again.

105. It would also be inconsistent with the spirit and purpose of the Packaging Directive to accept that recycled packaging waste is still waste. The central concern of the Packaging Directive is the attainment of quantitative recovery objectives. If packaging waste did not as a rule cease to be waste upon being recycled, it could undergo a recovery operation again. The same material would then be recovered twice and double counted with regard to achievement of the recovery rate.

106. A majority of the parties submit that the two directives should be read 'together' and also consider that waste ceases to be waste after recycling has been carried out. Proceeding on that basis, MPR in particular judges the recovery operation carried out on the basis of whether the processed material continues or ceases to be waste. The definition of recycling is thus determined by the recycling's outcome.

107. This approach fails to take into account that for the definition of recycling

the Packaging Directive is special legislation *vis-à-vis* the Waste Directive. Regard would not be had to that relationship if the question whether recycling has been carried out were determined on the basis of whether or not a material is waste. On the view put forward in this Opinion as to the relationship between the two directives, it must, quite to the contrary, be examined first and foremost whether a recycling operation has been carried out. If that is the case, it is to be concluded as a rule that the recovered material has ceased to be waste.

108. In this connection, it should be remembered that, in accordance with settled case-law, the question whether a substance is waste cannot be answered on the basis of certain characteristics of the substance itself, but that the crucial factor is the conduct of the holder of the waste, that is to say whether or not he intends to discard the substance.²⁷ The Court has thus refused to make classification of a material as waste dependent on its economic value, its fitness for reuse²⁸ or the environmental hazards posed by it.²⁹

109. The holder's conduct can be appraised only with regard to his intentions, a fact

27 — Judgments in *Inter-Environnement Wallonie*, cited in footnote 5 above, paragraph 26, and in Case C-9/00 *Palin Granit* [2002] ECR I-3533, paragraph 22.

28 — Judgments in Joined Cases C-206/88 and C-207/88 *Vessoso and Zanetti* [1990] ECR I-1461, paragraph 9, and in *Tombesi*, cited in footnote 5, paragraph 52.

29 — *ARCO Chemie*, cited in footnote 5, paragraph 66.

which causes the body applying the law considerable difficulties. The Court solves this problem by inferring an intention to discard the substance from objective indicators; in so doing it has regard both to all the factual circumstances and to the aim of the Waste Directive.³⁰

110. In determining whether Grade 3B scrap is to be classified as waste, all circumstances which suggest the discarding of a substance, or no such discarding, would accordingly be relevant. In this context, a crucial factor is whether the material has already undergone recycling. If it has not, a further indicator can be whether it is to be subjected to such a recovery process. Assessment of the processes carried out by MPR or the steel producers in the light of Article 3(7) of the Packaging Directive is thus an issue preliminary to the classification of Grade 3B scrap as waste and not vice-versa.

111. The Court has found that it may not be inferred from the mere fact that an operation referred to in Annex IIA or IIB to the Waste Directive is carried out that the holder of the material intends to discard it since it is often difficult to distinguish between waste disposal or recovery oper-

ations and the treatment of other products.³¹

112. However, those findings do not preclude the approach put forward here. In contrast to the position in the judgments cited, the material to be recovered was (at any rate originally) packaging waste. The issue is solely that of determining whether it is still waste. Classification of the operations which have already been carried out or are still to be carried out has, in this case, a significance different from that in cases where it is first to be established whether the material to be dealt with is waste at all.

113. Moreover, it is to be inferred that material is waste from the carrying out not of a recovery operation under Annex IIB to the Waste Directive but of a recycling operation, which is more precisely defined in Article 3(7) of the Packaging Directive than the operations in Annex IIB.

114. Nor is the concept of waste retroactively altered by the approach put forward here. Rather, the classification of a substance under the Waste Directive has always depended on whether the holder intends to dispose of it. The Waste Direc-

30 — See the judgment in *Palin Granit*, cited in footnote 27, paragraphs 24 and 25.

31 — Judgments in *ARCO Chemie*, cited in footnote 5, paragraphs 51 and 82, and in *Palin Granit*, cited in footnote 27, paragraph 27.

tive does not lay down the criteria to be applied in determining the holder's intention.³² As already stated, that depends on the overall circumstances in each case. In this connection, not only factual circumstances but also the wider legislative context may be relevant, even if the pertinent legislation was not adopted until after the Waste Directive.

nary ruling. In any event, the second question is to be dealt with first.

C — The order in which the two questions referred for a preliminary ruling should be dealt with

115. It follows from the observations set out in A and B above that the question as to which operation constitutes complete recycling of steel from packaging waste does not turn on whether the materials arising from the process in question are still to be classified as waste within the meaning of the Waste Directive. On the contrary, the very characterisation of the operation carried out determines whether they cease to be waste.

D — The second question referred for a preliminary ruling

117. Article 3(7) of the Packaging Directive defines recycling for the purposes of that directive. This provision forms the basis for answering the second question submitted for a preliminary ruling. It would appear that hitherto the Court has not adopted a view on the concept of recycling. Before interpreting the provision on the basis of its wording, brief consideration must be given to the Community law context, the meaning of the term 'recycling' in the light of the objectives of the Packaging Directive and the evolution of that concept in the legislative process which led to the adoption of the Packaging Directive.

(1) Preliminary remarks

116. It therefore appears unnecessary, having regard to the questions of law to be decided in the main proceedings, to answer the first question submitted for a preliminary

(a) Recycling in Community law

118. The Packaging Directive contains the first detailed definition of the concept of

³² — See the judgment in *Palin Granit*, cited in footnote 27, paragraph 25.

recycling, which — in simple terms — consists in recovery of the materials from which the packaging has been produced in order to reuse them. This method of recovering packaging waste has two merits. First, the recycled material no longer needs to be disposed of as waste. Secondly, energy and raw materials are conserved.

119. Essentially this approach may be found in a series of older legislative measures. Thus, in the Waste Directive — if not also in the German language version — the term ‘recycling’ is likewise referred to in Article 3(1)(b)(i). MPR places substantial reliance on that provision, where, in its submission, the aspect of recycling highlighted is the extraction of secondary raw materials. The national court too refers, in alternative (a) in its questions, to the obtaining of secondary raw materials (‘a feedstock’).

120. The idea of recycling had already appeared in Article 2(e) of Council Directive 85/339/EEC of 27 June 1985 on containers of liquids for human consumption³³ which was replaced by the Packaging Directive.³⁴ In addition, Article 3 of

Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils³⁵ should be mentioned.

121. Apart from the fact that those special legislative measures can have little bearing on the sphere of packaging waste, they also provide no further pointers as to the concept of recycling. That is equally true of the legislative measures following the Packaging Directive which took up its definition of recycling.³⁶

(b) Recycling in the Packaging Directive’s legislative context

122. Article 3(7) of the Packaging Directive cannot be looked at in isolation. On the contrary, in interpreting that provision regard is to be had to the objectives of the directive and of related legislation.

123. It is to be noted that the Packaging Directive aims, on the one hand, to prevent any impact of packaging waste on the environment or to reduce such impact, thus

33 — OJ 1985 L 176, p. 18.

34 — See Article 23 of the Packaging Directive.

35 — OJ 1975 L 194, p. 23.

36 — See in particular Article 2(7) of Directive 2000/53.

providing a high level of protection, and, on the other hand, to ensure the functioning of the internal market.³⁷

(i) High level of environmental protection

124. The objective of attaining a high level of environmental protection accords with the requirements of Article 174(2) EC. Article 6 EC requires environmental protection requirements to be integrated also when measures to harmonise laws are adopted. The Court has deduced from that objective, which the Waste Directive also serves, that the concept of waste is to be interpreted broadly.³⁸

125. Applied to the Packaging Directive, this means that the concept of recycling cannot be interpreted in such a way that a material ceases to be waste too quickly and consequently is no longer subject to waste controls at a time when those controls are still necessary in order to ensure a high level of environmental protection.

37 — See Article 1(1) of the Packaging Directive and the first recital in its preamble.

38 — Judgment in *ARCO Chemie*, cited in footnote 5, paragraph 40.

126. It is to be ensured in particular that used packaging does not pose an environmental hazard and that — in so far as it cannot be reused — it is where possible recovered, avoiding disposal.³⁹

127. Of the various forms of recovery, recycling is the one to be preferred.⁴⁰ It contributes to environmental protection by conserving energy and primary raw materials and reducing the amount of waste for ultimate disposal.⁴¹

(ii) No distortion of competition in the internal market

128. In contrast to the Waste Directive, the Packaging Directive sets specific recovery targets. Article 6(1)(b) thus imposes quantitative obligations on the Member States with regard to the proportion of the total amount of packaging material that must as a minimum be recycled. The Packaging Directive, which is based on Article 100a of the EC Treaty, is intended to standardise the provisions of the Member States, and distortions of competition are intended to be avoided.

39 — See Article 1(2) of the Packaging Directive and the seventh recital in its preamble.

40 — See the eighth recital in the preamble to the Packaging Directive. The priority accorded to recycling is, however, subject to a proviso as to adequate scientific and technological knowledge concerning recovery.

41 — See the 11th recital in the preamble to the Packaging Directive.

129. Even if, taking all factors into account, recycling can lead to savings in the national economy,⁴² it represents a cost factor for the undertakings which must pay for recycling the packaging placed into circulation by them. Ultimately that expenditure makes their products more expensive and thus affects their prospects on the market.

(c) Evolution of the concept of recycling in the legislative process

132. The definition of recycling in the Commission proposal⁴³ differs from the version in force (see point 7 above), stating:

130. The Community has to some extent accepted unequal burdens on industry in the Member States by not laying down a specific minimum recovery rate but allowing a spread of rates. Greater imbalances could result if the Member States take as a basis concepts of recycling which differ substantially from one another and the costs of meeting the recovery rates consequently differ.

“recycling” means the recovery of the waste materials for the original purpose or for other purposes excluding energy recovery; recycling means also regeneration and composting’.

131. The Court should therefore lay down a definitive interpretation of the concept of recycling in order to ensure that the objective of harmonising laws is achieved. In addition, the interpretation must ensure that the same packaging material is not counted more than once in recycling rate calculations, as the United Kingdom Government correctly points out.

133. The definition is not considered in greater detail in the explanatory memorandum. It lacks some elements which are included in the version now in force. According to the German version of the proposal, simply ‘materials’ (‘Stoffe’) can undergo recycling; it is left open whether or not they must be waste. In addition, the process is characterised solely by the objective of reuse of the material for the original or other purposes. The draft does not contain a more detailed description of the process of recycling.

42 — The Commission estimates, on the basis of various studies, that the costs of recycling are roughly equal to the saved waste disposal costs. (See the explanatory memorandum for the Commission proposal for a Directive of the European Parliament and of the Council amending Directive 94/62/EC on packaging and packaging waste, COM(2001) 729 final of 7 December 2001, p. 17.)

43 — COM(92) 278 final, also reproduced without the statement of reasons at OJ 1992 C 263, p. 1.

134. A version corresponding in essence to the current formulation first appears in Common Position (EC) 13/94 of the Council of 4 March 1994.⁴⁴ No reason is given for the amendment. Nor does it appear to be commented on by either the Commission or the Parliament in the subsequent procedure. It can merely be stated that the definition ultimately adopted describes the process of recycling more precisely and thus enables a clearer line to be drawn between recycling and other recovery operations, a fact which has significance with regard to the recovery rates in Article 6(1).

(d) Subsequent evolution

135. Recycling has in the meantime acquired considerable importance and will in the future play an even more significant role in the recovery of packaging waste.

136. It is apparent from the interim report prescribed by Article 6(3), which the Commission submitted in 1999,⁴⁵ that almost all the Member States had already attained the minimum targets four years after the directive entered into force and some had clearly exceeded the maximum targets. The

United Kingdom, with a recycling share of 30% by weight, occupied a place nearer the bottom of the list of Member States; in the case of steel, the recycling rate reached an average of 26% by weight.⁴⁶

137. In the meantime the Commission has submitted a proposal to amend the Packaging Directive.⁴⁷ The proposal envisages a significant increase in the recovery rates (between 60% and 75% by weight for recovery and between 55% and 70% by weight for recycling). Furthermore, the Commission follows a new approach of introducing separate rates for the recycling of various materials. Thus, the recycling rate for metals should reach 50% by weight in the future.

138. In particular with regard to plastics, a distinction is, moreover, drawn between mechanical, chemical and feedstock recycling. Those further definitions could be illuminating if taken as subcategories of recycling. However, doubts are engendered by use of a Commission proposal for the amendment of the Packaging Directive in order to draw conclusions as to the interpretation of the directive in the version in force.

⁴⁴ — See Table III.5 of the 1999 interim report (cited in footnote 45), which reproduces figures for the United Kingdom for 1997.

⁴⁷ — Commission proposal of 7 December 2001 for a Directive of the European Parliament and of the Council amending Directive 94/62/EC on packaging and packaging waste (COM(2001) 729 final, also reproduced without the explanatory memorandum at OJ 2002 C 103 E, p. 17).

⁴⁴ — OJ 1994 C 137, p. 65.

⁴⁵ — COM(1999) 596 final.

(2) Interpretation of Article 3(7) of the Packaging Directive

be waste within the meaning of the Waste Directive. Classification of the steel producers' activity would then no longer depend on whether or not the Grade 3B scrap melted down by them is still waste.

139. The definition of recycling in Article 3(7) of the Packaging Directive contains three elements of relevance here: recycling is undergone by 'waste materials' (a); the waste materials are reprocessed for the original or another purpose (b); and the reprocessing occurs in a production process (c). The inclusion of organic recycling and exclusion of energy recovery are irrelevant to the present case.

142. This must be prefaced by the observation that some language versions of the Packaging Directive simply use the term corresponding to 'waste' in Article 3(7) too (as the French, Spanish, Portuguese and Finnish versions do). The majority of the language versions, on the other hand, parallel the English version where 'waste materials' appears (as the German, Danish, Swedish, Dutch and Italian versions do). It therefore cannot be ruled out that use of the term 'waste materials' was intended to indicate that not only waste may undergo recycling.

(a) Waste materials

140. MPR submits that the steel producers do not carry out any recycling if only because the starting material supplied by MPR, Grade 3B scrap, is already no longer waste.

141. In the definition of recycling, however, the term used is not 'waste' but 'waste materials' which is not to be found anywhere else in the Packaging Directive, or in the Waste Directive. It could be concluded from this choice of words that the materials which can undergo recycling derive from (packaging) waste but at the time of recycling do not necessarily still have to

143. A factor running counter to that interpretation is the function, already set out, of the definition of recycling in relation to achievement of the recovery targets. If material which derives from waste but is no longer waste could still be subjected to a recycling operation, there would be the risk that material which has already been recycled once would undergo recycling once again. That could result in the same material being counted more than once when calculating the recovery rate.

144. Furthermore, the definition of packaging waste in Article 3(2) of the Packaging Directive actually includes 'packaging material' in so far as it is covered by the definition of waste in the Waste Directive. In view of that, it is hardly possible to proceed on the basis that the term 'waste materials' was intended to denote substances which are not waste.

subjected to an appropriate production process cannot cease to be waste solely for that reason.

145. One might, however, wonder whether materials which are subjected to recycling can be waste at all. Since recycling is described as use in a production process, it might be supposed that the element of discarding which is central to the definition of waste is missing.

147. The term 'waste materials' emphasises on the contrary only the material-based starting point for recycling. Recycling is underlain by the idea that certain substances are recovered from waste and reused, so that a materials cycle arises, as the word 'recycling' makes clear.

146. That proposition is opposed, however, by the fact that all recovery constitutes a beneficial use of waste but the materials to be recovered do not cease to be waste for that reason. On the contrary, in accordance with the Court's case-law discarding of material takes place precisely when it is recovered or disposed of.⁴⁸ Since recycling is to be regarded as a special form of recovery,⁴⁹ material which is to be

148. Starting out from that idea, the term 'waste *materials*' makes it clear that the various materials or substances joined together as packaging must be dealt with separately with regard to their recycling. Glass, metal, plastic, paper and so forth can be used only in specific production processes applicable to the material in question. That differentiates recycling, including organic recycling, from energy recovery, for which mixtures of substances can also be used.

149. It must therefore be concluded that it was not intended, by employing the term 'waste materials', to indicate that substances which undergo recycling no longer have to be waste. Rather, that term merely takes account of the fact that the materials must be recovered separately.

⁴⁸ — Judgment in *ARCO Chemie*, cited in footnote 5, paragraph 47.

⁴⁹ — See the 11th recital in the preamble to the Packaging Directive.

(b) Reprocessing for the original purpose or another purpose

materials can be raw materials or semi-finished products. The new product is characterised by a higher degree of processing than the starting material.

150. The concept of *reprocessing* means that the waste materials are, by their treatment, returned to a state in which they were before they became packaging waste. That process should make the materials reusable for the original or another purpose.

(3) Classification of the operation carried out by MPR

151. The United Kingdom Government has put forward the view, as Corus did at the hearing, that the term 'other purposes' must mean purposes similar to the production of new packaging. However, the directive's wording provides no basis for that interpretation. Nor is it even the issue. In accordance with the spirit and purpose of the directive, it is intended merely to preclude the recycling of material for the purpose of then treating it as waste again, that is to say carrying out further recovery operations or even disposing of it.

153. It must be examined whether, on the basis of the interpretation of Article 3(7) of the Packaging Directive put forward in this Opinion, MPR's activity is to be regarded as recycling.

154. The materials processed by MPR include a certain proportion of metal packaging waste which indisputably amounts to waste materials falling within the definition that has been elucidated.

(c) Production process

152. The distinguishing feature of a production process is that, with some utilisation of means of production and the use of energy, one or more starting materials are transformed or joined together in such a way that in the end a new product is created. The starting

155. It is open to doubt, however, whether MPR carries out reprocessing for the original purpose or for other purposes. For that to be the case, MPR would have to return the material to a state in which it was before it became packaging or packaging waste.

156. It cannot be reconverted into iron ore. Even if it is assumed that Grade 3B scrap has already been used in producing the packaging, MPR does not return the material to an identical state. Grade 3B scrap is a mixture containing, in addition to steel, a certain amount of foreign substances. The previously processed Grade 3B scrap and the Grade 3B scrap obtained by MPR from packaging waste do not have the same composition. Rather, the material does not attain a previous state until it is pure steel again.

operations cannot amount to 'another purpose' within the meaning of Article 3(7) of the Packaging Directive.

159. As is apparent from the order for reference, Grade 3B scrap contains impurities which must be removed before the steel is reused. Those foreign substances are not separated from the steel by means of physical or chemical processes until the melting-down stage when they are removed with the slag which forms a sediment on the liquid metal or vaporise.

157. Nor can Grade 3B scrap be used directly for the original purpose of producing new packaging. At most, 'another purpose' is possible, namely use as material for stoking furnaces.

160. Finally, the operations carried out by MPR cannot be regarded as a production process. It is true that MPR indisputably uses both machines and energy. The crushing could also be regarded as a kind of transformation. However, the process does not result in a product which displays a higher degree of processing than the starting material. Rather, MPR produces a secondary raw material. That material may admittedly meet the Grade 3B specification established by the industry and therefore be suitable for use in a production process. However, it is still a raw material which — as its appellation already indicates — is unprocessed.

158. The aim of recycling is, however, to recover starting materials. As long as there are still mixtures of substances which must be cleaned and have foreign substances removed from them in further processes, reprocessing has not yet been completed. Rather, subsequent cleaning and separation processes are to be regarded as recovery operations. The production of a substance which must be subjected to further recovery

161. The wording in Article 3(2)(b)(i) of the Waste Directive concerning the concept of recycling (see point 6 above) does not preclude that outcome. On MPR's reading

of that provision, the objective of recycling is precisely to extract secondary raw materials.

case where the secondary raw material still contains foreign substances which must be removed in subsequent operations. If a different concept of recycling were to underlie the Waste Directive in this regard, the Packaging Directive, as special legislation, would override it.

162. First, it is, however, not entirely clear whether the phrase 'with a view to extracting secondary raw materials' refers to the word 'recycling' or only to the final matter listed, namely 'any other process'. As the Environment Agency correctly points out, on 'reclamation' at any rate, which is also included in the list, no secondary raw material is extracted.

165. This interpretation also accords with the objectives of the Packaging Directive, in accordance with which recycling is to result in the saving of primary raw materials. Primary raw materials are not saved until steel is obtained from Grade 3B scrap instead of from iron ore.

163. Nor is the term 'recycling' included in Article 1 of the Waste Directive where any other definitions applying to the Waste Directive are set out. It is therefore questionable whether the term 'recycling' should be defined at all at this point in the directive.

166. Moreover, a narrow interpretation is required in order that the packaging waste processed by MPR does not cease to be waste at a time when it still needs to be controlled as waste. It is apparent from the order for reference that, even after processing by MPR, the material contains impurities which call for special storage precautions, as in the case of waste, in order to avoid soil contamination. In addition, on the subsequent processing of the material the steel producers are subject to Integrated Pollution Control.

164. Secondly, regard is to be had to the relationship between the two directives. On the interpretation of the Packaging Directive put forward in this Opinion, when a secondary raw material is produced recycling within the meaning of the directive has not yet taken place. That is at any rate the

167. MPR's treatment of packaging waste is thus not recycling within the meaning of

the Packaging Directive because the metal is not completely recovered, foreign substances still requiring removal, and because there is no production process from which a new product comes into being.

substance of its classification as waste.⁵⁰ That applies *a fortiori* where pre-treatment such as sorting and grinding is involved which does not purge the material of all unwanted foreign substances.⁵¹

(4) Classification of the operation carried out by the steel producers

168. The Grade 3B scrap which the steel producers melt down should comprise waste materials derived from packaging. The material processed by MPR originally contained packaging waste. The fact that the operation carried out by MPR is not to be classified as recycling is an indication that the material is still waste.

171. Since the material is to undergo a further processing operation, in which the steel is rid of the final foreign substances, only when it reaches the steel producers, MPR's treatment has not caused the packaging material to cease to be waste. Regard is also to be had in this connection to the fact that the steel producers are subject to Integrated Pollution Control when they process the Grade 3B material.

169. The only issue which might require consideration is whether MPR has recovered the material in another way and it has thereby ceased to be waste. The processing by MPR could for example involve 'recycling/reclamation of metals and metal compounds' in accordance with point R3 of Annex IIB to the Waste Directive.

172. The fact that Grade 3B scrap has an economic value and is suitable for use as a raw material does not prevent it from continuing to be waste.⁵² In *Palin Granit*, the Court regarded the degree of likelihood that a substance will be reused, without any further processing prior to its reuse, as a relevant criterion for determining whether it is waste for the purposes of the Waste Directive.⁵³

170. It is, however, to be remembered that the Court has held that the carrying out of a complete recovery operation under Annex IIB does not necessarily deprive a

50 — Judgment in *ARCO Chemie*, cited in footnote 5, paragraphs 94 and 95.

51 — See the judgment in *ARCO Chemie*, cited in footnote 5, paragraph 96; as to grinding, see the judgment in *Tombesi*, cited in footnote 5, paragraph 53.

52 — Judgments in *Vessoso and Zanetti*, cited in footnote 28, paragraphs 12 and 13, in *Tombesi*, cited in footnote 5, paragraph 54, and in *Inter-Environnement Wallonie*, cited in footnote 5, paragraph 31.

53 — Judgment in *Palin Granit*, cited in footnote 27, paragraph 37.

173. In the present case, the precise likelihood that the Grade 3B material will be further processed by the steel producers immediately after being treated by MPR is unknown. There are, however, some indications that the Grade 3B scrap is used in the steelworks at once.

is thus again brought to a state in which it was before the packaging was produced. The ingots, sheets or coils of steel can be used to produce packaging again or other products.

174. In *Palin Granit*, however, the issue to be decided was whether leftover stone which arises as a by-product from quarrying is waste in the first place. In answering that question, different criteria are to be applied from those in the present case, in which it is clear that the material at issue was waste. In order to take account of the protective aim of the Waste and Packaging Directives, it is to be presumed that the material continues to be waste at least until it has demonstrably been fully recovered. As a rule, material ceases to be waste upon being recycled.⁵⁴ That is not necessarily the case with other forms of recovery.⁵⁵

176. Finally, the melting down also forms a production process. In the steelmaking process, using furnaces and energy, (semi-finished) products are made, from the Grade 3B scrap which have a higher degree of processing than the starting material.

177. The answer to the second question should therefore be that the materials have not already been recycled within the meaning of Article 3(7) of the Packaging Directive when they have been rendered suitable for use as a feedstock but have been recycled only when they have been used by a steelmaker so as to produce ingots, sheets or coils of steel.

175. The treatment by the steel producers also constitutes reprocessing for the original or another purpose. Through remelting, pure steel is obtained and the material

E — *The first question*

178. In view of the answer to the second question, it appears no longer necessary to answer the first question. The question whether packaging waste has been recycled

⁵⁴ — See points 104 and 105 above.

⁵⁵ — See the case-law cited in footnote 26.

is to be determined exclusively on the basis of the Packaging Directive.

179. The question whether and when it ceases to be waste is relevant in relation to recycling only in so far as waste materials form the starting material for recycling. In the absence of recycling by MPR, Grade 3B scrap has — as set out — not ceased to be waste and can be recycled by the steel producers.

180. The first question might, however, also be understood as meaning that the High Court wishes to ascertain when other materials not covered by the Packaging Directive are to be regarded as recycled.

181. In accordance with settled case-law, it is first of all solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice.⁵⁶

182. Nevertheless, the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law, or the decision as to validity of Community law, sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical.⁵⁷

183. The parties to the proceedings before the High Court are in dispute as to the entitlement to issue PRNs in respect of the recycling of packaging waste. The order for reference provides no indication at all that the question of when waste other than packaging waste has been recycled is relevant to the decision in the case pending before the High Court.

184. Accordingly, the question should not be answered.

⁵⁶ — See in particular the judgment in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59.

⁵⁷ — See the judgments in *Bosman*, cited in footnote 56, paragraph 61, and in Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 52.

VII — Conclusion

185. On the basis of the foregoing arguments, I propose the following answer to the second question referred for a preliminary ruling:

Packaging waste made of steel has not already been recycled within the meaning of Article 3(7) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste when it has been rendered suitable for use as a feedstock but has been recycled only when it has been used by a steelmaker so as to produce ingots, sheets or coils of steel.