

Anonymised version

Translation

C-654/18 — 1

Case C-654/18

Request for a preliminary ruling

Date lodged:

18 October 2018

Referring court:

Verwaltungsgericht Stuttgart (Germany)

Date of the decision to refer:

10 October 2018

Applicant:

Interseroh Dienstleistungs GmbH

Defendant:

SAA Sonderabfallagentur Baden-Württemberg GmbH

VERWALTUNGSGERICHT STUTTGART (Administrative Court, Stuttgart,
Germany)

Order

In the administrative proceedings

Interseroh Dienstleistungsgesellschaft mbH,

[...] 51149 Cologne

- applicant -

[...]

v

SAA Sonderabfallagentur Baden-Württemberg GmbH,

[...] 70736 Fellbach

- defendant -

[...]

concerning cross-border waste shipments

the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart) — 14th Chamber — [...]

on 10 October 2018

made the following order: **[Or. 2]**

I. The following questions on the interpretation
of Article 3(2)

of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, published in the *Official Journal of the European Union* of 12 July 2006, L 190 p. 1 et seq.,

are referred to the Court of Justice of the European Union pursuant to heading (b) of the first paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU):

1. Is Article 3(2) of Regulation (EC) 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, 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 (EC) 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 [Or. 3] 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?

II. The proceedings are stayed pending the ruling of the Court of Justice of the European Union.

Grounds:

I.

The parties are in dispute over whether the applicant is required, for the shipment of residue-drained paper, paperboard or cardboard (PPC) wastes and PPC-based combinations from the Federal Republic of Germany to the Netherlands, to implement the notification procedure under Article 4 of Regulation (EC) No 1013/2006. In particular, it is disputed whether the waste at issue comes under Basel Code B3020 of Annex III ('Green' Listed Waste) or under point 3(g) of Annex IIIA ('Green Listed Waste') or whether that waste is unlisted waste.

Basel Code B3020 covers paper, paperboard and paper product wastes and, in the [English] version, is worded as follows:

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 **[Or. 4]**

Point 3(g) of Annex IIIA provides the following:

3. The following mixtures of wastes classified under separate indents or sub-indents of one single entry are included in this Annex:

...

- (g) mixtures of wastes classified under Basel entry 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)

...

Since 2006, the applicant has collected used sales packaging (lightweight packaging — LWP) from private final consumers throughout Germany and consigned it 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 there. Transportation from *Land* Baden-Württemberg has until now been carried out on the basis of the export control permits of the defendant and the competent authorities in the Netherlands under Article 4 et seq. of Regulation (EC) No 1013/2006. The waste paper shipped by the applicant to the Netherlands must, according to the specifications of the purchaser (ESKA Graphic Board BV), have the following composition:

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.

A maximum of 10% impurities:

- No metallic and mineral impurities with a piece weight > 100 g
- Liquid packaging board < 4%
- Plastic articles < 3%
- Metals < 0.5%
- Other impurities (glass, metal, plastics (e.g. foils, cups, bags), foreign materials (e.g. rubber, stones, wood, textiles)) < 3.5%

(see the specification required by the operator of the paper factory, ESKA Graphic Board BV, PPC from LWP 1.02 Special Grade). [Or. 5]

On 20 May 2015, the operator of the paper factory, ESKA Graphic Board BV, obtained a judgment from the Chamber for Contentious Administrative Proceedings of the Raad van State (Council of State, Netherlands), according to which that waste paper mixture, regardless of the present impurities, comes under Basel Code B3020 of Annex III and, accordingly, the list of wastes subject to the general information requirements under Article 18 of Regulation (EC) No 1013/2006 ('Green' Listed Waste).

The applicant takes the view, on the basis of that judgment, that the cross-border transportation of the waste paper without prior implementation of the costly and time-consuming notification procedure under Article 4 of Regulation (EC) No 1013/2006 is permissible. By letters of 9 June 2015 and 7 December 2015, the applicant contacted the defendant Sonderabfallagentur Baden-Württemberg (Special Waste Agency, Baden-Württemberg) and requested that the PPC waste shipped by it to the Netherlands also be classified as waste under the 'Green List'.

The defendant is responsible in *Land* Baden-Württemberg, as a private entity performing delegated public functions (*Beliehene*), for the implementation of waste-shipment law and performs, inter alia, the functions specified in Regulation (EC) No 1013/2006 [...].

The defendant takes the view that the mixture of waste at issue is still subject to the notification requirement, since it does not come under Basel Code B3020 of Annex III. The mixture may not be fully assigned to one of the four single entries of that Basel Code, in particular the fourth indent, since that indent is not a catch-all provision for mixtures of varying provenance and composition. To subsume a mixture of wastes from the first three indents under the fourth indent runs counter to the general scheme of Regulation (EC) No 1013/2006, according to which

waste must be unambiguously assigned. Classification of the mixture under point 3(g) of Annex IIIA cannot succeed owing to its excessive proportion of foreign matter and impurities of 10%. This view is shared by the Abfallrechtsausschuss (Legal Committee on Waste, ARA) of the Länderarbeitsgemeinschaft Abfall (Federal State Working Group on Waste, LAGA) in its decision of 23/24 February 2016. **[Or. 6]**

On 1 June 2016, the applicant brought an action by which it seeks a declaration that it is entitled to ship the wastes at issue to other EU Member States in accordance with the procedure under Article 18 of Regulation (EC) No 1013/2006. In support of its action, the applicant relies on the Raad van State's judgment of 20 May 2015 and considers the stance taken therein to be correct. It also relies on information provided by the Basel Convention Focal Point at the Umweltbundesamt (Federal Environmental Agency) on 17 August 2015, according to which the presence of impurities in PPC fractions does not of itself preclude PPC from being included among the mixtures set out in point 3(g) of Annex IIIA to Regulation No 1013/2006.

The defendant contests the action and maintains its position.

II.

The proceedings must be stayed and a preliminary ruling requested from the Court of Justice of the European Union pursuant to the second paragraph of Article 267 TFEU. The question of EU law referred is material to the decision to be given and requires clarification by the Court of Justice for the purposes of ensuring a uniform application and interpretation of EU law.

1.

The question referred is relevant to the Administrative Court's decision because the applicant's action for a declaration would be successful if the Raad van State's interpretation of the provisions of EU law in its judgment of 20 May 2015 is correct, since, in that event, the applicant would not be subject to the notification requirement under Article 4 et seq. of Regulation (EC) No 1013/2006 for the shipment of the mixture of waste at issue, but merely to the general information requirements under Article 18 of Regulation (EC) No 1013/2006. Should the interpretation of the defendant Sonderabfallagentur Baden-Württemberg be followed, the mixture of waste at issue would have to be classified as unlisted waste and would consequently be subject to the notification requirement. **[Or. 7]**

2.

In the view of the Chamber hearing the present case, the following arguments militate in favour of the defendant's position:

(a)

Mixtures of the wastes set out under the four indents of Basel Code B3020 should not be assigned as waste under that Basel Code because the waste identification code B3020 does not constitute one single entry within the meaning of Article 3(2)(b) of Regulation (EC) No 1013/2006. Instead, the individual indents under B3020 respectively constitute single entries within the meaning of Article 3(2)(b) of Regulation (EC) No 1013/2006. Each indent of Basel Code B3020 describes waste which is regarded as waste listed in Annex III within the meaning of Article 3(2)(b) of Regulation (EC) No 1013/2006. Mixtures of those wastes accordingly come under Article 3(2)(b) of Regulation (EC) No 1013/2006 only if they are listed in Annex IIIA.

This interpretation of the rule is illustrated by the provision in point 3 of Annex IIIA. That provision concerns mixtures of 'wastes classified under separate indents or sub-indents of one single entry'. That provision is to be interpreted solely as meaning that wastes are listed under the indents of Basel Code B3020 in the sense of a single entry. In so far as those wastes remain unmixed with other wastes, they are subject, in accordance with Article 3(2)(a) of Regulation (EC) No 1013/2006, to the general information requirements under Article 18. However, as soon as they are mixed with other wastes which are classified under another indent, they are subject as mixtures to the conditions of Article 3(2)(b) of Regulation (EC) No 1013/2006. Notification is therefore not required for them only if they are listed as a mixture in Annex IIIA.

(b)

The fourth indent of Basel Code B3020 does not cover mixtures of wastes which are listed under the first three indents with other wastes. This is supported, first, by the fact that express provision is made, in respect of mixtures of wastes which are covered by the first three indents of B3020, in [Or. 8] point 3(g) of Annex IIIA, which provides that those exact mixtures are exempt from the notification requirement. That exemption from the notification requirement is, however, limited to mixtures of the wastes listed in the first three indents, the wording of which is fully incorporated in point 3(g) of Annex IIIA. According to the intention of the legislature, only mixtures of one type of green listed wastes should therefore be exempt from the notification requirement. A mixture of waste which contains wastes other than those listed in the first three indents or foreign matter is consequently not exempt from the notification requirement. This also follows from the provision in point 1 of Annex IIIA, according to which mixtures may not be subject to the general information requirements under Article 18 of Regulation (EC) No 1013/2006 if they are contaminated by other materials to an extent which 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/EEC (point 1(a)) or which prevents the recovery of the wastes in an environmentally sound manner (point 1(b)).

As there is, accordingly, a special provision in point 3(g) of Annex IIIA for mixtures of wastes which come within the first three indents of Basel Code B3020, for this reason alone the fourth indent of B3020 may not also cover the mixture of waste covered by the special provision. Furthermore, ‘other’ wastes come within the fourth indent of B3020, that is to say, specifically not those which are set out under the first three indents.

3.

The defendant’s position is, however, contrary to the Raad van State’s interpretation in its judgment of 20 May 2015. The Raad van State, on the basis of the Dutch-language version of Basel Code B3020, held, first, that paper and paperboard also come under the fourth indent in the form of ‘unsorted waste’. The presence of impurities does not, in its view, mean that the waste concerned does not, as a mixture of waste, come under Basel Code B3020. The Raad van State’s view is based on the ground that Part B3 of Annex III refers to wastes containing principally organic constituents, which may contain metals and inorganic materials, and that materials do not come under code B3020 only when they are mixed with hazardous [Or. 9] wastes (introductory wording of B3020). The Raad van State concludes that, in itself, the presence of impurities in a waste stream of used paper and paperboard wastes does not mean that that waste stream is to be regarded as a mixture of waste materials that comes under the green list of waste only if it may be classified as one of the mixtures set out in Annex IIIA to Regulation (EC) No 1013/2006. The Raad van State also held in its decision that PPC wastes which come from waste treatment facilities that have the specific purpose of separating domestic waste into other recoverable fractions no longer come under the orange list of waste of unsorted domestic waste, with the result that there is no obstacle to classification under Basel Code B3020. Sorted wastes are to be assumed even where there is a proportion of impurities of up to 7%.

4.

The applicant considers the Raad van State’s interpretation to be correct and shares its position. The presence of impurities does not prevent a mixture of PPC from lightweight packaging from being green listed waste.

5.

The defendant takes issue with the Raad van State’s position and submits that it is clear from the very wording of the fourth indent of Basel Code B3020 that no mixtures of wastes may be classified thereunder. This is because, 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 Netherlands court 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. **[Or. 10]**

The defendant further argues, in opposition to the Raad van State’s judgment, that it is not apparent from the heading of Basel Code B3020 that mixtures of wastes may come under B3020. Only wastes mixed with hazardous materials would be excluded, because such mixtures would be subject to particular regulatory requirements on account of their hazardous nature. However, the opposite conclusion may not be drawn that any mixture of waste paper with non-hazardous waste materials would come under the fourth indent of Basel Code B3020. This is because mixtures that are exempt from the notification requirement are regulated in Annex IIIA to Regulation (EC) No 1013/2006.

Nor, in the defendant’s view, can it be concluded from the heading of subdivision B3 of the Basel Convention (‘Wastes containing principally organic constituents, which may contain metals and inorganic materials’) that mixtures of wastes that are contaminated with foreign matter or impurities also come under Basel Code B3020. This is because the heading merely takes into account that wastes may already contain foreign matter as integral constituents on account of the manufacturing of the product. However, mixing with genuine foreign matter should not be equated thereto. Basel Code B3020 could instead cover only PPC wastes that are of one type and non-hazardous and not those that are mixed with plastics, metals and other foreign matter.

6.

The decisive question whether mixtures of wastes which are composed of wastes covered by the first three indents and also contain up to 10% impurities come under Basel Code B3020, and may accordingly be shipped within the European Union without notification, or whether Basel Code B3020 exclusively covers wastes of one type and mixtures are governed solely by the provision in point 3(g) of Annex IIIA to Regulation (EC) No 1013/2006, requires an answer by the Court of Justice of the European Union. Without such a clarification, the question of the notification requirement for comparably or even identically composed volumes of waste would be answered differently in different Member States. Clarification by the Court of Justice of the European Union is therefore required **[Or. 11]** for the purpose of ensuring the uniform application and interpretation of EU law.

7.

[...] [Stay of proceedings, provisions of national law]

[...]