

Seminar for prosecutors and judges:
EU WASTE LEGISLATION AND COMBATING WASTE CRIME

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Presiding Judge
Administrative Court Aachen

Case Study: “In dubio pro Leo “



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My case („In dubio pro Leo“) was inspired by ...

C-238/21 - Porr Bau GmbH („Porr“)

Reference for a preliminary ruling
by the Administrative Court of Steiermark /Austria
that lead recently to the

Judgment of the CJEU from 17 November 2022

You may look it up at: www.curia.eu

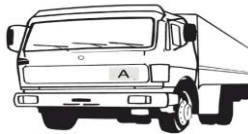


2

The facts are clear ...

Important:

The material is topsoil or „mothersoil“:
No danger for the environment at all !



Copyright: amazon.com

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Is there a legal basis for the fine (50.000 €)?
Is there an offence under national law? Yes ...

Under national law the case is easy ...

An unauthorized waste disposal site is an offence.

Article 6 of the National Code on Waste applies:

Excavation soil has been brought away from the building site
and counts as waste. Leo has no „end-of-waste certificate“.

However, when it comes to the concepts

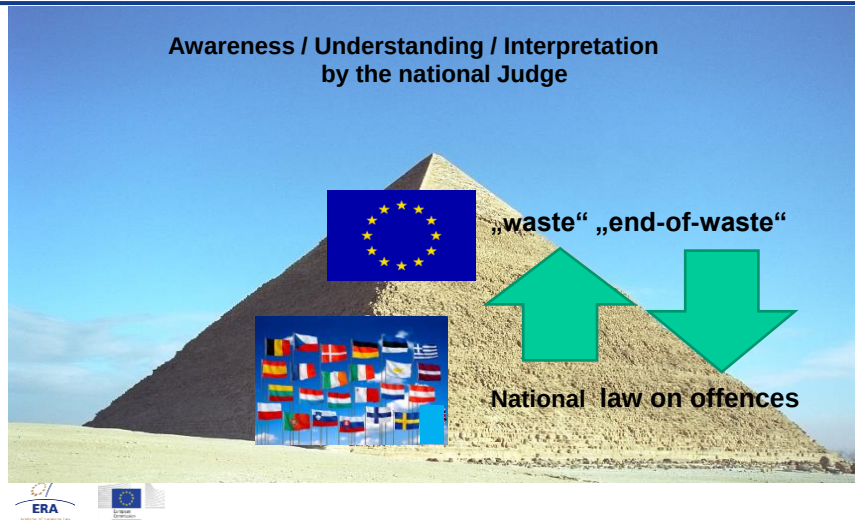
of **“waste”** and **“end-of-waste”**

the national law must comply with the EU Directive on Waste.



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Multi level system ... from the perspective of the national judge



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Recital 11 of Directive Directive 2008/98 on Waste
gives us helpful information:

It states:

“The waste status of uncontaminated excavated soils (...) which are used on sites other than the one from which they were excavated should be considered in accordance

with the definition of waste and
the provisions on by-products or
on the end of waste status

under this Directive.”



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Point 1 of Article 3 of the Directive on Waste:

“The mother” of all waste law provisions in the EU

Definition

“waste” means

any substance or object

which the holder **discards** or

intends or **is required to discard**



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Is the topsoil of Mr Leo waste?

Point 1 of Article 3:

“waste” means

any substance or object

(yes, topsoil)

which the holder **discards** or

(no)

intends or **is required to discard**

(no) / (no)



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Lex specialis: There is a special category of “not being waste”:
“By-product under Article 5”

Article 5 (1) of the Directive on Waste, entitled ‘By-products’, states:

‘A substance or object, resulting from a production process, the primary aim of which is not the production of that item, **may be regarded as not being waste (...) but as being a by-product** only if the following conditions are met:

- (a) further use of the substance or object is certain;
 - (b) the substance or object can be used directly without any further processing other than normal industrial practice;
 - (c) the substance or object is produced as an integral part of a production process;
- and
- (d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.’



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**Is the topsoil of Mr Leo a “by-product”
 which qualifies for the status of not being waste? Yes!**

Article 5 (1) of the Directive on Waste, entitled ‘By-products’, states:

‘A substance or object, resulting from a production process, the primary aim of which is not the production of that item, **[Yes, with topsoil in a construction company this is the case]** may be regarded as not being waste (...) but as being a by-product only if the following conditions are met:

- (a) further use of the substance or object is certain; **[Assessment of the factual circumstances: 10 farmers/5 gardeners / “good price” / contracts concluded, Yes]**
- (b) the substance or object can be used directly without any further processing other than normal industrial practice; **[Yes, with topsoil this is the case]**
- (c) the substance or object is produced as an integral part of a production process; **[Yes, no doubt about that]** and
- (d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.’ **[Yes]**



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Article 5 applies!

However, **let us speculate a little** and presume that Leo's topsoil had possessed a waste status! Might the 'End-of-waste status' under Article 6 apply analogously? What is your opinion? What would be a better legal solution?

Under Article 6 of the Directive on Waste, headed 'End-of-waste status':

'1. Certain specified waste shall **cease to be waste** (...) when it has undergone a recovery, [no recovery mentioned in the case, but may we argue a *maiores ad minus* here ??] including recycling, operation and complies with specific criteria to be developed in accordance with the following conditions:

- (a) the substance or object is commonly used for specific purposes; [Yes]
- (b) a market or demand exists for such a substance or object; [Yes]
- (c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; [Yes]

and

- (d) the use of the substance or object will not lead to overall adverse environmental or human health impacts. [Yes]
- The criteria shall include limit values for pollutants where necessary and shall take into account any possible adverse environmental effects of the substance or object. [Yes]



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Interim outcome of the case study:

Topsoil is a „by-product“ (!) under EU Law



Credit: gograph.com

and it is „waste (?)“ under national law



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Classical case of conflict of norms:
Topsoil is a „by-product“ under EU Law
and „waste (?)“ under national law:



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The dark and the bright side of the legal pyramid



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Conflict of norms to be solved by the ...



... Supremacy of EU law (van Gend & Loos):

„The EU legal act takes precedence over the XY-national act.“

„Directives (sufficiently precise + unconditional) have direct effect v. public entity

Acquittal for Mr Leo !!!

Mr Leo can rely on Article 3 and 5 of the Directive on Waste (sufficiently precise + unconditional) against his Member State in Court.

Consequently, the national Judge has to set aside national Waste Law and recognize the “by-product”-quality of Leo’s topsoil.

In the same way he/she has to set aside the national requirement of the “end-of-waste certificate” as being not in conformity with the sufficiently precise + unconditional provision in Article 6 of the Directive on the “end-of-waste” status.

Another caveat for the Member State: The Environmental Liability Directive (ELD) that has not yet been transposed **can in no way be used against Mr Leo** to justify a harsh and severe fine.



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Thank you
for your kind attention!



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