

Co-operation with national judges in the field of environmental law under the European Commission Framework Contract ENV.A.I/FRA/2012/0018

Training module

HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-
COMPLIANCE WITH EU WASTE LAW



Organised by Academy of European Law

EU Waste Framework Directive and the Court of Justice of the European Union

Main objectives and key features
CJEU case law



Dr. Christoph Sobotta
Chambers of Advocate General Juliane Kokott
Court of Justice of the European Union

Please feel free to interrupt



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On the Advocate General

- Member of the Court
- Advises the Court by independently preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background
- Presentation is my personal view



Article 252 TFEU

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Remarks:

The Council has decided to increase the number of AGs to eleven.

The AG is not assigned to any particular chamber of the court. She does not participate in the deliberations of the judgment.

Outline

- Short Overview of the Waste Framework Directive (WFD)
- Relevant EU Legislation
 - Historical Stages of the WFD
 - Legislative Context
- Main Focus of CJEU Jurisprudence on the WFD
 - Core obligation of Waste Law
 - Waste Definition
 - Recovery/Disposal
 - Polluter Pays Principle
- Hazardous Waste



The presentation will start with a short overview of the WFD. Then the historical stages leading to the current system will be highlighted as well as the legislative context. The main part will address the primary focus of the jurisprudence on the WFD, that is the core obligation of waste law, the definition of waste, the distinction between recovery and disposal and the application of the polluter pays principle with regard to waste law.

General and Specific Waste Law

- General Objective of waste law: Protection of Human Health and the Environment (Articles 1, 13)
- Definition of Waste (Article 3 (1) + Articles 2, 5)
- Recovery / Disposal (Article 3 (15) and (19)) + End of Waste Status (Article 6 - complete recovery)
- Responsibility (Articles 8, 14, 15 - polluter pays)
- Some rules on specific Waste Streams:
 - Hazardous Waste (Articles 7, 17 - 20, 35)
 - Waste Oils (Article 21)
 - Bio-Waste (Article 22)



The most important elements of the WFD for judicial practice concern the general waste law.

The definition of waste is laid down in Article 3 no 1, but it is limited by the exemptions of Article 2 and specified by the rules of Article 5 on the distinction between by-products and waste.

Another core concept is the distinction between disposal and recovery of waste, defined by Article 3 nos. 15 and 19. If “complete” recovery is achieved the resulting material will no longer be considered waste.

The underlying general objective of EU waste law is the protection of human health and of the environment.

Moreover, the WFD aims to apply the polluter pays principle by requiring the producer of waste to ensure appropriate waste treatment and in particular to cover the costs. The WFD also allows to attach responsibility to the producers of products that later become waste.

In addition to these general rules the WFD, in its current incarnation, also includes rules on some specific waste streams, namely on hazardous waste, on waste oils and on bio-waste. In the past the first two of these sets of rules were laid down in specific directives.

Administration of Waste Law

- Regulation of the Waste Treatment Industry (Articles 23 - 27)
- Waste Hierarchy (Articles 4 + 9 - 12)
- Administrative Waste Planning (Articles 28 - 33)
- Practical implementation (Articles 34 - 36)
- Commission Powers [Articles 5 (2), 6 (2), 7 (1), 11 (3), 27 (1) and (4), 29 (4), 33 (2), 38]



The second important part of the WFD concerns the administration of waste law by national and EU authorities. It is of huge practical relevance, but appears less important for the courts.

The regulation of the waste treatment industry aims to guarantee that the practical treatment of waste respects the general objective to protect health and environment. The waste hierarchy describes, on the one hand, the obvious preferences with regard to waste, but its practical implementation requires difficult compromises. These are the responsibility of MS authorities and can influence the administrative waste planning and the practical implementation of waste law.

It should be highlighted that the current law provides extensive powers to the Commission to specify and implement the WFD, in particular with regard to by-products and to the end-of-waste status. The exercise of these powers is subject to control by the Council and by the EP.

Historical Stages - How did we get here?

- Council Directive 75/442/EEC on waste
- Substantially amended by Council Directive 91/156/EEC
- Consolidated by Directive 2006/12/EC
- Council Directive 78/319/EEC on toxic and dangerous waste
- Replaced by Council Directive 91/689/EEC on hazardous waste
- Both were replaced by Directive 2008/98/EC
(Transposition by 12/12/2010)



The EU began adopting Waste legislation more than 30 years ago with the first incarnation of the WFD. It was substantially amended in 1991 and consolidated in 2006. Legislation on hazardous waste began in 1978 and was revamped in 1991 as well. Both strands of legislation were combined into the current WFD in 2008.

Legal Context in the EU law

- In General: see presentation on waste legal instruments
- Of particular interest:
 - Commission Decision 2000/532/EC establishing a list of wastes
 - Directive 2010/75/EU on Industrial Emissions codifying, among others, Directive 2000/76/EC on the incineration of waste
 - Directive 1999/31/EC on the landfill of waste



The legal context of the WFD in EU law is characterised by a huge number of instruments which are described in a special presentation. Of particular interest here are the EU waste list, the provisions on waste incineration in the Directive on industrial emissions and the Landfill Directive.

The main obligation of the WFD

Article 13

Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular:

- (a) without risk to water, air, soil, plants or animals;
- (b) without causing a nuisance through noise or odours; and
- (c) without adversely affecting the countryside or places of special interest.



This is the central obligation resulting from the WFD as well as its core objective.

The Trainer could ask for the participants' opinion whether the provision has direct effect.

The main obligation of the WFD

Is Article 13 directly applicable?

- Some elements appear sufficiently clear and unconditional, e.g. “without causing a nuisance through noise or odours”.
- *Comitato di coordinamento per la difesa della cava and Others* (C-236/92, EU:C:1994:60, para 14): the provision defines the framework for the action to be taken and does not require, in itself, the adoption of specific measures or a particular method of waste disposal
- *Commission v Italy* (‘San Rocco’, C-365/97, EU:C:1999:544, para 67): ... it is none the less binding on the Member States as to the objective to be achieved ... >> MS can infringe this obligation if they tolerate a situation in conflict with Article 13



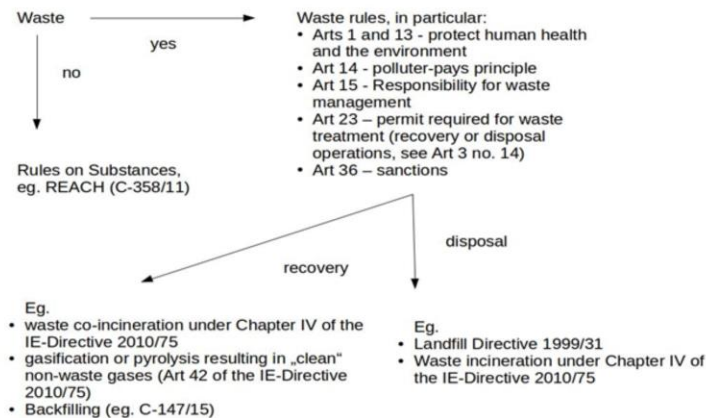
Being the main obligation of the WFD one would expect the direct applicability of Article 13. However, the CJEU considered a similar provision in the original WFD to be insufficiently precise. This is correct insofar as Member States enjoy discretion with regard to the specific measures to adopt.

Conversely, the objectives of Article 13 appear very clear. Therefore, if Member States adopt measures that are insufficient to achieve these objectives, e.g., they allow a waste operation that causes a nuisance, it should not be excluded to rely directly on Article 13. In any event, at least the Commission can obtain a finding that a Member State has infringed this obligation if a situation in conflict with it persists and, in particular, if it leads to a significant deterioration in the environment over a protracted period without any action being taken by the competent authorities.

It may be that the *Comitato* case reflects the dispute before the national court. There was no specific indication that the measure at issue, the authorisation of a landfill, would be in conflict with Article 13. The only argument raised by the national court concerned the question whether the Member State had adopted sufficient measures to encourage the prevention, recycling and processing of waste. However, it seems clear that the absence of such measures can't directly be relevant for the authorisation of individual landfills.

Irrespective of the direct applicability of Article 13 there are today many specific obligations of EU waste law that can have direct effect and therefore may be invoked with regard to specific problems.

Core System of the WFD



This is the core system of the WFD. The central issue is whether a substance is waste or not. Once it is considered waste the obligations of the WFD will apply and result in substantial burdens on the waste holder. Often the waste holder will be required to pay a professional waste treatment operator for the further handling of the waste. Substances that are not waste may be subject to other regulations, but usually these are not as burdensome as waste law.

The distinction between waste disposal and waste recovery is important for the further handling of waste. Recovery is preferable because it implies that the waste serves a useful purpose and replaces primary substances. Therefore the regulatory burden on recovery operations often is more limited than the regulation of disposal operations. In particular, there are less EU rules on recovery operations than on disposal operations. In addition Regulation 1013/2006 allows for more restrictions on the shipment of waste intended for disposal than on the shipment of waste intended for recovery.

Definition of Waste

- Article 3 (1): 'waste' means any substance or object which the holder discards or intends or is required to discard
- What about the Waste list? A list of wastes was included in the old definitions, but even there it was only considered illustrative, but not decisive!



The relevant term is „to discard“. The concept of discard is interpreted by the Court of Justice in a broad way, making reference to the „effet utile“ jurisprudence and the general principles of precaution and prevention.

Definition of Waste

- To discard
 - Special case: required to discard → specific legislation (e.g. C-176/05, paras 54 - 57 - meat-and-bone meal containing specified risk materials)
 - To discard or to intend to discard
 - depends on subjective elements in the mind of the holder
 - objective elements are used to deduce these subjective elements → case by case assessment, all circumstances to be taken into account, is the substance a burden?
 - cannot be interpreted restrictively → high level of protection



-The concept of discarding is the central to the waste definition. All problems with the definition stem from this very open term.

-In rare cases an obligation to discard a substance can be found. For example, in the case C-176/05 such an obligation resulted from legislation combatting mad cow disease with regard to meat-and-bone meal containing specified risk materials.

-The action of discarding or the intention to discard are not defined. They are essentially subjective in nature. Whether a substance is reasonably used or discarded often depends on the intention of the holder, e.g. incineration, landfilling etc. Moreover, the recovery of waste implies a rational use. This makes it even more difficult to distinguish between waste and non-waste.

- The Court requires a wide interpretation to ensure the protection of the environment and human health. All circumstances of a case must be taken into consideration to determine whether a substance has been discarded – the result is a case by case approach

See, for example:

Judgment of 12 December 2013, Shell Nederland and Belgian Shell (C-241/12 and C-242/12, EU:C:2013:821, paras 37 ff.)

Judgment of 24 June 2008, Commune de Mesquer (C-188/07, EU:C:2008:359, paras 38 ff.)

Definition of Waste

- A number criteria for the exclusion of substances from waste were rejected as not being decisive in themselves:
 - economic value of a substance >> recovery includes economic operations
 - the list in annex I illustrates but is not decisive
 - the form of treatment is not decisive as similar treatments can be applied to waste and to primary products (e.g. incineration)
 - environmental risks >> primary products also bear risks



Self-explanatory

Definition of Waste

- Example: The Erika Oil Spill (Commune de Mesquer, C-188/07, EU:C:2008:359)



Foto: Wikimedia commons,
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The picture actually doesn't depict the Erika, but the Amoco Cadiz, another tanker involved in an earlier oil spill.

Definition of Waste

Example: The Erika Oil Spill (Commune de Mesquer, C-188/07, EU:C:2008:359):

The Italian company ENEL concluded a contract with Total for the delivery of heavy fuel oil intended to be used as fuel for electricity production. Total chartered the vessel Erika to carry it from Dunkirk (France) to Milazzo (Italy). The Tanker sank off the coast of Brittany, spilling her cargo at sea and causing pollution of the Atlantic coast of France.

- Is heavy fuel oil waste?
- If no: was the spilled oil waste?



Self-explanatory

Definition of Waste

Example: the Erika Oil Spill - is heavy fuel oil waste?

- Heavy fuel oil is obtained as a result of the process of refining oil. This residual substance is capable of being exploited commercially (as fuel) on economically advantageous terms. But it poses substantial environmental risks.
- What is your opinion?



Foto: [Wikimedia Commons, Glasbruch2007](#)



HFO combines the least valuable fractions of crude oil and is more or less what remains after the more valuable fractions (petrol, diesel, kerosine) are extracted by refinery. Its price, after refinery, is about half the price of crude oil. HFO needs to be heated to become fluid. It also is contaminated by unwanted substances, in particular sulfur. It is used as fuel in shipping and power generation.

Definition of Waste

Example: the Erika Oil Spill - is heavy fuel oil waste?

- Waste can and should be recovered = replace primary raw materials. Therefore the possibility of economic reutilisation or commercial value alone **do not exclude waste**.
- **Production residue** = a product not sought as such > assumption of discarding or intention of discarding
- In contrast **by-products** are not assumed to be discarded if the reuse:
 - is not a mere possibility but a certainty,
 - without any further processing prior to reuse
 - and as an integral part of the production process
- CJEU relied on commercial value to assume a by-product.



The first issue to address is the commercial value of the substance in question. The definition of waste does not explicitly refer to commercial value, but the concept of waste recovery indicates that commercial value can't be decisive [Judgment of 28 March 1990, Vessoso and Zanetti (C-206/88 and C-207/88, EU:C:1990:145, para 8)].

Environmental risks as such are not decisive for the concept of waste because products can also be associated with environmental risk.

The CJEU focussed on the distinction between production residues that are considered waste and by-products that which are not.

Judgment of 24 June 2008, Commune de Mesquer (C-188/07, EU:C:2008:359, para 41 ff):

41 ... certain circumstances may constitute evidence that a substance or object has been discarded or of an intention or requirement to discard it ... That will be the case in particular where the substance used is a production residue, that is to say, a product not sought as such (ARCO Chemie Nederland, paragraphs 83 and 84). The Court has thus said that leftover stone from extraction processes of a granite quarry which is not the product primarily sought by the operator in principle constitutes waste (Palin Granit, paragraphs 32 and 33).

42 However, goods, materials or raw materials resulting from a manufacturing or extraction process which is not primarily intended to produce that item may constitute not a residue but a by-product which the undertaking does not wish to discard but

intends to exploit or market on economically advantageous terms in a subsequent process without prior processing (see *Palin Granit*, paragraph 34, and order in Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005, paragraph 35).

43 There is no reason to apply the provisions of Directive 75/442 to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products (see *Palin Granit*, paragraph 35, and order in *Saetti and Frediani*, paragraph 35).

44 However, having regard to the obligation to interpret the concept of waste widely in order to limit its inherent nuisance and harmful effects, the reasoning concerning by-products should be confined to situations in which the reuse of goods, materials or raw materials is not a mere possibility but a certainty, without prior processing and as an integral part of the production process (*Palin Granit*, paragraph 36, and order in *Saetti and Frediani*, paragraph 36).

45 In addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not the substance is waste within the meaning of Directive 75/442 is thus the degree of likelihood that the substance will be reused without prior processing. If, in addition to the mere possibility of reusing the substance, there is also an economic advantage to the holder in so doing, the likelihood of such reuse is high. In that case, the substance in question can no longer be considered a substance which its holder seeks to 'discard' and must be regarded as a genuine product (see *Palin Granit*, paragraph 37).

Definition of Waste

Production residue vs By-product - examples:

- **ARCO**: hydrocarbon residues resulting from a production process and used as fuel in cement kilns - need special environmental protection measures and can only be incinerated
- **Saetti**: petroleum coke intentionally produced and used in an oil refinery
- **Palin**: leftover stone in a quarry that was stored for indeterminate future use
- **Avesta**: stone debris used, without prior processing, in order to ensure the necessary filling in of underground galleries of the same mining operation



These cases illustrate the distinction between production residues and by products.

judgment of 15 June 2000, *ARCO Chemie Nederland and Others* (C-418/97 and C-419/97, EU:C:2000:318) > tends towards waste

order of 15 January 2004, *Saetti and Frediani* (C-235/02, EU:C:2004:26) > rejects waste

judgment of 18 April 2002, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* (C-9/00, EU:C:2002:232) > waste

judgment of 11 September 2003, *AvestaPolarit Chrome* (C-114/01, EU:C:2003:448) > rejects waste

Definition of Waste

- Would it make a difference if a refinery could not directly sell a large quantity of Heavy Fuel Oil and stored it, hoping to sell it at a later date?



This question gives the opportunity to reconsider what we learned up to now.

Definition of Waste

Production residue vs By-product - Article 5 (1) WFD

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.



Article 5 (1) of the new WFD codifies the jurisprudence on the distinction between production residues and by-products. In particular, the provision clarifies that the use of the by-product doesn't have to be integral to the production process.

It should be noted that Article 5 (2) allows the Commission to specify these conditions by applying them to specific substances. Such measures could help to clarify the distinction between waste and specific by-products. The Court has not yet ruled on the question whether Member States enjoy similar powers.

Definition of Waste

Example: the Erika Oil Spill - is spilled heavy fuel oil waste?

- Spilled oil is not wanted by the holder and can't be used without further processing.
- Therefore it can be assumed that it is a burden that the holder has discarded by spilling.
- The absence of any intent can't be relevant.



Judgment of 24 June 2008, Commune de Mesquer (C-188/07, EU:C:2008:359, §55 ff):

55 In those circumstances, it must be examined whether such an accidental spillage of hydrocarbons is an act by which the holder discards them within the meaning of Article 1(a) of Directive 75/442 (see, to that effect, *Van de Walle*, paragraph 44).

56 Where the substance or object in question is a production residue, that is to say, a product which is not itself wanted for subsequent use and which the holder cannot reuse on economically advantageous terms without prior processing, it must be regarded as a burden which the holder 'discards' (see *Palin Granit*, paragraphs 32 to 37, and *Van de Walle*, paragraph 46).

57 In the case of hydrocarbons which are accidentally spilled and cause soil and groundwater contamination, the Court has held that they do not constitute a product which can be reused without prior processing (see *Van der Walle*, paragraph 47).

58 The same conclusion must be reached in the case of hydrocarbons which are accidentally spilled at sea and cause pollution of the territorial waters and then the coastline of a Member State.

59 It is common ground that the exploiting or marketing of such hydrocarbons, spread or forming an emulsion in the water or agglomerated with sediment, is very uncertain or even hypothetical. It is also agreed that, even assuming that it is technically possible, such exploiting or marketing would in any event imply prior processing operations which, far from being economically advantageous for the holder of the substance, would in fact be a significant financial burden. It follows that such hydrocarbons accidentally spilled at sea are to be regarded as substances which the holder did not intend to produce and which he 'discards', albeit involuntarily, while they are being transported, so that they must be classified as waste within the meaning of

Directive 75/442 (see, to that effect, *Van der Walle*, paragraphs 47 and 50).

Definition of Waste

What about legal certainty?

- the principle of legal certainty requires that individuals should be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (general principle, e.g. C-581/10, para 66)
- In particular sanctions: *nulla poena sine lege*! (Article 49 of the EU Charter of Fundamental Rights)
- Due diligence? Operators should consult the authorities and/or experts if there is doubt!



Legal certainty is the elephant in the room. If the determination whether a substance is waste is difficult and uncertain, even for judges, it is questionable whether the definition of waste meets the requirement of legal certainty. This is of particular relevance if sanctions are imposed.

Regrettably, the CJEU has not yet been confronted with this problem.

Nevertheless, the limited certainty with regard to the definition of waste should at least oblige the relevant operators to seek clarification from the authorities and/or experts. Such obligations are justified in view of the environmental risks related to waste. Operators that do not apply this diligence should not be allowed to excuse themselves by invoking legal certainty.

Definition of Waste

- Article 2 (1) (unqualified exemptions)
 - (a) gaseous effluents emitted into the atmosphere;
 - (c) uncontaminated soil and other naturally occurring material excavated in the course of construction activities where it is certain that the material will be used for the purposes of construction in its natural state on the site from which it was excavated;
 - (d) radioactive waste;
 - (e) decommissioned explosives;
- >> no jurisprudence, substances are subject to specific legislation, e.g. Directive 2010/75/EU on industrial emissions



Self-explanatory

Definition of Waste - Exemptions

- Article 2 (1) (b) land (in situ) including unexcavated contaminated soil and buildings permanently connected with land;
- Reaction to Case Van de Walle and Others (C-1/03, EU:C:2004:490): is soil, contaminated by hydrocarbons originating from defective storage tanks of a petrol filling station, waste?
 - Spilled hydrocarbons are waste (cf. the Erika case)
 - Contaminated soil is waste because appropriate treatment of the waste hydrocarbons requires a separation from soil (decontamination) (para 52)



This exemption aims to clarify that contaminated soil does not fall under the waste regime. Quite often Member States already have specific instruments in place to address soil contamination. Moreover, more recent cases of contamination could be subject to Directive 2004/35 on environmental liability.

There is a certain tension between this exemption and the van de Walle case that was decided before this exemption had been introduced with Directive 2008/98. However, the exemption does not address spilled hydrocarbons. Therefore, it doesn't exclude them from being qualified as waste. Can hydrocarbons lose this quality if they contaminate soil? If not, how should waste law be applied in such cases? It should be noted that this exemption does not seem to affect the obligation of Member States to clean up illegal landfills (Cf. Opinion of Advocate General Kokott in *Commission v Italy* (C-196/13, EU:C:2014:2162, para 99) and judgment of 2 December 2014, *Commission v Italy* (C-196/13, EU:C:2014:2407)).

Conversely, older sites that were contaminated before EU waste legislation came into force are not necessarily subject to the logic of van de Walle.

Definition of Waste - Exemptions

Exemptions for Agriculture

- Article 2 (1) (f) faecal matter, if not covered by paragraph 2(b), straw and other natural non-hazardous agricultural or forestry material used in farming, forestry or for the production of energy from such biomass through processes or methods which do not harm the environment or endanger human health.
- Article 2 (2) (excluded to the extent that they are covered by other EU legislation)
 - (b) animal by-products including processed products covered by Regulation (EC) No 1774/2002, except those which are destined for incineration, landfilling or use in a biogas or composting plant;
 - (c) carcasses of animals that have died other than by being slaughtered, including animals killed to eradicate epizootic diseases, and that are disposed of in accordance with Regulation (EC) No 1774/2002;



These exemptions aim to limit the application of waste law to agriculture. They appear more far-reaching than the corresponding earlier exemption. However, it is likely that under both regimes only lawful use, in particular use of manure as fertilizer that complies with the Nitrates Directive 91/676, would allow to exclude the material from the scope of waste law.

Definition of Waste - Exemptions

- Article 2(2)(a) waste water shall be excluded from the scope of this Directive to the extent that it is covered by other Community legislation
- In principle waste water is subject to Directive 91/271/EEC.
- Thames Water Utilities (C-252/05, EU:C:2007:276):
 - waste water which escapes from a sewerage network is discarded (cf. the Erika and van de Walle cases)
 - other legislation can only exempt a substance if it contains precise provisions organising its management as waste and ensures a level of protection which is at least equivalent to waste legislation
 - Directive 91/271/EEC does not address escaped waste water



The Thames Water case illustrates the requirements of the “other legislation” exemption of Article 2 (2) WFD. Such legislation must provide sufficient guarantees that the waste in question is appropriately treated.

Recovery and Disposal

- Article 3 (15) WFD: '(R)ecovery' means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations.
- Article 3 (19) WFD: 'disposal' means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations.
- Recital 19: clear distinction between ... [recovery and disposal], based on a genuine difference in environmental impact through the substitution of natural resources in the economy and recognising the potential benefits to the environment and human health of using waste as a resource.



The definitions of recovery and disposal have been clarified by the new WFD. Recovery is characterised by two elements, namely the useful purpose of the waste and the replacement of other materials.

Recovery and Disposal

- Edilizia Mastrodonato (C-147/15, EU:C:2016:606): is the backfilling of a quarry with waste disposal (requiring respect of the Landfill Directive 1999/31/EC) or recovery?
- Main objective of the recovery operation must be the conservation of natural resources - a secondary effect would be insufficient (para 39)
- Annexes I [D1 - Deposit into or on to land (e.g. landfill, etc.)] and II [R 10 - Land treatment resulting in benefit to agriculture or ecological improvement] set out the most common disposal and recovery operations, but do not provide an exhaustive list (para 40)
- Operations must be classified on a case-by-case basis in the light of the objectives and definitions set out in the Directive (para 41)



The distinction between recovery and disposal of waste is in some ways similar to the distinction between waste and non-waste. While there are some illustrative indications in the annexes the final determination must be made on a case-by-case basis, taking all circumstances and the objectives of waste law into account.

Recovery and Disposal

Edilizia Mastrodonato (C-147/15, EU:C:2016:606)

- Would backfilling have taken place even if waste had not been available and, accordingly, other materials would have had to be used? Who pays (waste holder, operator of the quarry)? (paras 43 and 44)
- Is the waste used suitable in the light of the most recent state of scientific and technical knowledge? (paras 45 - 48)



This is an illustration of the necessary case-by-case assessment and the importance of both elements of the definition of recovery. A useful purpose (backfilling) alone is insufficient if the waste does not replace other materials. Moreover, a replacement is only possible if the waste is suitable for this purpose. Suitability implies that this use would not create dangers for human health or the environment.

Recovery and the end of waste

Article 6 WFD

Certain specified waste shall cease to be waste ... when it has undergone a recovery, 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;
- (b) a market or demand exists for such a substance or object;
- (c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
- (d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.



This provision does not in itself contain a rule when waste ceases to be waste, but only allows for the establishment of criteria in this regard. Article 6(2) shows that these criteria are to be developed by the Commission.

A methodology to develop the criteria has been elaborated by the Joint Research Centre (JRC reports). After having agreed this methodology with the Member States, the Commission is now preparing a set of end-of-waste criteria for priority waste streams.

So far, the criteria have been laid down for:

- iron, steel and aluminum scrap (see Council Regulation (EU) No 333/2011)
- glass cullet (see Commission Regulation (EU) N° 1179/2012)
- copper scrap (see Commission Regulation (EU) N° 715/2013)

In the absence of Commission criteria, Member States may decide on a case-by-case basis under Article 6(4), taking into account the applicable case law, whether certain waste has ceased to be waste.

As the reference to case law indicates this provision codifies jurisprudence that addressed the “complete recovery” of waste, thus ending the qualification of the material as waste.

Recovery and the end of waste

- Lapin ELY-keskus, liikenne ja infrastruktuuri (C-358/11, EU:C:2013:142, para 59): to determine whether a recovery operation may transform the object in question into a usable product, it is necessary to determine, in the light of all the facts of the case, whether that object may be used ... without endangering human health or harming the environment.
- This also applies to hazardous waste (in this case wood poles treated with preservatives).
- But in spite of complete recovery it is still necessary to assess whether the material in question is being discarded!



Under the new WFD, the CJEU addressed this question in a Finnish case. According to this judgment complete recovery appears to be equivalent with transformation into a usable product that can be used without endangering human health or harming the environment.

The Polluter Pays Principle

- Example - the Erika Oil Spill
- Who bears the clean-up costs? Are the producer of the heavy fuel oil spilled at sea and/or the seller of the fuel and charterer of the ship responsible?



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Obviously the clean-up of a tanker oil spill can be very expensive. The liability of tanker operators is capped by an international agreement and, moreover, such enterprises usually can't cover the full cost. Therefore, the question arose whether companies of the Total group also could be held liable because one company of the group had produced the oil and another company had sold it and chartered the ship.

The Polluter Pays Principles

- Article 14 WFD (1) In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders.
- Article 3 (5): “‘waste producer’ means anyone whose activities produce waste (original waste producer) ...”



The Polluter Pays Principles

The Erika Oil Spill

- The owner of the ship carrying the oil is in fact in possession of it immediately before it becomes waste. In those circumstances, the ship-owner may thus be regarded as having produced that waste and on that basis be categorised as a holder (para 74).
- If the seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur it could be considered a previous waste holder, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship (para 78).



The CJEU found that the primary responsibility lies with the owner of the ship. However, it is possible that the national court finds that the seller-charterer contributes to the risk and therefore becomes liable. In case of an oil spill such contribution could in particular result from the choice of the ship. However, on its own the mere production of heavy fuel is not sufficient to create liability.

The Polluter Pays Principles

- Article 14 WFD ((2) Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs.
- >> Primarily aims to allow the creation of an extended producer responsibility where original producers can contribute to the reduction of waste or help to facilitate appropriate waste treatment



Under Article 14(2) of the new WFD Member States can provide for liability of the original producer of a product. However, it is unlikely that Member States will create unlimited producer liability for accidents such as oil spills. On the contrary, most Member States are party to international conventions that create a fund to cover such risks and at the same time limit the liability.

The idea behind this liability of producers is to be found in the extended producer responsibility of Article 8. It is supposed to strengthen the re-use and the prevention, recycling and other recovery of waste. If producers of products are responsible for them when they become waste they will aim to facilitate appropriate treatment already at the design stage.

Hazardous Waste



- Article 3 (2): “‘hazardous waste’ means waste which displays one or more of the hazardous properties listed in Annex III”.
- Article 7 (1) “... The list of waste shall include hazardous waste ... The list of waste shall be binding as regards determination of the waste which is to be considered as hazardous waste. ...”
- Hazardous Waste is marked by a * in Commission Decision 2000/532, e.g.: 05 01 05* - oil spills
- Under Article 7 (2) and (3) Member States may identify additional hazardous wastes or consider certain waste not hazardous if certain conditions are fulfilled.



Once a substance has been identified as waste it is not difficult to find out whether it hazardous or not. It is sufficient to associate it with the appropriate category of the Waste List.

Hazardous Waste



Additional Obligations

- Article 17 - ... traceability from production to final destination and control of hazardous waste ...
- Article 18 - the mixing ban
 - (1) "... hazardous waste is not mixed, either with other categories of hazardous waste or with other waste, substances or materials. Mixing shall include the dilution of hazardous substances."
 - (2) limited exceptions
 - (3) "Subject to technical and economic feasibility criteria, where hazardous waste has been mixed in a manner contrary to paragraph 1, separation shall be carried out where possible and necessary in order to comply with Art. 13."
- Article 19 - labelling of hazardous Waste
- Article 20 - special obligations do not apply to households
- Article 35 - record keeping with regard to hazardous waste

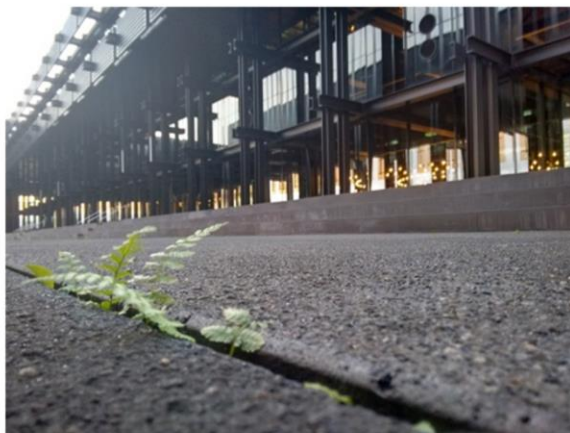


The special obligations applying to hazardous waste aim to ensure that each type of hazardous waste can be treated appropriately, that is to in accordance with the objective to protect human health and the environment (Article 13). The required treatment depends on the environmental risks associated with the specific type of waste: e.g. some hazardous hydrocarbons need to be incinerated at certain minimum temperatures.

If the wrong types of hazardous waste are mixed it may be more difficult or even impossible to treat the mixture appropriately.

Another risk is dilution of hazardous waste until the limit value for the qualification as hazardous no longer is reached. Though the hazardous waste appears to be gone, such dilution may not be the appropriate treatment to minimise risk to the environment and human health.

Thank you for your attention!



Case law: <http://curia.europa.eu/juris/recherche.jsf?language=en>

