

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

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

30 November – 02 December 2016, Thessaloniki (Greece)

Solution to the 1st case study

The case is based on the Judgment of 7 March 2013, *Lapin ELY-keskus, liikenne ja infrastruktuuri* (C-358/11, EU:C:2013:142) and the Opinion of Advocate General Kokott in (EU:C:2012:797), but not all of the issues raised by the case study were addressed by the Court or in the Opinion.

It is necessary to examine the reasoning of the environmental authority, namely that, first, waste law does not apply and, second, that, if it applied, the use of the poles would be allowed. As a consequence, it is necessary to decide whether the poles became waste at some point before they were used and in the affirmative whether the foreseen use would be allowed under waste law.

1. Did the poles become waste?

This question was not decided by the Court, but it shouldn't be too difficult to resolve. It hinges on whether the holder of the poles discarded, intended to discard or was required to discard them. In this regard it's not the distinction between production residues and by-products that is relevant, but the delimitation between consumption residues and used/second-hand goods. The latter are not waste if they are reused definitely and in a comparable manner, without prior processing (Niselli, para 49). These conditions are not met in our case. There is no indication that a use of poles was certain when they were dismantled. It's questionable that the use as structural support is comparable to the use as telecommunications poles. And the use as structural support implies some processing, in particular cutting of the poles.

If they had been dismantled and directly used for another (legal) purpose it could have been possible to assume that they were not discarded. However they were put in storage. Therefore, it should be assumed that they were discarded and therefore became waste (see also the *Palin Granit* case).

2. Was the use of the poles allowed under waste law?

The use of the poles could be considered recovery. In this regard it is decisive that such use of similar materials is allowed under the REACH Regulation and that this instrument has comparable objectives as the WFD. Moreover, once the poles are part of foreseen structure they can no longer be considered waste as they meet the requirements that would be applied to products used for the same purpose.

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Solution to the 2nd case study

The case is based on the Judgment of 12 December 2013, Shell Nederland and Belgian Shell (C-241/12 and C-242/12, EU:C:2013:821). In this case the Court denied that the consignment became waste while the Opinion of Advocate General Jääskinen in Joined Cases Shell Nederland (C-241/12 and C-242/12, EU:C:2013:405) arrived at the opposite conclusion. I am not convinced by the reasoning of Court, but I can support the Court’s result.

In any event, readers should be aware that there is a translation error in the English version affecting the central finding in para 53 of the judgment. Instead of “in a subsequent recovery process” it should read „without any recovery process“.

Advocate General Jääskinen

1. The mixture transported by Shell from Belgium to the Netherlands may fall within several of the categories mentioned in Annex I to Directive 2006/12, such as, for example, Q2 ‘Off-specification products Q4’, ‘Materials spilled, lost or having undergone other mishap, including any materials, equipment etc., contaminated as a result of the mishap’ or Q12 ‘Adulterated materials (e.g. oils contaminated with PCBs etc.)’. However, these categories only provided guidance (paras 19 to 21) (and have been omitted in Directive 2008/98).

2. The central argument for the AG lies in the accidental contamination of the diesel fuel that renders it off-spec. In contrast the intentional delivery of off-spec products does not necessary render them waste (paras 40 and 41).

The Judgment

The question is whether the consignment of contaminated diesel fuel was discarded or whether there was an intention or an obligation to discard the consignment.

1. The Court starts by stating the absence of any indication for an obligation to discard (para 43).

2. A distinction needs to be drawn between the client and the trader.

a) The Court finds that the client did not discard or intend to discard the consignment. While it was not suitable for its intended purpose the client returned it, expecting a substantial refund (para 46).

b) As regards the trader, the court considers several issues to be not decisive:

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The fact that the consignment could be sold on the market and that it has commercial value comparable to the uncontaminated product do not show the actual intention of the trader (para 49). Moreover the Court had already found in other cases that both facts do not exclude waste (para 50). Neither does the fact that similar products are not traded as waste exclude waste (para 51).

What is decisive to the Court is the intention of blending the consignment (with more diesel) and placing it back on the market (para 52).

In this regard the Court highlights the absence of any recovery operation and requires that the national court verifies that no recovery processes referred to in Annex II B to Directive 2006/12 is necessary prior to reuse (para 53).

Criticism

The reliance of the Court on recovery processes of the Annex is not convincing as there is no strict connection between recovery or disposal operations and waste (see ARCO, paras 49 and 50, Niselli, para 37 and 38). Moreover, one could actually consider the blending to be recycling or reclamation of organic substances, listed under R3.

However, it could be argued that all elements taken together guarantee that the contaminated consignment will not be discarded.

On the other hand, it could also be argued with the AG that accidental contamination, rendering the product off-spec, is sufficient to assume discarding.

Perhaps the most decisive element in this case lies in the high absolute value of a shipload of contaminated diesel fuel where the contamination can very easily be reduced below the threshold of relevance, without implying any (additional) risks to human health or the environment. In such a situation discarding is extremely unlikely.