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

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Please feel free to interrupt
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.
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.
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.

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 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.
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.
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.
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.
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.
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.
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.
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
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
HFO combines the least valuable fractions of crude oil and is more or less what remains after the more valuable factions (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.
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).
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 kansanterveyden julistus (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.
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.
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).
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
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.
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.
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.
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.
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 me made on a case-by-case basis, taking all circumstances and the objectives of waste law into account.
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.
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) No 1179/2012)
- copper scrap (see Commission Regulation (EU) No 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.
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.
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 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.
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.
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.
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!