ANNUAL CONFERENCE
OF THE EUROPEAN UNION FORUM OF JUDGES FOR THE ENVIRONMENT

The Law Society
London
2 & 3 December 2005

EUROPEAN LAW RELATING TO WASTE:THEORY AND PRACTICE: CASE LAW IN ITALY

Amedeo Postiglione
Justice Supreme Court of Cassation, Italy
Vice-President European Forum of Judges for the Environment
Director ICEF (International Court of the Environment Foundation)
icef.postiglione@tiscali.it

TABLE OF CONTENTS

1. Existing legislative basis currently in evolution.

2. General case law enforcing the legislation.

3. Cases of divergence on the definition of waste and on the concept of the recycling of the secondary raw materials.

4. The prospect of a revision of the Directive in the sense of giving greater space for prevention and the recycling of secondary raw materials.

1. Existing legislative basis currently in evolution

The earliest law on waste in Italy dates back to 1982 (Law No. 915/82) introduced with a certain time lag under the stimulus of the first Community Directive (75/442/EEC) on waste in general and 78/319/EEC on toxic and dangerous waste).

A subsequent wider law was enacted in 1997 (Law No. 22/97). It implemented Directive 91/156/EEC on waste, 91/659/EEC on hazardous waste and 94/62/EC on packaging and packaging waste.

Problems of interpretation arose – as we shall see – following action taken by the government and Parliament aimed at narrowing the concept of waste and, at the same time, opening up the field of recycling (Decree Law No. 138 of 8 July 2002 converted into Law No. 178 of 8 August 2002). On this matter, the European Court of Justice came to a different conclusion on 11 November 2004 in the Niselli judgment (C-457/02) in the sense it contrasted with the Community definition of waste.

Similar difficulties arose with reference to some sectoral laws tending to exclude *"ex lege"* the concept of waste in individual cases (earth and rocks from excavations pursuant to Art. 1 of Law No. 443 of 21 December 2001, metal scrap pursuant to Arts. 25, 26 and 27 of Law No. 308 of 15 December 2004).

The legislative situation in Italy in relation to waste is now subject to revision, because Parliament has issued a Decree Law to the Government (No. 308/2004) and a special Commission has just presented on 12 September 2005 a draft Legislative Decree containing 90 articles, which is not as yet final or in operation.

In essence, the legislation is preserved but within a more rational framework, giving greater space to the role of operational management by private parties for prevention and recycling.

2. General case law enforcing the legislation

- In order to have an idea about the number of contaminated sites examined by the Italian Court of Cassation, we have two data: 1) 400 decisions enforcing the earlier Law of 1982 and 2) 262 enforcing the more recent Law of 1997.

  In actual fact, the number is higher because only the most important cases are stored in the data banks of the Court of Cassation.

  The sensitivity and the commitment of the judges of the Courts of First Instance and the Appeal Courts are noteworthy: about 310 decisions. However, this number is not complete as there is a missing patrimony of case law and many decisions have been discussed in law journals (874 precisely including those of the Cassation).

- The case law is mainly criminal. Administrative case law is growing. Case law of a civil nature remains marginal (although it is necessary to take into consideration that some claims for damages are made during criminal proceedings with aggrieved parties acting in those proceedings to recover damages).

- The case law deals with all the aspects of this complex subject matter:
  - the notion of waste
  - the distinction from the concept of dumping of water
  - the concept of air pollution (having separate regulations)
  - the role of the criminal investigation squad in inspections (depositions on the facts, depositions, searches, sequesters, technical operations of sampling and analyses, etc.)
  - acts authorised by competent Public Administrations (express and specific acts)
  - emergency measures taken by the Public Administration (mayoral orders and their legality)
  - management of dumps
  - abandonment of waste
  - temporary waste dumping
  - transport
  - failure to clean-up contaminated sites
  - illegal trafficking in waste
  - authorised management of certain categories of waste (abandoned cars, hospital waste, electric or electronic waste, old tires, waste-derived fuel and high-quality waste-derived fuel, waste from ships, oil and vegetable fats, used lead batteries)
  - integrated preventive authorisation for incinerators
  - Regional plans and the prohibition against transporting waste from Region to Region
  - prohibition on waste blending
  - earth and rocks from excavations, metal scrap, railway sleepers
  - legality of policy agreements
  - liability for negligence
  - liability of the owner of contaminated site, etc.

- On the whole, it is rather strict case law which reflects the all-embracing notion of waste of Community origin.

There is an attempt leaning towards excluding waste in some particular cases (there is no requirement of abandonment; there is an effective objective – recycling – if there is, in practice, no damage to the environment.

3. Cases of divergence on the definition of waste and on the concept of the recycling of the secondary raw materials

In an initial phase, the Italian legal system defined regulations (we are talking about waste) for so-called secondary raw materials**,** that is, for those residuals deriving from production processes able to be used as raw materials in other production processes. This occurred under Law No. 400 of 9 November 1988 and No. 475/88 and with a Decree of the Ministry of the Environment of 26 January 1990 which, on a technical level, contained a list of secondary raw materials (indicating their origin and intended use), subject to the regulations relating to waste.
The Italian Constitutional Court intervened with a decision (No. 518/90) in which it did not exclude the legality of the Ministerial Decree for technical aspects (apart from the competence of the Regions), recognising that, in the case of the objective and unequivocal for recycling, it is outside the concept of waste. The Court of Cassation also recognised, in general, secondary raw materials (Full Bench Cass. ,27/3/1982, Vezioli; Div. III Cass. , 4/2/1992 No. 257
Puppo; Div. III Cass., 31/1/1995 No. 1016, Zambianchi).

- The situation changed following a reference made by the Magistrates' Court of Terni to the European Court of Justice, which was upheld in its decision of 26/6/1997, VI Chamber, in the Tombesi Case.
  Under the new Law 22/97, the autonomous concept for secondary raw materials disappeared and recovery operations were included within waste management.

- As has already been mentioned, recently the national legislator has taken action in the matter in two ways:
  a) in general, with a provision interpreting the concept of waste (Art. 14 Law No. 178/2002);
  b) with individual measures (on earth and rocks from excavations; on scrap metal, etc.).

- On the former aspect the Court of Cassation has taken two different approaches: in the Passeritti Case, Decision No. 4052 of 13 September 2002 (and others, for example the Sollo Case, III Div. Cass., 27 October 2004, No. 1255), it held that national courts cannot not apply the law of their country; instead the Ferretti Case, Decision No. 2125 of 27 November 2002 and the

Gonzales and Rivoli Case, Decision No. 1766 of 15 January 2003, it favoured a largely unchanged application of Community law on the notion of waste.

The question was faced by the European Court of Justice in the Nisselli Case (C-457/02) of 11 November 2004, in the sense of non-conformity of Italian law with the Community notion of waste.

On a formal level, the principle of the supremacy of Community law is upheld but this does not mean that this law cannot be criticised and improved upon.

In fact, it should be noted that, recently, in the Marretti Case (III Criminal Div., Cass. No. 18836/2005) handed down on 4 March 2005, the Italian Court of Cassation held that the courts must apply Italian regulations relating to waste, even when they are in contrast with EU Directives, because these Directives are not self-executing in Italy.

1. The prospect of a revision of the Directive in the sense of giving greater space for prevention and the recycling of secondary raw materials

- Over 30 years have passed since the first European Directive on Waste: in the meantime, much has changed at the level of sustainability and interest in the economic world in recycling residues, also in relation to energy. There are, today, advanced technologies available on the market for preventing and limiting the quantities and the quality of waste, improving upstream the type and mode of production. A system which is too rigid, bureaucratic and centralised downstream may prove counterproductive for the environment if <u>everything</u> is waste *ex ante*. The community wants a certain severity in controls but it also wants recycling of that which has a value for the economy, keeping in mind the enormous amount of waste in certain areas which cannot be managed as, for example, in the south of Italy.

- The case law may also make a contribution if the system provides a role for it with respect to actual case and to its specific nature. Today, a non-ideological but practical vision may be the best thing for the environment.

- The concept of waste is by its nature related to dumping: it seems advisable to reduce it only to non-recyclable substances, to be eliminated without damage to the environment.

- As for residuals, it is necessary to make the economic party responsible, obliging it to indicate the normal route for waste recycling, to give a preventive economic guarantee, to submit to strict sequential controls providing proof of objective, unequivocal, and actual use imposing not only a new kind of criminal but also administrative penalties (for example, suspension and

revocation of the activity). This stricter and more concrete method provides case law with a role in distinguishing punishable acts from legal behaviour.

If the economic party is controlled directly in relation to the result, it will gradually be convinced to introduce into its productive process the technology necessary for reducing the quantities and the danger of the waste.

These personal opinions do not exclude the duty today to properly and effectively enforce existing Community law.