



EU FORUM OF JUDGES FOR THE ENVIRONMENT
UE FORUM DES JUGES POUR L'ENVIRONNEMENT

EUROPEAN WASTE LAW THEORY & PRACTICE
EUFJE ANNUAL CONFERENCE 2005

QUESTIONNAIRE ON NATIONAL CASE LAW REGARDING ISSUES OF WASTE

AUSTRIA

This questionnaire addresses a number of contentious issues which arise from the case law of the European Court of Justice (a summary of the leading cases is available at http://europa.eu.int/comm/environment/law/pdf/leading_cases_2005_en.pdf#page=41). The questionnaire particularly considers issues of waste law arising from Directive 75/442/EC - Waste Framework Directive.

The purpose of this questionnaire is to compare how case law at European level is reflected in different Member States. In order to encourage responses from all member states, this questionnaire is divided into two sections:

Section A: General Issues of Case Law & Implementation - it is hoped that everyone will be able to respond to this section by providing details of a national case of interest which has involved issues of waste. Reference may be made to the more detailed guidelines and questions in Section B.

Section B: Specific Issues of Case Law & Implementation - this section gives more detailed guidelines on the types of waste issues which are of particular relevance with specific reference to Directive 75/442/EC - Waste Framework Directive. Please respond as you are able, focusing on any issues raised in your jurisdiction.

Once you have completed Section A and (if relevant) Section B, please return your response by email to David Whiting, Assistant to the Secretary-General at: EUFJE@elflaw.org

Your responses may be as short or as long as you wish.

IT WOULD HELP US IF YOU COULD REPLY BY FRIDAY 30 SEPTEMBER 2005.

Secrétariat – Secretariat :
<http://www.eufje.org>

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SECTION A: GENERAL ISSUES OF CASE LAW & IMPLEMENTATION

(To be completed by all)

Please provide details of a case in your jurisdiction which raises points of interest on the implementation of EU waste law. If you wish, you may refer to one or more of the issues highlighted in Section B.

VWGH=Verwaltungsgerichtshof (Supreme Court of Administration)

Judgment of the VwGH, July 4th 2001, 99/07/0177-7

In this case the VwGH had to determine whether filter residues from the recovery of wolfram are or are not waste. The Federal Minister for the Environment had determined the filter residues were waste as there was an intention to discard the substances. The VwGH however did not share this opinion and determined that the residues were not to be regarded as waste. The court pointed out that if the residues were given to another company to have them converted into a product to be delivered to the clients of the wolfram recovery for use in their production processes the discard test is to be answered in the negative as there is no intention to discard. Kuppelproduktionsprozess. By-product

Judgment of the VwGH, July 25th2002, 2001/07/0043

The Federal Minister for the Environment had determined the material in question (waste from grinding plexiglass, die-casting residues, PET bottles etc being sorted, milled and melted to a size of 8mm) used as fuel was waste. The Federal Minister had reasoned that the input of packaging waste can lead to a high aluminium content in the incineration residues. The VwGH on the contrary again declared that also by-products can be regarded as results of a complete recovery operation that ceases the designation as waste.

Judgment of the VwGH, July 25th2002, 2001/07/0043

Consultation the ASA-case of he ECJ (C-6/00) the VwGH determined that the

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**SECTION B: SPECIFIC ISSUES OF CASE LAW & IMPLEMENTATION -
DIRECTIVE 75/442/EC - WASTE FRAMEWORK DIRECTIVE**

(You may complete as much of this section as you wish, depending on its relevance within your jurisdiction).

Article 1(a) - Definition of Waste

1. Special meaning of Discard/Uncertainty

The definition of waste contained in article 1(a) is based on the discard test as interpreted by the Court. Designation as waste results in a substance being subject to regulation. Determining whether a substance is or is not waste according to this test can be difficult and there are sometimes complaints that the definition is not clear enough.

Please give examples of cases where a national court has been asked to determine whether a substance is waste in your jurisdiction. How have ECJ judgments concerning the question of when something becomes waste been applied (in particular Case C-417/98 Arco Chemie)? Have courts had any difficulty interpreting the definition or applying the ECJ case law?

In his judgment 99/07/0177 (see above Section A) the VwGH refers to all the criteria the ECJ established in the Arco-Case (C-417/98) regarding the designation of waste. The court also mentions the cases C-304/94 Tombesi; C-206/88 und C-207/88 Vessoso; C-422/92 Kommission/DC-129/96 Inter-Environnement Wallonie ASBL. Referring to the Arco-Case, the court concludes that from the fact, that filter residues are subject to a further process of treatment it may not be inferred that the material has been discarded so as to enable it to be regarded as waste.

2. Disproportionate regulation/Barriers to use

The application of regulation is usually not welcomed by those subject to it. This is particularly the case where waste is being used as a substitute for non-waste where it is often claimed the level of regulation applied is disproportionate and acts as a disincentive to find uses for these substances. The purpose of waste regulation is of course to ensure that the disposal and recovery of waste is conducted in circumstances which ensure protection of the environment.

Has the application of ECJ case law on the definition of waste resulted in complaints that it is interpreted too widely or too narrowly?

3. Products, by-products and residues

The majority of case law on the definition of waste at Community level is concerned with the question of whether materials resulting from a production process which are not primarily sought by the operator should be considered waste or not. This may be due to the variety of circumstances to which it is applied – from manure on a farm to leftover rock from a quarry. Despite the amount of case law, there remain complaints that the case law is unclear.

Have national courts in your jurisdiction applied the ECJ case law concerning by-products and residues? Have they had any difficulty applying the principles laid down by the ECJ? Have they developed additional criteria?

See above 1. No additional criteria have been developed

4. Complete recovery operation

One area where it is said that there is uncertainty in ECJ case law relates to the concept of a complete recovery operation. This is a key part of the “end of waste” debate – if you apply a complete recovery operation to a substance, does it cease to be waste? If it ceases to be waste controls are no longer applied and hence any subsequent use will not be regulated as a recovery operation.

Have national courts applied the idea of a ‘complete recovery operation’ in your jurisdiction to find that substances have ceased to be waste? In doing so have they compared the waste derived material with raw materials?

See above 1. The VwGH considers the filter residues as a substitute for customary ore.

5. Substitute fuels and complete recovery operations

A particular example of the end of waste debate concerns the status of waste derived fuel. If it ceases to be waste before it is burnt none of the controls in the Waste Framework Directive or the Waste Incineration Directive apply. On one hand, energy is recovered from the waste and it is only at the stage of burning that this is realised. Any operations carried out before that stage are liable to simply prepare the waste for burning and hence be regarded as pre-treatment. The recovery operation is burning as a fuel. The contrary argument is that where a complete recovery operation is carried out on the waste, it possesses similar characteristics to a primary raw material used as fuel and hence there is no reason to apply waste controls.

Have national courts accepted that it is possible for waste derived fuel to cease to be waste prior to its use as fuel? What criteria have they applied to distinguish complete recovery operations from simple pre-treatment in these cases?

See above Section A. Judgment 2001/07/0043. In this decision the court accepted that it is possible for waste derived fuel to cease to be waste at a point in time long before the use as fuel. In his conclusions the court refers to the Arco-Case of the ECJ. The court also refers to the Palin-Case (C-9/00) which it considers not applicable as that case dealt with leftover stone.

6. End of waste and recycling

The need for greater clarity in this area has been recognised by the Commission in the proposal for a revised Waste Framework Directive. This is one mechanism to help deal with claims that regulation should not apply where substances are being used without the need for special precautions.

At what point do national courts consider materials are recycled within the meaning of the Packaging Waste Directive? Do different considerations apply in assessing the point at which substances cease to be waste for those substances which are sent for recycling than for those which are not (e.g. scrap metal)?

7. Lawyer driven not policy driven

A common complaint over waste legislation is that regulation turns on legal interpretation and not on the basis of policy. This may reflect the lack of guidance given by the legislation.

Have national regimes which transpose the EU legislation set down criteria for the Courts to apply in determining what is waste or has it been left to the Court?

Criteria can be found in the Federal Waste Management Plan

Article 2(1)(b) – Other legislation

Even if a substance is waste, it will not be controlled under the Directive if it is excluded under article 2(1)(b) of the Directive. Certain waste streams are excluded if they are covered by “other legislation”. Case C-114/01 *Avestapolarit* found that national legislation could be “other legislation” for these purposes if it relates to the management of that waste as such within the meaning of Article 1(d) of the Directive, and if it results in a level of protection of the environment at least equivalent to that aimed at by that Directive, whatever the date of its entry into force.

Community legislation may also be “other legislation”.

Have national courts made any decisions as to what constitutes “other legislation” for these purposes both at Community and national level? What criteria do they apply?

No relevant decisions of supreme courts

Definition of recovery

The Commission has identified difficulties with the distinctions made between disposal and recovery operation. Several consequences flow from this distinction (eg under the Waste Shipments Regulation 293/93/EC where there is free trade in recovery of waste but not disposal, targets set in Producer Responsibility legislation and a requirement to encourage recovery in the Waste Framework Directive).

Is there any national case law on the concept of recovery? Is this based on any national criteria to distinguish between disposal and recovery?

In the judgment 2003/07/0012 (see above) the VwGH determined that if waste is disposed in a mine, where there is no duty to fill up the mine (Versatzpflicht), the disposal can not be determined as recovery operation. The VwGH can be interpreted that way that if on the contrary there is a legal duty to fill up a disused mine, the deposit of waste in the mine is to be determined as a recovery operation. The criterion – legal duty to fill up the mine (Versatzpflicht) – diminishes the position of the authority of dispatch to decide autonomously whether a shipment is to be regarded as a disposal or as a recovery operation.

Article 4 – General objective of the Directive

This article imposes a high level obligation on Member States to ensure that waste is disposed of without causing harm to the environment or human health. It is not sufficiently precise to give rise to individual rights (Case 236/92 *Lombardia*) but it is still possible for Member States to be held to account for failing to meet its requirements (C-365/97 *San Rocco*).

Is there any case law in your jurisdiction on a failure to meet article 4 requirements in particular circumstances? Or have national standards been seen as disproportionate? Have differences in the way Member States transpose created any difficulties?

No relevant decisions of supreme courts

Article 7 – Waste Plans and permits

Article 7 of the Directive requires competent authorities to draw up waste management plans to attain the objectives in articles 3,4 and 5 of the Directive. In turn the implementation of these management plans is meant to be carried out by issuing individual permits consistent with those plans (Case C-53/02 *Biffa-Tilleut*). Plans are not the only factor which determines the location of waste disposal sites, inasmuch as the final decision concerning location in some circumstances depends on the relevant rules relating to land-use planning and, in particular, the consultation and decision-making procedures implemented pursuant to Council Directive 85/337/EEC.

Have your national courts been asked to consider the relationship between individual permits and national waste plans?

In the decision 2000/07/0229, Oct 18th 2001 the VwGH determined that the permit for a for a waste incineration must not be denied on the ground that the site of the plant is not specified or mentioned in the federal waste management plan. The VwGH stated that it does not follow from directive 75/442/EWG that an individual permit may only be granted if the site is designated in the national waste management plan.