EUROPEAN WASTE LAW, THEORY AND PRACTICE
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NETHERLANDS REPORT

BY Th.G. Drupsteen
Member of the Netherlands Council of State

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SECTION A: General Issues of Case Law and Implementation

The case, I have taken as an example of the way European waste law is implemented in the Netherlands, has been decided by the Department of Administrative Jurisdiction of the Council of State by a verdict of may 26, 2004. It is the case of Aviko bv/Gedeputeerde Staten van Gelderland.

Aviko/Gedeputeerde Staten van Gelderland
Aviko bv is a factory that produces potatoe-products, like mashed potatoes, peeled potatoes and fried potatoes.
Gedeputeerde Staten van Gelderland is the daily board of the province of Gelderland. Gelderland is a rather rural province in the eastern part of the country. The provincial board is competent to issue environmental licenses for the bigger industrial plants and is also competent for administrative enforcement of these licenses.

Administrative enforcement may be applied in my country along two ways; either by real execution by the competent administrative body or by issuing an order under a penal sum. In this case Gedeputeerde Staten van Gelderland issued an order under a penal sum because of the fact that Aviko exploits an installation for storing and drying potatoewashwatersilt without having a license.

Before being worked up into potatoe-products the potatoes are brushed and washed in the factory of Aviko. The washwater contains sand- and clayparticles of the potatoefields. The washwater is treated with a flocculationmean to let these particles sink. The sunken ground forms a silted substance and is called potatoewashwatersilt or tarraground. This tarraground is brought into a depot in which it will be dried by natural evaporation and sinking away of the water into the soil. After a period of drying the tarraground will be removed out of the depot and brought on a maize field.

Gedeputeerde Staten van Gelderland consider the tarraground to be waste. Aviko has no license for the storage of waste.

Before the Department of Administrative Jurisdiction of the Council of State Aviko argues that the tarraground should not be considered as waste. It does not originate from its factory, it only gets off in the factory. Furthermore, it is clean according to a governmental decree on Building materials which may be used into the soil (clean soil belongs to these materials; the decree contains a.o. standards for the quality of clean soil). Although the tarraground will be dried in the depot, it is not necessary to do so; the tarraground could also directly be brought on the maizefield.

For as far the tarraground should be considered as waste, this waste will directly and environmentally justified be applied into a work in a way that according to the governmental decree on Environmental installations and licenses does not require a license. A work is a technical term for activities that cannot be called installations, like a noise-wall. According to the just mentioned decree under certain circumstances no license is required for the use of waste in a work.

In the following, I will concentrate on the question whether the tarraground should be considered as waste or not and further refrain form dealing with questions concerning the meaning of the decrees on Building materials and on Environmental installations and licenses.

National and European case-law on waste

According to the traditional, national case-law of the Department of Administrative Jurisdiction a substance that can be applied directly, without any environmental objections and without any further treatment was considered not to be waste. This national case law was also accepted by the national government (Department of Environmental Affairs) and laid down in policy-rules of this department. In those days no definition of waste could be found in national environmental legislation. Whether a substance should be considered as waste depended of a number of circumstances among which common sense played an important role. Of course, common sense was described as 'social circumstances'. Since 1994 the Environmental Management act contains a definition of waste: 'all substances, preparations or other products of which the holder – in order to remove them – disposes of, is preparing to dispose of or has to dispose of'. Later this definition has been changed in 'all substances, preparations or other products belonging to the categories mentioned in annex 1 of directive nr 75/442/EEG of the Council of the European Communities of July 15th, 1975 concerning waste of which the holder disposes of, is preparing to dispose of or has to dispose of'.

The European Court of Justice decisions in Epon and Arco forced the Department of Administrative Jurisdiction to reconsider its case-law. The rule that substances that can be applied directly, without environmental objections and further treatment are no waste, could no longer be uphold. After Epon and Arco the Department used a wide concept of waste, for which in general the question whether the holder has to dispose of its materials was deciding. Especially, cases in which in a production-process residues originate, that do have a certain value and can be applied without treatment and without environmental objections, caused intensive discussions inside the Department. According to the Epon and Arco case-law it seemed that these substances of which the owner has to dispose of, should be considered as waste, although according to the opinion of many members of the Department this did not make sense.

Than came the Palin Granit verdict and it seemed that the Department could go back to its traditional approach. In the Palin Granit verdict the European Court first repeated its most important conclusions of Epon and Arco. Than it stated that the fact that the gallery stones came free undeliberately, forms an important indication for the waste-character of it. But then came a new element in the Courts case-law on waste: 'If re-use without treatment not only is possible, but also is guaranteed and may be considered as a continuation of the production-process, than one can not speak of waste'. An important indication for the question whether a substance will be reused for another purpose lays in the fact that such a reuse will produce economic profits for the owner.

Considerations of the Department of Administrative Jurisdiction

The Department of Administrative Jurisdiction considers in the Aviko/Gedeputeerde Staten van Gelderland case, that according to common language waste is the substance that falls of when a material or an article is worked up and that is not the direct aimed result of the production-process. The Department refers here to the Palin Granit verdict. Therefore, the Department is of the opinion that the fact that the existence of the tarraground within the potatoe-products factory is the inevitable result of the supply of potatoes and that the tarraground does not originate in the factory, does not mean that already only for those

reasons the owner of the factory does not dispose of waste. (I apologize for the double or threefold negation in this sentence).
The Department deducts from the circumstances of the case that tarraground is not a deliberated product; therefore it should considered to be a residue. Next, it should be taken in consideration whether the circumstances of the case give rise to the opinion that the tarraground may be considered to be ‘as in itself a deliberated product’. According to the Palin Granit Verdict and the Saetti and Frediani decision this may be the case when the reuse of a good, material or substance is not only possible, but also is guaranteed, without further treatment and as a continuation of the production-process.
The Department holds that this cannot be said in this case, because of the fact that the reuse of the terraground cannot be considered as a continuation of the production-process. For this reason, and taken into account the Palin Granit verdict and the Saetti and Frediani decision, it has to be hold that tarraground can not be considered ‘in itself a deliberated product’ and that therefore there is no reason not to consider it as a residue (Apologizes again).
Nor does the Department seas reasons, again taken into account the criteria of the Palin Granit and Avesta Polarit Chrome verdicts, to consider a part of the tarraground as a by-product. Also for this reason terraground has to be considered as a residue.
Concluding the Department holds that the circumstances of the case give ample reason for the opinion that the owner of the factory disposes of the terraground. This terraground should therefore be considered as waste. The mere fact that the tarraground can be applied on an environmental justified way and without drying for the raise of agricultural fields and that a regular market exists for this purpose, does not make any difference.

The Department of Administrative Jurisdiction follows in this case the wordings of verdicts and decisions of the European Court of Justice rather strictly. Considered from a mere environmental point of view, there is less reason to be concerned about the environmental effects of bringing tarraground back on the fields. There is also less reason to be concerned about the environmental effects of the depot. Requiring an environmental license for the depot does not seem to make much sense. Although in accordance with the way of reasoning of the European Court the conclusion that tarraground should be considered as waste is rather inevitable. Compared with the concepts of Epon and Arco the approach in Palin Granit is more restricted, but the tarraground of Aviko does not meet the criteria set in Palin Granit.

SECTION B: SPECIFIC ISSUES OF CASE LAW AND IMPLEMENTATION –DIRECTIVE 75/4422/EC – WASTE FRAMEWORK DIRECTIVE

Article 1a –Definition of Waste

1. Special meaning of Discard/Uncertainty

There are number of cases in Netherlands environmental law in which courts had to determine whether a substance is waste or not. First cases date from 1981. Most cases are decided by the Department of Jurisdiction of the Council of State as an administrative court or by its predecessor the Crown. Some cases are decided by criminal courts. Substances at stake vary from concrete-silt, soot-oil (which is a material for automobile tyres), paper-pulp, egg-shells, mussel-shells, all kinds of residues, second hand clothes and shoes, carpet-pieces (used in a riding school), sawdust and wood-shaving, mushroom-feets, energy-pellets, yesterday's bread, tyres, soil, till even railway wagons.

Originally the question whether a substance was waste was determined merely on the basis of national law in which the social circumstances of the case were deciding. Common sense played an important role.

Later on this case-law was criticized from a European perspective. The national concept of waste was too narrow compared with the broad approach of the ECJ. The Department of Administrative Jurisdiction changed its case law under the influence of the European case law, especially the Arco-case which was broad to the Court by preliminary questions of the Netherlands Department of Jurisdiction.

The Department of Administrative Jurisdiction still has problems in applying this case law especially in case in which the substance that has to be considered as waste, because of the fact that the holders disposes of this substance, forms no risk to the environment whatsoever. In those cases it does not make sense to apply the strict regulations on the collection, storage and disposal of waste. These cases often deal with production residues, that can be used in an environmental justified way or with products made out of waste that meets the same standards as originally products, such as energy-pellets and collected and sorted wood as a material for chip-plate production.

3. Products, by-products and residues

As explained above the Netherlands Department of Administrative Jurisdiction applies the ECJ case law concerning by-products and residues. The discussion in individual cases is about the question whether a substance or a material should be considered as a deliberated product or a residue. To avoid the consequence that a product has to be treated as waste there is a certain tendency to accept materials as a deliberated product although difference in opinion in an individual case is still possible. As I explained before the Department has from time to time difficulties in applying the ECJ principles. Until now the Department did not develop own additional standards.

4. Complete recovery operation

The Department of Administrative Jurisdiction has accepted the 'idea of a complete recovery operation' in cases about energy-pellets. Energy-pellets are made exclusively out of waste. They are used as fuel in electricity-plants f.i. in Sweden. The energy-pellets are composed and do have a shape according to criteria set by the electricity-plant. Energy-pellets made be applied in the electricity-plant without any environmental preconditions or any environmetal objection. Under these circumstances the Department of Administrative Jurisdiction

determined energy-pellets as no-waste. These decisions are criticized by scholars for not meeting the European criteria for waste.

5. Substitute fuels and complete recovery operations
See under 4. Important for the Department of Administrative Jurisdiction were two elements:
a. the energy-pellets are composed and shaped according to criteria and conditions set by the electricity-plant; from this point of view it can be argued that energy pellets are made from waste, but form a new and deliberated product;
b. energy-pellets may be used under the same conditions and circumstances as original fuel; no special environmental conditions or precautions are required.
According to European criteria it is doubtful whether the second element may plan a significant role.

6. End of waste
As far as I know the Department of Administrative Jurisdiction did not develop any criteria for the question whether materials are recycled within the meaning of the Packaging Waste Directive.

7. Lawyer driven not policy driven
With the exception of the definition of waste, mentioned above, that refers to the framework directive on waste no further criteria are set down in national environmental legislation. Applying this definition in special cases has been left to the courts.

Article 2(1)(b)- Other legislation
As far as I know the Department of Administrative Jurisdiction did not made any decision about other legislation. Criteria are not set until now.

Definition of recovery
The Netherlands minister of Environmental Affairs has explained and established his policies related to waste in a National waste management plan. This plan is required by law (art. 10.3 Environmental Management Act). Any administrative body takes the actual waste management plan into account by applying competences related to waste according to the Environmental Management Act (art. 10.14 EMA).
For different kinds of waste different sub-plans are established. Especially for the transborder shipment of waste additional criteria, such as a minimum caloric value to determine between disposal of by burning and recovery by burning and production of energy, are set in a sub-plan. Nevertheless, these criteria are not accepted by the ECJ

Article 4-General objective of the Directive
As far as I know there is not any case-law on failure to meet article 4 requirements. Besides this, I don’t think that article 4 is formulated in a way that it can be applied directly by a national court.

Article7-Waste Plans and permits
The Department of Administrative Jurisdiction is not only asked to consider the relationship between individual permits and national waste plans; as I explained before article 10.14 EMA obliges administrative bodies to take into account the content of the actual waste plan in applying there competences. To take into account means that an administrative body may deviate from the plan but that it has to give good reasons for this. In appeal the court may

consider whether administrative bodies have met their obligation under art. 10.14 EMA or whether they gave good reasons.

End of the report