



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

NORWAY

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>

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.

The relevant directives form part of the EEA Agreement, and have been transposed to Norwegian domestic legislation. They can now be found in regulation nr.930/2004 on waste. The regulation was adopted under the authority of the statutes on pollution and control of products.

As far as I can see, there is only one decision by Norwegian courts that raises issues of relevance to you questionnaire, but this case went all the way to the Supreme Court. The judgement by the Supreme Court has been published in Norsk Retstidende (Rt.) 2004 on page 1645. The question dealt with by the Supreme Court was the question of which sentence the offenders should be given. I will give a short summary of the important parts of the judgement.

Mr. Eide was the chairman of the board and a main owner of shares in Alcusan AS (LTD). The company reclaimed and utilized waste from the aluminium industry. Mr. Sjøli was the director of the company. Both had been accused of offences against the pollution statute by having allowed a considerable amount of water from the process, containing oxides/aluminium hydroxides solid substances run uncleaned into a fjord. In addition they had been charged with having deposited a considerably higher amount of oxide into the fjord than they had been given permission to do. Finally they had been charged with having given erroneous information to the pollution authority in connection with dust from a mill.

In the court of first instance both MR. Eide and Mr. Sjøli was found guilty on all points and sentenced to imprisonment in 120 days, of which 90 days were suspended. Both appealed to the Court of Appeal. Here they were found not guilty on some points and the court reduced the sentence to 60 days suspended imprisonment. The prosecutor appealed to the Supreme Court. The sentence was here increased to 45 days of unconditional imprisonment.

In her remarks Justice Øie, on behalf of the Court, mentioned that legislation and recent judgements show that criminal acts against the environment generally are being punished more severely. On the question of handling of waste the Justice stated in paragraph 39 of the judgement that this is an activity that is becoming more common, offering a possibility to make a considerable amount of profit. At the same time it might be expensive to handle the waste in the proper/adequate manner. A wish to make profits and to maintain work places may entice less responsible actors to give environmental measures less importance. At the same time the risk of discovery is little. For these reasons the responsible persons must be punished in a way that will deter others. The Justice also stated that she found attempts by the company to hide the emissions to constitute an aggravating circumstance. Among other things the company had sawed off an auxiliary pipe under water to hide the discharge so that it could not be discovered by divers.

**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?

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?

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?

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?

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?

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?

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?

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?

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?