EC Waste Law or How to Juggle with Legal Concepts

Drawing the Line between Waste, Residues, Secondary Materials, By-Products, Disposal and Recovery Operations

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I. Introduction

The definition laid down in Directive 75/442/EEC on waste has proved to be of particular importance because Directive 75/442/EEC, as amended by Directive 91/156/EEC, has been elevated to the status of Framework Directive and has underpinned, since 1993, the whole of the Community's policy on waste. Thus the definition of the concept of waste constitutes the keystone of all sectoral regulation on waste products, including the Community rules pertaining to the trans-frontier movement of waste. Essentially, any substance or object that is discarded but, in the light of the particular circumstances does not fall under this definition, is not subject to the administrative obligations relating to collection, sorting, storage, transportation, international transfer and treatment methods that are applicable to waste.

In order to evade the Caudine Forks of waste regulation, including the financial burden of waste transfer (taxes, levies), some economic operators have not hesitated to qualify their residues as either products or by-products. The Community definition has thus lain at the root of various controversies in nearly every Member State where national authorities and public officials cross swords with business on the issue of whether such and such a residue constitutes waste or not. Against this background the ECJ has been trying, for a number of years, to elaborate this definition according to clear and concrete criteria. Familiarity with this jurisprudence is of great benefit for national lawyers, as any clarification handed down by the ECJ in a case brought against a Member State is of a priori theoretical interest for all the other Member States.

The basic problem associated with defining waste stems from the fact that the concept cannot be properly understood without an appreciation of the scope of a number of other concepts. Accordingly, the first part of the article, will attempt to distinguish between the concepts of waste, secondary raw materials and by-products.

The third section of the article will address the concepts of recovery and disposal. The scope of these operations has been dogged by controversy for a number of reasons. Of particular importance is that recovery and disposal operations are subject to different administrative requirements, in particular regarding the prior issue of a permit by the competent authority (Directive 75/442/EEC, Article 10). Furthermore, the concepts of recovery and disposal are essential to ensure the supervision of trans-frontier movements of waste in line with the procedures provided for under Regulation 259/93/EEC on the supervision and control of shipments of waste within, into and out of the European Community. This Regulation effectively adopts identical definitions by referring to the annexes of the Framework Directive. As a result, the classification of an operation either as a recovery or a disposal operation has significant legal implications in the field of waste management.

It should be stressed from the outset that, whereas the EC Commission is unwilling to envisage any changes to the definition of waste and disposal, its first draft of a proposal for a directive on waste

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1 This is a framework directive setting out the general principles in this area (Case C-114/01 – Avesta Chrome Oy [2003] ECR, para. 48).
2 The EC Commission Communication on the Prevention and Recycling of Waste of 27 May 2003 highlights that the definition is the keystone of waste legislation (p. 38). Consequently, changes to this definition are likely to affect an array of legislative instruments, and as such must be consistent with the objectives of all of them, and also with the principles of legal certainty and legitimate expectations.
3 This Regulation will be modified in the near future. See Council common position 1531/4/2004.
entails major changes with respect to the definition of recovery operations. Given that this is a first draft and not yet published in the Official Journal, no attempt will be made here to comment on these proposals.

II. The definition of waste

1. The scope of the definition: framing the issues

The notion of waste is difficult to specify for the following reasons. There are first of all various types of waste. In one way or another, all sectors of our consumer society produce waste, and the numerous regulations which define it reflect this diversity. National regulations refer, often in an uncoordinated manner, to "industrial waste", "household waste", "hospital waste", "agricultural waste", "mineral waste" and "special waste". Since some of them are more dangerous than others, legislators have also come to distinguish between "dangerous and toxic waste" and "ordinary waste".

Furthermore, the concept of waste is variable because the development of different types of waste is far from homogeneous. On the account of the dynamic and non-static processes, the time factor is crucial in this respect. Household waste, for instance, disappears quickly because it is biodegradable while, in contrast, the life span of other wastes — in particular nuclear waste — stretches to millennia. Treatment and disposal processes can also, where appropriate, play a decisive role. The various ways in which waste both manifests itself and is disposed of differ markedly. Solid wastes are incinerated and thereby dispersed into the atmosphere in the form of polluting particles, liquid waste dissolved into a water body is discharged in the form of polluting effluents. However, they could all easily take the place of raw materials through recycling and further integration into production processes. It goes without saying that the choice of medium here has important consequences for the protection of the environment. The dispersal of waste into the air, water and soil can alter the affected ecosystems (atmospheric pollution, contamination of soil and aquifers, water eutrophication...) whereas their reclamation for the production of secondary raw materials proves to be less damaging for the environment and, moreover, allows for savings on raw materials.

Finally, waste is characterised by its relativity. An object that may appear "unusable" at any given time, in a particular place and for a particular person, is not necessarily so in another place, at another time and for another person. This can be illustrated by example: an old jacket no longer satisfies its owner who is happy to discard it. Were the jacket to be retained by a third party who continued to wear it, it would not be a waste product. On the other hand, if no new wearer could be found, its owner would have to get rid of it as a piece of rubbish. Using analogous reasoning, a substance can at different stages in its life cycle be qualified alternatively as a product, by-product, waste or secondary raw material according to the use that is made of it or under the applicable law. Thus for a given company, a residue can within the space of a year, or even several months, cease to be classified as waste either due to technical advancements or for economic reasons where an increase in the price of raw materials renders secondary raw materials more competitive.

Since the concept of waste fluctuates according to place, time, circumstances and the people involved, it would at first sight appear to escape any uniform legal classification.

In addition, can the everyday understanding of the concept of waste throw any light on the Community definition? The everyday notion of this term, however, proves to be of little help. Putting to one side problems deriving from the variety of official languages of the European Community, the term "waste" is polysemic in every language. It is in fact understood differently both in daily parlance and scientific literature. Even though it is beyond doubt that the term is evocative of some kind of diminished utility, dictionary definitions are not particularly enlightening as to its precise scope. Thus, waste is defined in a relatively vague manner as: "unwanted matter or material of any type, often that which is left after useful substances or parts have been removed", "no longer useful and to be thrown away" or "eliminated or thrown aside as worthless after the completion of a process". Such definitions are of minimal use for lawyers.

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