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Industry Briefing

Legal Definition of Waste: Part 1
ECJ case law on Discarding

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This Briefing is Part 1 of a two-part set of Briefings for industrial and waste recovery operators. Some may be familiar with the issues associated with the legal definitions of 'waste' and 'end of waste': others perhaps less so. One thing we know: this opaque legal subject is invariably a cause for concern and confusion for those at the sharp end, due to the uncertainties and regulatory inconsistencies that surround it.

As operators know only too well, this is an area of legal definition which has consistently confounded the courts in Europe and the UK, as well as being a source of regular acrimonious dispute and litigation here in the UK between operators and regulators. The objective here is to examine the legal position afresh.

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This Part 1 focuses on the question – has a material become waste in the first place? A lot of print is generated around 'End of Waste', but that often ignores the more basic question: has the material even become waste in the first place? That is the focus of this first briefing.

Brexit?

Before we start, let's get this out of the way. Brexit might in the long run have an effect on the legal definition of waste in the UK, or it might end up being irrelevant: it's way too early to say. For the moment, and for the foreseeable future, we are dealing with EU law here, even after Exit Day (albeit in its 'retained as UK law' guise).

Recognising the difference between 'Not Waste at all' and 'End of Waste'

This is fundamentally important. These are two distinct subjects, with different legal rules and lines of case law. So, the first thing you have to ask yourself is: am I dealing with a question of "not waste at all" or "something which was waste to begin with but which I think has ceased to be waste"? The rest of this Briefing deals with the first question: what makes something 'waste' (or not waste) to begin with?

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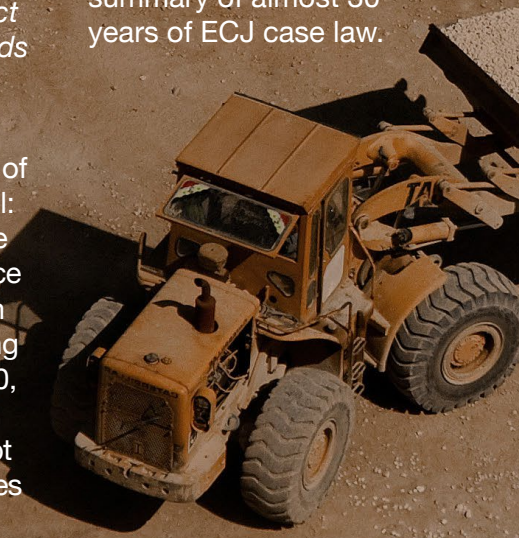
The basic legal definition of waste: the nebulous concept of ‘discarding’

The legal definition of waste is in **Article 3(1)** of the **Waste Framework Directive** (2008/98/EC, as amended by **Directive 2018/851/EU)**. It defines “waste” as:

“any substance or object which the holder discards or intends to discard or is required to discard”.

Obviously, the concept of ‘discard’ is fundamental: what does it mean? The European Court of Justice (ECJ) has grappled with this concept of discarding several times since 1990, and it has developed a highly expansive concept of ‘discarding’ which goes well beyond the normal understood meaning of the word, but which at the same time remains vague and often hard to nail down.

I find it useful to analyse the law against the various ‘ages’ of the case law, which span the period from around 1990 to the present day. Bear in mind, this is necessarily a ‘nutshell’ summary of almost 30 years of ECJ case law.



Early case law 1990-2000: development of wide concept of discarding

There were a series of cases which expanded the meaning of 'discarding' beyond its normal understood meaning. These culminated in what became the leading early case in August 2000 [**ARCO: Cases C-418/97 and C-419/97, 2000**]. In that case, the ECJ emphasised the importance of interpreting the term 'discard' widely in order to ensure that the environmental protection aims of the Directive and the EC Treaty were not undermined.

Unfortunately, that ruling consisted of a series of quite vague and ambiguous statements which were nothing more than generic statements which were inconclusive in practical terms. This lead some years later to an English judge (who now sits in the Supreme Court) [Lord Justice Carnwath, in his judgment in **OSS Group v Environment Agency, 2007**] famously (and with some justification) lamenting that *"…a search for logical coherence in the [ECJ] case-law is probably doomed to failure."*

Even so, there were some guidelines in that early case law:

- intention to discard would be measured objectively from the facts of each case and not from what the producer or holder of the material stated was his intention;
- sometimes such inference is unnecessary, because there is an obligation to discard – such as for example where legislation requires disposal of a particular type of material;
- you could be discarding a substance even if you are carrying out a recycling or other recovery operation in the course of your business and even though the substance or object has a commercial value to you and others;
- you can have accidental, involuntary, discarding where the intention was the complete opposite of what happened – a good example of this can be seen in the *Van de Walle* contaminated soils case commented on below;

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- although the European Waste Catalogue sets down the "lists of wastes" under the Waste Framework Directive, the mere inclusion of a material in that list does NOT necessarily mean that it is a waste in every case;
- subjecting a material to one of the disposal or recovery operations listed in the Waste Framework Directive was not conclusive;
- conversely, the mere fact that a material is not subjected to one of the listed disposal or recovery operations does NOT mean that it is not waste;
- in line with the case-by-case approach, member states who have tried to pre-judge discarding categories in their national legislation have fallen foul of Commission action and ECJ rulings against them.

Case law development 2002-2005: the certainty of re-use principle

Fortunately, the ECJ developed things beyond this point, and established limits to the principle of 'discarding' in cases where materials resulting from industrial or extractive processes were certain to be used without any further processing and without harming human health or the environment. The ECJ ruled that, in principle, such materials were not discarded.

The key to these 'non-discarding' cases was *certainty of reuse*. The first ruling to establish this was **Case C-9/00, *Palin Granit Oy*, 2002**.

This opened things up a bit, but even so the operator in that first case lost and his 'residues' were classed to be wastes by the ECJ, because the material in question (leftover stone resulting from stone quarrying) was to be stored for an indefinite length of time to await *possible* (but not certain) use. Therefore, the ECJ ruled that it was discarded or intended to be discarded. It did not matter, either, that the stone did not pose any real risk to human health or the environment. [**Case C-9/00, *Palin Granit* Oy, 2002**]

Coincidentally, a similar case came before the ECJ a year later and produced the opposite result. In the *AvestaPolarit* case, the ECJ ruled

that the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine did not discard or intend to discard those substances, where he used them lawfully for the necessary filling in of the galleries of that mine and provided sufficient guarantees as to the identification and actual use of the substances to be used for that purpose. The certainty of use of identified materials was pivotal. [**Case C-114/01, *AvestaPolarit Chrome* Oy, 2003**]

The 2004 *Niselli* case concerned materials from the dismantling of machines and vehicles, which the defendant in the case insisted were certain to be reused. Their common characteristics were their ferrous composition, and their partial contamination by organic substances such as paint, grease or fibres. They were products of various technological processes from which they had been withdrawn because they were no longer usable in them. The ECJ reiterated the principles of the 'certainty of reuse' doctrine developed in *Palin Granit* and *AvestaPolarit*, but excluded the application of the doctrine to materials such as those in this case, which the ECJ characterised as *"consumption residues which cannot be regarded as 'by-products' of a manufacturing or extraction process which are capable of being reused as an integral part of the production process."* **[Case C-457/02, *Antonio Niselli*, 2004]**

An 'extension' of the concept of 'discarding' occurred in the *Van de Walle* case, also in 2004. The ECJ ruled that hydrocarbons which had been unintentionally spilled and had caused soil and groundwater contamination were waste. What made the judgment unusual was that the ECJ ruled that the same result applied to the soil contaminated by the hydrocarbons, even though the soils had not been excavated. The contaminated soil under the ground was itself 'waste'. **[Case C-1/03, *Van de Walle*, 2004]**.

The first extension of the 'certainty of reuse' principle was the ECJ's development of the concept of the 'secondary product' which was not (therefore) discarded in the 2004 *Saetti* case. It concerned petroleum coke produced and used in an oil refinery, composed of solid carbon and variable amounts of impurities, which was one of the numerous substances resulting from the refining of petroleum.

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The ECJ found that the coke was intentionally produced at the refinery, as it was widely used as fuel in the cement and steel industry, and that it could not be classified as a waste because its production was the result of a technical choice, specifically intended for use as fuel. **[Case C-235/02, *Saetti*, 2004]**.

The second extension of the 'certainty of reuse' principle came in 2005, in an unusual case known as the 'Spanish Pig Manure' case. In that case, the ECJ returned to the themes developed in *Palin Granit* etc. and applied them to livestock effluent, which the ECJ stated could fall outside classification as waste, if it was used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage was limited to the needs of those spreading operations. What made the case even more notable was that the ECJ did not restrict its effect to the use of the material on the same landholding that had produced the effluent. The effluent could still be considered not waste even if it was not used on land forming part of the same agricultural holding as that which had generated it, but rather to meet the needs of other economic operators on other sites. **[Case C-416/02, *European Commission v. Spain*, 2005]**.

This was an important breakthrough, with potential effect beyond the agricultural sector. Thus, whereas the *AvestaPolarit* and *Saetti* rulings had concerned operators who sought to use the 'by-product' or 'secondary product' in an integrated way within their own operations, the Spanish Pig Manure case opened the way for a 'true' by-product, one which could be 'placed on the market', as it were, and used elsewhere. The fact that this ruling was given in such an unlikely context such as pig manure, with such obvious 'waste' connotations, made the case all the more noteworthy, in my view. Thus, for example, if a real estate developer excavates residues which he cannot reuse in his development, but the residues perform the function of secondary aggregates and are sought after by other developers in another location, then the Spanish case opened the way for them to be potentially treated as non-waste products. Even today, this is not accepted by some UK regulators.

Interlude: Waste Framework Directive 2008

This case law, insofar at least as it referred to 'by-products', was largely codified in EU legislation – the current Article 5(1) of the Waste Framework Directive 2008, which laid down for the first time in legislation firm criteria for materials to be deemed as not discarded *because they are by-products*, and therefore not waste. The criteria are not identical to those of the case law but broadly similar.

Later case law 2008/2013: the Shell case and reinforcement of the certainty of use principle

This area of discarding versus non-discarding has continued to be developed and applied by the ECJ to new circumstances in more recent years.

The ECJ ruled in 2008 that hydrocarbons accidentally spilled at sea following a shipwreck, and which became mixed with water and sediment, constituted waste, *where they were no longer capable of being exploited or marketed without prior processing* [my emphasis] **[Case C-188/07 *Commune de Mesquer* [2008]**.

The fact that the ECJ classified these oils and polluting mixtures as discarded waste was unsurprising. What was noteworthy about the case were the words emphasised above, and this notion that the exploitation or marketing of material might affect the outcome.

This in fact was precisely what happened in the 2013 case, which was a criminal case taken against the Dutch and Belgian subsidiaries of the global Shell oil and petroleum group. The *Shell case* demonstrated that the ECJ had further developed the notion of 'discarding' to take account of legitimate business exploitation of material that others perhaps do not have a use for.

The facts of the case are instructive. It concerned the transport from Belgium to the Netherlands of a consignment of Ultra-Light Sulphur Diesel (ULSD) which was unintentionally mixed with methyl tertiary butyl ether (MTBE). Shell had loaded the ULSD onto a ship and delivered it to a client in Belgium. When the consignment was delivered to that client, it became apparent that, at the time that the ship was loaded, the tanks were not completely empty, which resulted in the ULSD being mixed with MTBE.

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Since the flashpoint of that consignment was too low for it to be resold as fuel for diesel engines in accordance with its initial purpose, and since the client was precluded from storing the mixture under its environmental permit, the consignee returned the consignment to Shell Belgium which shipped the consignment back to Shell Netherlands, where Shell intended to resell it after having mixed it with another product. Was the consignment 'waste'?

> The ECJ considered it pivotal that Shell took back the rejected consignment with the intention of blending it and placing it back on the market.

The ECJ said NO: these 'rejected' materials were not waste. They had not been discarded. The facts of the case are quite complex, and the ECJ judgment equally so as a result, but essentially the ECJ considered it pivotal that Shell took back the rejected consignment with the intention of blending it and placing it back on the market. The ECJ described this as being "of decisive importance" in finding that the material had NOT been discarded. I have to say I found this decision quite surprising at the time, especially since the consignment still had to undergo a further blending process before it could be resold. However, it is a ruling of the ECJ and a legitimate precedent for operators to adopt in their dealings with regulators. **[Cases C-241/12 and C-242/12, *Criminal Proceedings against Shell Nederland BV and Belgian Shell NV*, December 2013]**

Practical conclusions?

The most critical lesson or conclusion is: do not rush to make a judgment.

The practical application of the definition of waste is notoriously unpredictable. It is essential to follow the principles of the case law and carefully consider the facts of your own situation against those principles. It should not necessarily be accepted that materials which the regulators class as 'waste' are in law waste. Every case is different, but EU law provides enough precedent, and some principles, which open up the possibility of challenging what are often 'default' regulatory positions which are not based on correct application of the law.

Be careful of situations where regulators try and force you to accept that your materials are waste and therefore, in order to market them, necessitates proving that they have reached End of Waste. This is often a trap, because as I will show in Part 2 of this briefing, the way End of Waste is applied in England in particular (although the risk is also present in other jurisdictions), it is becoming increasingly difficult to establish End of Waste. In many cases, the material might not even be waste to begin with. It is important to recognize where this might be the case, and to fight your corner if the commercial circumstances merit it.

To find out more, get in touch

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