

## Identifying by-products in the frame of European Court case law

The Waste Framework Directive 2008/98/EC (hereinafter the Directive)<sup>1</sup> is the centerpiece of EU legislation dealing with the handling of waste and putting in place the essential requirements for the management thereof in the Community.

Article 3.1 of the Directive defines waste as *'any subject or object, which the holder discards or intends or is required to discard'*.

The product meeting the above definition will thus be considered a waste, unless the substance or object is considered a by-product or has undergone a recovery process.

By-products are regulated under the provisions of Article 5 of the Directive.

The wording of Article 5.1., in particular, suggests that in order to identify and conceptualize by-products, it is necessary to operate a preliminary distinction between:

- a product, which is deliberately created in a production process; and
- production residue, which is not deliberately created in the production process, and may or may not be classified as waste depending on the application of the facts.

Although the Directive does not provide a specific definition of “production residue”, it is understood that such “residue” is the starting point for identifying a production as by-product. More specifically, what is legitimately inferred from the text of the Article is that the “residue” in question is presumed to be waste, and will become a by-product provided that it meets the following conditions:

- i) further use of the substance or object is certain;
- ii) the substance or object can be used directly without any further processing other than normal industrial practice;
- iii) the substance or object is produced as an integral part of a production process; and
- iv) further use is lawful, i.e. the substance or object fulfills all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

The decision of whether or not a given substance meets the aforesaid conditions must be made on a case-by-case basis, in light of all the circumstances and in a way whereby the effectiveness of the Directive shall not result undermined.

These four conditions were drawn from criteria developed in European Court case law and are cumulative in nature.

Provided below is an in-depth review of the conditions under scrutiny, as illustrated and developed in recent jurisprudence of the European Court of Justice (hereinafter the “Court”).

- i) The first condition to be satisfied entails the requirement of certainty of further use, a main consideration of which being a genuine demand for the substance. The existence of contracts between a producer and a subsequent user may generally be regarded as an indication of certainty of further use. Alternatively, another

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<sup>1</sup> Directive 2008/98/EC on waste and repealing certain Directives, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0098&from=EN>

indication may be the economic value to the producer arising from further use of the substance. These considerations were first made in the case of **Palin Granit**,<sup>2</sup> where the Court held that production residue may be regarded not as a waste, but as a by-product, which the holder does not wish to discard, but intends to exploit or market on terms which are advantageous to himself in a subsequent process.<sup>3</sup> Furthermore, the Court also clarified that, despite a potential wish of the producer to exploit the production, if the substance is stored for an indefinite length of time awaiting possible use, this will serve as an indication that the substance will be waste.<sup>4</sup>

Another example of the condition of further use can be found in the in the context of the joined cases **Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV**, where the Court ruled that, a consignment of accidentally mixed substances is not covered by the concept of 'waste', provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market.<sup>5</sup>

Worth mentioning, finally, is also a 2007 Communication from the European Commission to the Council and the European Parliament, insofar as it states that, in cases where only a certain proportion of the material may be used, while the rest disposed of, if certain use cannot be guaranteed for all the material concerned, then the material should start as a waste.<sup>6</sup>

ii) The second condition establishes that the substance should be capable of being used directly without any further processing.

Notably in this regard, in the case **AvestaPolarit**, for instance, the Court held that the further crushing of rock into aggregates before it could be used was to be regarded as a further recovery process, thus indicating that the rock was a waste.<sup>7</sup> A substance, however, can still be considered a by-product, rather than a waste, if the further processing thereof is considered to be part of industrial practice, as highlighted by the Court in the case of **Wallonne**.<sup>8</sup>

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<sup>2</sup> Case C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus* (2002), Judgment of the Court (Sixth Chamber), 18 April 2002, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47274&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=102220>.

<sup>3</sup> *Id.*, par. 34.

<sup>4</sup> *Id.*, par. 39.

<sup>5</sup> Joined cases *Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV* C-241/12 and C-242/12, Judgment of the Court (First Chamber), 12 December 2013, available at [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=145531&occ=first&dir=&cid=25480](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=145531&occ=first&dir=&cid=25480).

<sup>6</sup> Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products, 21.02.2007, par. 3.3.1, available at <http://www.epa.ie/pubs/advice/waste/product/EU%20Commission%20paper%20on%20waste%20&%20by-products2.pdf>

<sup>7</sup> Case C-114/01 [2003] *AvestaPolarit Chrome Oy*, formerly *Outokumpu Chrome Oy*, Judgment of the Court (Sixth Chamber), 11 September 2003, par. 40-41, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48565&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=102721>.

<sup>8</sup> Case-129/96 *Inter-Environnement Wallonie v Région wallonne*, Judgment of the Court, 18 December 1997, par. 32-33, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=43562&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=102884>.

In June 2012, the European Commission issued a guidance document on the interpretation of the Waste Framework Directive (hereinafter the “Guidance”)<sup>9</sup>. The Guidance clarifies that “normal industrial practice can include all steps, which a producer would take for a product, such as the material being filtered, washed, or dried; or adding materials necessary for further use; or carrying out quality control”. Whether any further processing is to be considered as falling within the given definition will be determined by reference to the overall circumstances, however strictly the test has been interpreted.

- iii) The third condition establishes that the substance must be produced, or made ready for further use and then sent for such further use as an integral part of the production process. This condition was addressed in the case of **Commission v. Spain**, where the Court held that livestock effluent, being a production residue from the original production process, was to be considered a by-product, rather than waste, when used as soil fertilizer as part of a lawful practice of spreading on clearly identified parcels.<sup>10</sup> In line with previous jurisprudence, furthermore, the Court held that the substance was to be regarded as a by-product even in cases where its use would be used to meet the needs of economic operators other than that which produced it.<sup>11</sup> This specification, however, seems to have been ruled against by the decision concerning the case of **Niselli**, where the Court ruled that the substance must be re-used an integral part of the same production process.<sup>12</sup> As such, it is not clear whether the re-use must be part of a *similar or different* production process, or *the same* particular production process, which generated it.
- iv) The fourth and final condition establishes the requirement for further use to be lawful, i.e. compliant with relevant environmental and health protection standards, an assessment of which must be conducted by considering any technical specifications related to the particular substance. In relation to this final condition, in **AvestaPolarit** the Court held that when the use of a production residue was prohibited in particular for reasons of safety or environmental protection, the production must be considered as discarded or required to be discarded.<sup>13</sup> This was also previously stressed in **Arco Chemie**, where the Court held that when the composition of a residue is not suitable for the use made of it, or where special precautions must be taken when it is used owing to the environmentally hazardous nature of its composition, there is evidence of discarding (as opposed to further use).<sup>14</sup>

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<sup>9</sup> Guidance on the Interpretation of Key Provisions of Directive 2008/98 EC on Waste, June 2012, available at [http://ec.europa.eu/environment/waste/framework/pdf/guidance\\_doc.pdf](http://ec.europa.eu/environment/waste/framework/pdf/guidance_doc.pdf)

<sup>10</sup> C-121/03 [2005] Commission of the European Communities v. Kingdom of Spain, I-7569, Judgment of the Court (Third Chamber), 8 September 2005, par. 60, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=59566&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=103318>.

<sup>11</sup> *Id.*, par. 61.

<sup>12</sup> Case C-457/02 Criminal proceedings against Antonio Niselli (2004), Judgment of the Court (Second Chamber), 11 November 2004, par. 52, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49661&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=105226>

<sup>13</sup> (see note 7 above), par. 38.

<sup>14</sup> Joined cases ARCO Chemie Nederland Ltd and Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer and between Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+, Vereniging

It is apparent, therefore, that the condition under scrutiny emphasizes a precautionary and preventative burden to be discharged by the producer of the residue.<sup>15</sup>

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Stedelijk Leefmilieu Nijmegen and Directeur van de dienst Milieu en Water van de provincie Gelderland, C-418/97 & C-419/97, 15 June 2000, parr. 86-87, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45350&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=106469>.

<sup>15</sup> Proof of this can also be found in the ruling on Commission of the European Communities v. Kingdom of Spain (*see* note 10 above), par. 60.