Defining waste: a necessary step in the search for sustainable development

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Abstract

In this article we will discuss the efforts in the European Community to distinguish effectively when a substance is discarded and should be considered as a waste, a condition essential to triggering European environmental protection based on the achievement of sustainable development. Special attention is paid to the substantial body of jurisprudence that has developed around the waste definition.

1 The definitional problem of waste in the European Community

In their efforts to create a system of environmental controls based on the achievement of sustainable development, European legislators have created a system where the core of the waste definition is based on the interpretation of "disposed of". The first European Waste Directive 75/442/CEE [1] defined waste as "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force" [2]. According to this definition therefore, a necessary condition of a waste material is its disposal or the existence of an obligation to dispose of. MARTIN MATEO underlines that the definition enphasises the imperative cesion of the waste, overcoming the traditional privatist enfasis on the res delictiae [3]. The definition has been defined as vague and imprecise [4], and led to a wide variety of interpretations on the part of the different Member States of the European Community [5], especially in the interpretation of the difference between a wastes and products in the context of secondary materials reused as effective substitutes for raw materials in an industrial process.
The second general waste Directive, the 91/156/CEE modifying Directive 75/442/CEE, tried to solve the interpretational problems by listing of materials considered as wastes, defining waste as 'any substance or object in the categories set our in Annex I which the holder discards or intends or is required to discard'. There are therefore two novelties in the new definition. In the first place, there is a specific reference to the "intention" to dispose of the substance or object, provision clearly introduced to enable the control of wastes before the effective materialization of the act of "discarding", but which introduces a further element of subjective interpretation. The second novelty is the necessary inclusion of the substance or object discarded in a list included in Annex I of the Directive, later to be amplified into the European Waste Catalogue. However, as KRAMER points out, the list of wastes makes itself redundant because of the all encompassing nature of the category 16, "any materials substances or products which are not contained in the above categories", which effectively refers back to the definition of waste included in the article 2 of the Directive [6]. Annex I of the Directive 75/442 as amended was used as the base for the establishment in decision 94/3/CE of a list of wastes pursuant to Article 1a of the Directive, commonly known as the European Waste Catalogue. The catalogue applies to all waste, whether destined to disposal or to recovery, but as the Court of Justice has pointed out "the fact that a substance is mentioned on it does not mean that it is a waste in all circumstances. An entry is only relevant when the definition of waste has been satisfied" [7]. The list therefore has the same concrete effect as the Annex, making itself redundant by referring back to the definition of waste contained in the Council Directive 75/442 as amended.

2 European jurisprudence regarding waste

The deliberations of the European Court of Justice have been fundamental in resolving many of the issues raised in the definition of waste included in the Directives, resolving many of the interpretational problems by giving the term "disposed of" a special meaning in the context of the waste directives which as well as simply throwing something away, includes consigning a substance or object to an recovery operation. The first case to come before the Court of was the result of several prejudicial questions elevated to the Court by the Prefatura de Asti in criminal proceedings against various transporters accused of transporting hazardous wastes without having obtained a license from the competent authority, infringing the Italian Presidential Decree 915 of the 10th of September 1982 [8], which, adapting Italian Law to the European Waste Directives, established criminal penalties for those persons who transport and eliminate waste without the corresponding license.

The defendants maintained that the substances transported were not waste as defined in Article 2 of the cited Presidential Decree, which defined waste as "a substance or object which is produced by human activity or natural processes and which is, or is intended to be, abandoned" [9], arguing that the substances transported were to be reused and that therefore, there neither existed an effective disposal of an intention to dispose of. The prejudicial question raised by
the Italian court asked for clarification on whether the definition of waste included in the European Waste Directive 75/442/CEE includes things which the holder has disposed of which are capable of economic reutilization and whether the said articles must be interpreted as meaning that the term waste presupposes the establishment of *animus dereliquindi* on the part of the holder of the substance or object.

The European Commission argued that the Court should employ an objective interpretation of "disposal" based on the effective destination of the waste, rather than an interpretation based on the subjective criteria of the intentions of the possessor. According to the Commission, an objective interpretation was the only one that would guarantee the efficient working of the Waste Directives, given that making the application of the Directives dependent on establishing the intentions of the holder would seriously diminish their effectiveness.

The Advocate General supported this interpretation, pointing out that the "intrinsic danger of a substance or object has nothing to do with the fact that it will be recycled or reused again, and given the fact that the Directives explicitly mention the recycling and reuse of waste, it would be absurd to think that the definition of waste excludes substances or objects that will be subjected to these operations" [10]. This argument is precisely that used by the Court of Justice in its sentence to justify its decision. According to the court the fact that the Directives refer time and again to the concepts of recovery and recycling is a determining factor in the conclusion that a substance or object can be a waste even when it is capable of economic reuse. The Court therefore determined that "the concept of waste as defined in article 1 of the Directive 75/442/CEE and article 1 of the Directive 78/319/CEE is not to be understood as excluding substances and objects which are capable of economic reutilization. The concept does not presume that the holder disposing of a substance or an object intends to exclude all economic reutilization of the substance or object by others" [11].

According to this interpretation by the Court of Justice the terms "disposal" or "abandon" do not exclude the operations of recycling, reuse or recovery, and are not therefore limited to operations of "elimination" such as land disposal or incineration. The fact that a substance is to be recycled does not therefore mean that it is not a waste. The intention of the holder to exclude all economic reutilization of the substance or object cannot therefore be used as a determining factor in the categorization of a substance as a "waste" or as a "product". L KRAMER explains the discarding of the criteria of intentionality in terms of judicial effectiveness: "the intention to dispose of a product is not normally a visible act, but is an act that takes place in the mind of the holder of the object in question. It is therefore reckless to use this is a base to decide on whether to apply "product" legislation or "waste" legislation" [12].

The Court of Justice has had to study different aspects the waste definition in the light of the new definition introduced by the Directive 91/156/CEE which modified Directive 75/442/CEE in various occasions. The first was the case C-442/92 Commission vs. Germany [13]. In this case the European Commission questioned German Waste Law [14] that excludes from its waste definition certain waste products subjected to recovery operations in the context of
industrial collections. The Commission did not question the definition of waste in the German Law ("anything movable of which the holder intends disposing or the proper disposal of which is necessary in order to safeguard the public interest and in particular environmental protection"), but did question the exclusion contained in article 1.3 of the law for those substances or objects "which are reclaimed in accordance with the rules, for the purposes of collection for industrial use, providing that proof of such reclamation is produced to the bodies responsible for disposal and provided that higher interests do not militate against this" [15]. The German Government justifying the exclusion, alleged that the concept of waste should be distinguished from that of a "used product, capable of remaining within the economic circuit where the holder thereof wishes to dispose of it for a socially useful purpose or for a commercial operation" [16]. The Advocate General understood however, that while it may be difficult to distinguish between the disposal of waste destined to be recycled or reused and the handing over of objects within the normal economic cycle given that in both cases the holder no longer needs the goods which have a certain positive economic value, "this difficulty cannot justify a general exclusion from the definition of waste of all objects collected for reuse, including objects collected on a massive scale". This argument was accepted by the Court of Justice which once again redirected to the jurisprudence established in the Vessoso-Zanetti case, that the exclusion of substances or objects based solely on the fact that they are susceptible to be reused or recycled is not compatible with European waste legislation.

A further case that interprets the waste definition, joined cases C-304/94, C-330/94, C-324/94 and C-224 /95, Tombesi [17], examined various prejudicial questions raised by the Prefatura de Asti concerning Italian Waste Law. Italian Presidential Decree 915 of the 10th of September 1982 [18] defined waste as "any substance or object deriving from human activity or natural cycles which is abandoned or destined to be abandoned" and Italian Law 397 of the 19th of September 1988 [19] introduced special rules for wastes capable of being reused as secondary raw materials. A further series of Decrees entitled 'Provisions concerning the re-use of residues deriving from production and Consumption cycles in a production or combustion process and concerning the disposal of wastes have since been adopted in order to complete the legal framework established by the previous Presidential decrees. Essentially, the decrees distinguish between 'waste' and 'residues' which are described as "residual substances or materials deriving from a production or consumption process and capable of reuse", but exclude from their scope "materials quoted with specific commodity characteristics in commodity exchanges or official lists drawn up by Chambers of Commerce" [20]. The Italian regional court considering criminal proceedings brought under certain provisions of above-mentioned decrees, felt that this exclusion may be contrary to Community Law in that it removed an entire category of waste from the scope of DPR 915/82 and therefore from the application of the Communities waste legislation in Italy, staying its proceedings and requesting that the European Court interpret whether subproducts quoted in secondary product lists should be exclude from the waste definition, as well as
various specific questions on landfills, deactivation processes and waste incineration related to the criminal proceedings in question.

The Court of Justice following the established case-law of Vessoso Zannetti, Commission vs. Germany etc. already discussed above, ruled that the definition of waste included in the European waste directives "is not to be understood as excluding substances and objects which are capable of economic reutilization, even if the materials in question may be the subject of a transaction or quoted on public or private commercial lists. In particular, a deactivation process intended merely to render waste harmless, landfill tipping in hollows or embankments and waste incineration constitute disposal or recovery operations within the scope of the above-mentioned Community rules. The fact that a substance is classified as a reusable residue without its characteristics and purposes being defined is irrelevant in that regard" [21].

3 New tendencies in the definition of waste

In the case C-129/96 Inter-Environnment Wallonie v. Région Wallone, Inter-Environment seeks to annul the Regulation of the Wallon Regional Executive of 25th July 1991 on toxic or hazardous waste. Article 3.1 of the Decree defines waste in similar terms to the Directive 91/156/CEE as "all substances or objects in the categories set out in Annex I which the holder discards or intends or is required to discard". Article 5.1 of the regulation provides that "authorization is required for the setting up and running of an installation intended specifically for the collection, pretreatment, disposal or recovery of toxic waste which is not an integral part of an industrial production process and which processes waste originating from third parties". This article which effectively excludes from the definition of waste all secondary materials which are reused in the same industrial process in which they were originated, was questioned by Inter-Environment as being contrary to the European waste definitions. The national court sought a preliminary ruling from the Court of Justice, amongst other questions, on whether a substance referred to in Annex 1 to Council Directive 91/156/CEE and which directly or indirectly forms an integral part of an industrial production process to be considered "waste" within the meaning of Article 1(a) of that Directive".

The considerations of the Advocate General Jacobs in this case illustrate effectively the difficulty in drawing the dividing line between 'products' and 'wastes' where the substance or object concerned is recycled or reused directly within an industrial process. The Advocate General, laying out the different interpretations that are followed by different member states suggests that the Court of Justice should establish, in the interests of legal certainty [22], some guiding criteria to allow a more effective distinction between the two different legal worlds, the world of products and the world of waste.

According to the Advocate General, it is clear both that the scope of the term 'waste' in the Council Directives on waste depends on the interpretation of the term 'discard', (following the line of argument already used in the Tombesi case) which has a special meaning in the context of the Directives which includes not
only the disposal of waste, but also its consignment to a recovery operation, and that there is no provision in any of the Council Directives on waste which excludes recovery operations that are integrated in an industrial process [23]. Moreover the directives include expressly dispositions which affect the processing of industrial wastes within an industrial process, applying permitting requirements not only to those activities that carry out waste recovery operations for third parties, but also to those industrial operations that carry out their own waste processing activities. It is therefore clear that the waste Directives do not exclude per se from the definition of waste those products that are recovered within an industrial process.

The dividing line between the treatment of waste products and ordinary industrial processing of non-waste product continues however to be obscure, and subject to differing interpretations in different member states, who must apply more detailed criteria to apply the rules of the Directive, as interpreted by the Court of Justice, to those specific situations which occur in practice. The Advocate General does however suggest the existence of common ground in the interpretation of what is waste, and what is a non-waste product, based on the work of the OECD Waste Management Policy Group [24]. According to the work of this group, the most commonly established distinction is between raw materials, residual material and secondary raw materials. The first group, raw materials, are easily identifiable as materials obtained from natural sources for their direct use in the production process. They cannot be defined as waste because they are materials that have been intentionally obtained or produced as raw materials. A good example of an intentionally obtained raw material is crude oil obtained from oil wells. Residual materials on the other hand are materials that are produced as a consequence of the manufacture or use of another product. The term “secondary raw material” on the other hand is used in three different ways. The term can describe a material which no longer serves its original purpose but which can be used as an effective substitute for a raw material. It can also describe a material which can be used as a substitute for a raw material after being recovered (in which case it is likely to be considered as waste), or finally it can describe a material that has already been recovered and is ready to be used as a substitute for a raw material, and has therefore ceased to be considered as waste [25].

A material will not therefore constitute waste if it is intentionally obtained for use as a raw material, but is likely to constitute waste if it can only be reused as a raw material after it has been subjected to a recovery operation, at which time it generally ceases to be a waste. This distinction however still includes the necessity to make a difficult distinction, between the reuse of a product as an effective substitute for a raw material, in which case the residual product should not be considered as waste, and the use of a residual product as a substitute of a raw material as an operation of recovery.

The guidance offered by the Advocate General gives specific weight to the similarity between the raw material substituted and the secondary raw material, especially in the possible environmental consequences of the use or misuse of the secondary raw material. This approach leads the Advocate General to suggest a
functional rather than literal interpretation of waste as laid out in the waste directives in the case of materials reused in an industrial context where "the notion of waste must be interpreted sufficiently broadly to ensure that any processing of a substance that is undertaken by reason of its nature of waste falls within the regulatory system of the directive. Thus where, owing to the fact that it is a residue, by product, secondary raw material or other material resulting form an industrial process, a material - or the process which it undergoes - does not meet normal health or environmental requirements or standards, it must be regarded as waste and subject to special regulations under the directive. In so far as a material is wholly interchangeable with another product and requires no additional regulation of supervision beyond that applicable to the product it is replacing, it is unnecessary for it to be classified as a waste" [26].

The Court of Justice in its sentence of 18th of December 1997 limited its ruling to the question at hand, establishing that "substances forming part of an industrial process may constitute waste within the meaning of Article 1a of Directive 75/442, as amended" [27] and that therefore it is not excluded “by the mere fact that it directly or indirectly forms an integral part of an industrial process” [28]. Unfortunately the Court did not address the issues raised by the Advocate General as to the delicate distinction between waste and non-waste products, limiting itself to recognising the nature of the problem, indicating that its judgement “does not undermine the distinction which must be drawn ... between waste recovery within the meaning of Directive 75/442/CEE as amended, and normal industrial treatment of products which are not waste, no matter how difficult that distinction may be” [29].

4 Conclusion

European waste legislation, in its efforts to draw a clear line between over-regulation and the creation of an environmental regulatory system that permits a sustainable development, has struggled to define clearly the dividing line between ‘product’ and ‘waste’ in the context of the reuse of a residual product as a substitute of a raw material. The European Court has failed to draw a clear dividing line between “waste” and “sub-product”, preferring to attribute the broadest possible interpretation to the concept of “waste” from the very first moment. The broad interpretation given to the concept of “waste” as not excluding materials that remain in the economic circuit cannot be understood as undermining attempts made at the level of individual member states to distinguish between “products” and “waste”.

5 Bibliography

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References

[12] The basic German Waste Law is found in Abfallgesetz of 27th August 1986 (Law on Prevention and disposal of waste) BGBi.12126.
[21] I-14 paragraph 61.
[24] Judgement of the Court of Justice 18th December 1997 in Case C-129/96 Inter-Environment ASBL vs. Region Wallone paragraph 32.
[25] Id. paragraph 34.
[26] Id. paragraph 33.