

Waste (repeal. Directive 75/442/EEC). Codification

2003/0283(COD) - 21/02/2007 - Follow-up document

The definition of waste has been a key part of protecting the European environment from the impacts of waste generation and management over the past thirty years. The definition of waste is applied by the competent authorities specified by Directive 2006/12/EC (the Waste Framework Directive), on a case by case basis, when making waste shipment or permit decisions. In general it is clear what is or is not waste. However, a number of issues have arisen in relation to the interpretation of this definition.

In order to improve the legal certainty of waste legislation, and to make the definition of waste easier to understand and apply, this **Interpretative Communication** seeks to guide competent authorities in making case by case judgements on whether a given material is a waste or not, and to give economic operators information on how these decisions should be taken. The Communication will also help to smooth out differences in the interpretation of these provisions throughout the EU.

The Communication aims to explain the definition of waste set down in Article 1 of the Waste Framework Directive, as interpreted by the European Court of Justice, in order to ensure that the Directive is properly implemented.

The scope of this Communication is **the distinction between waste and non-waste in a production process context**. It is not relevant to other waste such as municipal waste or other similar waste streams, or to consumption residues. It does not deal with the issue of when a product may become a waste, or when a waste ceases to be a waste. It does not deal with waste that is excluded from the scope of the Waste Framework Directive.

The Commission gives guidelines on this matter, based on the jurisprudence of the European Court of Justice and addressing the issues of by-products in relevant industry sectors, on when by products should or should not be considered as waste in order to clarify the legal situation for economic operators and competent authorities. It feels that guidelines are better suited to delivering legal clarity than a definition of by-products in the Waste Framework Directive. Notably, a distinction between

waste and by-product that is based on whether the material is destined for recovery or disposal, or based on whether or not the material has a positive economic value, would not seem to offer the necessary guarantees for the protection of the environment.

With regard to the application of the Court of Justice's case-law, the Communication discusses the following points:

- **general notions around the definition of waste:** The ECJ has consistently stated that the definition of waste must be interpreted widely, in order to be consistent with the aim of Directive 2006/12/EC. It has stressed on several occasions that whether a material is a waste or not depends on the specific factual circumstances, and that therefore the decision must be taken by the competent authority on a case by case basis. It is important to note that even where a particular material satisfies the tests set out

by the ECJ in order to be considered as a non-waste, if it is in practice discarded, it must clearly be considered and treated as a waste;

- **whether the material concerned a production residue or a product:** In *Palin Granit* case, the ECJ stated that a production residue is something that is not the end product that the manufacturing process directly seeks to produce. In *Saetti*, the ECJ noted that where the production of the material concerned was “the result of a technical choice” (to deliberately produce such a material) it could not be a production residue. Therefore, the first question to be asked when determining whether a material is waste or not is whether the manufacturer deliberately choose to produce the material in question. If the manufacturer could have produced the primary product without producing the material concerned but chose to do so, then this is evidence that the material concerned is not a production residue. Other evidence that the production of the material concerned was a technical choice could include a modification of the production process in order to give the material concerned specific technical characteristics;

- **conditions where a production residue would not be waste:** even where a material is considered to be a production residue, the Court has indicated that it is not necessarily a waste. The characteristics of the material in terms of its readiness for further use in the economy can mean that it should not be considered to be a waste. In recent jurisprudence, (*Palin Granit* and following cases) the ECJ has set out a three part test that a production residue must meet in order to be considered as a by-product. The court stated that where the further use of the material was not a mere possibility but a certainty, without any further processing prior to reuse and as part of a continuing process of production, then the material would not be a waste. This test is cumulative – all three parts must be met. In addition to this test, the ECJ has noted that the use for which the by-product is destined must also be lawful - in other words that the by-product is not something that the manufacturer is obliged to discard or for which the intended use is forbidden under EU or national law;

- **other factors used by the court to distinguish between waste and by-product:** in the *Arco Chemie* case and in other similar jurisprudence, the ECJ lists a whole range of factors that may indicate that a material is a waste. None of these elements are necessarily conclusive, but some may be helpful in some circumstances:

- no other use than disposal can be envisaged, or the use has a high environmental impact or requires special protection measures;
- the treatment method for the material in question is a standard waste treatment method;
- the undertaking perceives the material as waste;
- the undertaking seeks to limit the quantity of material produced.

An annex to the Communication gives examples designed to illustrate some cases in which materials may be classified as wastes or not: slags and dusts from iron and steel production; by products from the food and drink industry – animal feed; by-products from combustion – flue gas desulphurisation gypsum; and off-cuts and other similar material.

As announced in the Thematic Strategy on the prevention and recycling of waste, the effectiveness of the guidelines proposed in the Communication will be reviewed in 2010, in the context of the review of the strategy. At the same occasion, there will be a review whether further jurisprudence from the ECJ has made a revision of the guidelines necessary.