Case Note

EUROPEAN WASTE LAW: HAS RECENT CASE LAW IMPACTED UPON THE MESS?[1]

Case C-6/00 *Abfall Service AG (ASA)* v *Bundesminister für Umwelt, Jugend und Familie* (2002) ECJ

Environment, waste, Regulation (EEC) No. 259/93 on shipments of waste, competence of the authority of dispatch to scrutinise the classification of the purpose of a shipment (recovery or disposal) and to object to a shipment on the ground of an incorrect classification, Directive 75/442/EEC on waste, classification of deposit of waste in a disused mine

Case C-9/ 00 *Palin Granit Oy and Vehmassalon kansanterveystyon kuntayhtyman hallitus* (2002) ECJ

Waste Directives 75/442/EEC and 91/156/EEC, definition of waste, quarry stone

FACTS

In March 1998, an Austrian company, Abfall Service, proposed making a shipment of 'slag' waste[2] from Austria to Germany for the purpose of sealing a disused salt mine and thus securing hollow spaces. Abfall Service classified this as a recovery operation and the competent authority of destination, the Stuttgart *Regierungspräsidium*, in Germany, agreed. They accepted Abfall Service's classification and had informed Abfall Service that there appeared to be no reason for it not to approve the notification classifying the shipment as a recovery operation. Subsequently, however, the German *Bundesminister für Umwelt, Jugend und Familie* (the Federal Minister for the Environment, Youth and Family) objected and suggested the shipment was a disposal operation under D12 of Annex IIA of Waste Directive 75/442 (as amended by Directive 91/156/EEC) instead.[3] The question became whether the competent authority of dispatch (in Austria), or only the competent authority of destination (in Stuttgart), could determine the classification.[4] The supplementary question was whether the transportation of waste for the purpose of mine sealing constituted disposal or recovery. To resolve these disputes, the case went first to the *Verwaltungsgerichtshof* (the Austrian Supreme

1. This title refers to Stephen Tromans' article 'EC Waste Law: A Complete Mess?' (2001) 13 JEL 133.
2. The waste consisted of slag and ashes produced as a by-product in the operation of waste incinerators and transformed into a specific product at a waste-treatment plant, at *ASA* ECJ para. 19.
3. Council Directive 75/442/EEC (OJ L194 15.7.75) on waste.
4. Under Council reg. (EEC) No. 259/93 (OJ L30, 6.2.93) on the supervision and control of shipments of waste within, into and out of the European Community.

Administrative Court) which subsequently referred a series of questions concerning the interpretation of Directive 75/442 and of Regulation No. 259/93 on shipments of waste to the ECJ under Article 234.

In *Palin Granit* an application was made for an environmental licence for a granite quarry in the region of Vehmassalo, Finland. The request was to store approximately 50,000 cubic metres per annum of leftover quarried stone at an adjacent site. The question for the Court was whether leftover quarried stone should be classified as 'waste' under Directive 75/442 (as amended in 1991).[5] At first instance, the local Finnish Administrative Court (the *Turun ja Porin laaninoikeus*) held that the leftover stone was waste for the purposes of Law 1072/1993 and further that the storage site was classified as a landfill under Council Decision 861/1997 on landfills. Under Finnish law, the regional environment centre of South-west Finland (the *Lounais-Suomen ymparistokeskus*, hereinafter 'the environment centre') is the competent authority for the granting of environmental licences for landfills, not the Vehmassalo public health municipal joint board (hereinafter 'the joint board') which had initially granted the environmental licence for the granite quarry. Consequently, the Court held, the licence granted by the joint board was invalid as it had not been issued by the competent authority.

Following this decision, Palin Granit and the joint board brought an appeal before the Supreme Administrative Court (the *Korkein hallinto-oikeus*) challenging the classification of leftover stone as waste. Palin Granit submitted that the leftover stone was stored for short periods for subsequent use without the need for recovery measures. The environment centre, concurring with the opinion of the Finnish Ministry of the Environment, argued that the leftover stone should be regarded as waste as long as there is no evidence of reuse of the stone. In order to establish which authority was competent to grant Palin Granit the environmental licence sought by it, the Supreme Administrative Court decided to stay the proceedings and refer to the ECJ for a preliminary ruling.

JUDGMENT

The first aspect of the ECJ's judgment in *ASA* concerned who precisely is entitled to raise an objection to a classification by the notifier of a waste shipment. The procedure here is that when a notifier[6] intends to ship such waste from one Member State to another, it must notify the competent authority of destination and send a copy of the notification to the competent authority of dispatch and to the consignee.[7] These bureaucratic procedures are significant because whether waste is classified as being for disposal or recovery determines how it is regulated. The procedures for the two classifications also differ. In particular, shipments of waste for disposal must be accompanied by an authorisation granted by the Member State of destination. It is to this authorisation that the Member State of dispatch has the right to object and the Member State of destination may issue the authorisation only in the absence of any such objections.[8] Such express authorisation is not required in the case of waste for recovery.

Indeed, as the Advocate General noted in his Opinion in *ASA*, 'the most significant difference between the procedures applying to the shipments of waste for recovery and for disposal lies

5. Council Directive 91/156/EEC (OJ L078, 26.3.91) amending Directive 75/442/EEC on waste.
6. Defined in Art. 2(g) of reg. 259/93 as 'any natural person or corporate body to whom or to which the duty to notify is assigned, that is to say the person referred to hereinafter who proposes to ship waste or have waste shipped'.
7. See Arts. 3(1) and 6(1) of reg. 259/93.
8. Article 4(1) and (2) of reg. 259/93.

in the grounds on which the various competent authorities concerned may oppose the proposed shipment'.[9] In the case of waste for disposal, the objections must be based on Article 4(3) of the 1993 regulations.[10] In the case of waste for recovery, the objections are to be based on Article 7(4).[11] The ECJ certainly confirmed that the two-track system applied. Indeed, the Court held,

> one of the Regulation's aims, namely to render shipments of waste for recovery easier than shipments of waste for disposal by laying down less restrictive rules for the former type of shipment, would be jeopardised if the classification of the purpose of those shipments were not scrutinised.[12]

Nevertheless, the Court concluded that despite the apparent lack of a role for a competent authority of dispatch in shipments destined for recovery, applying the separate provisions 'presupposes that the purpose of the shipment has first been correctly classified in accordance with the definitions of disposal and recovery operations' in the Directive. Even though, under the regulation, it is the notifier that is responsible for classifying the purpose of the shipment of waste in the consignment note through which notification is made to the competent authorities, it follows, held the Court, from the system established by the regulation 'that all the competent authorities to which that notification is addressed must check that the classification by the notifier is consistent with the provisions of the Regulation and object to a shipment which is incorrectly classified'.[13] As the Court pointed out, this obligation to check is necessary if, under Article 26 of the regulation, Member States are effectively to prohibit and punish any illegal traffic in shipments of waste. This is particularly relevant in cases resulting from a knowingly false classification of the purpose of the shipment by the notifier. It also assists in the application of Article 30(1) of the regulation, which expressly imposes a general duty on Member States to take the requisite measures to ensure that waste is shipped in accordance with the provisions of the regulation.

On the second point, whether this waste constituted disposal or recovery, the ECJ in *ASA* did not give a definitive ruling. Instead, it held that each case should be treated on a case-by-case basis in the light of the objectives of the Directive and consequently referred it back to the Austrian courts to decide whether the ASA shipment constituted a recovery or disposal operation. The Court did, however, provide guidance for making this decision. It held that the decision whether a substance was bound for disposal or recovery must be based on whether the operation served a 'useful purpose' in replacing other materials which would have been used for that purpose. Waste might be bound for recovery, the Court held, if 'its

9. *ASA* Opinion at para. 23.
10. Article 4(3)(a)(i) is important here since it states that 'in order to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels in accordance with Directive 75/442/EEC, Member States may take measures in accordance with the Treaty to prohibit generally or partially or to object systematically to shipments of waste. Such measures shall immediately be notified to the Commission, which will inform the other Member States.' Article 4(3)(b)(i) states that the 'competent authorities of dispatch and destination, while taking into account geographical circumstances or the need for specialized installations for certain types of waste, may raise reasoned objections to planned shipments if they are not in accordance with Directive 75/442/EEC, especially Articles 5 and 7'.
11. Article 7(4)(a) lists five grounds on which the competent authorities of destination and dispatch may raise reasoned objections. The second, third and fourth grounds are not at issue in the present case. The first and fifth grounds—set out in the first and fifth indents of Article 7(4)(a)—are as follows: '(i) in accordance with Directive 75/442/EEC, in particular Article 7 thereof [which concerns national waste management plans], or ... (v) if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.'
12. *ASA* ECJ at para. 38.
13. *ASA* ECJ at para. 40.

principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose'.[14] It is this test which the national courts must now apply.

In *Palin Granit,* meanwhile, the ECJ ruled that the stone was in fact to be classified as waste. It held that to make this determination, two questions must be addressed. The first was whether a substance constituted a production residue (and so was not sought for subsequent use)[15] which the Court held, in this instance, the stone was. The second question was 'the degree of likelihood that that substance will be reused, without any further processing prior to its reuse'. 'If' the Court considered,

> in addition to the mere possibility of reusing the substance, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances the substance in question must no longer be regarded as a burden which its holder seeks to discard, but as a genuine product.[16]

Here the ECJ agreed with the Finnish government's argument that the only foreseeable 'reuses' of leftover stone in its existing state would be, for example, 'in embankment work or in the construction of harbours and breakwaters'. In these circumstances, the stone would require,

> in most cases, potentially long-term storage operations which constitute a burden to the holder and are also potentially the cause of precisely the environmental pollution which Directive 75/442 seeks to reduce. The reuse is therefore not certain and is only foreseeable in the longer term, with the result that the leftover stone can only be regarded as 'extraction residue which its holder' intends or is required to discard within the meaning of Directive 75/442, and thus falls within the scope of … that directive.[17]

Consequently, because the stone would be stored for an indefinite length of time to await possible reuse, it has been 'discarded' and is therefore classified as waste within the meaning of the Directive.

ANALYSIS

These two cases concern EC waste law and this review attempts to ascertain whether the findings of the ECJ will have a positive impact upon future case law and whether they impart anything novel or additional to the case law in this field. The arguments are framed in terms of Tromans's statement that 'a robust and coherent definition of waste remains elusive, as does the relationship in many respects between waste regulation and free movement of goods'.[18] The two principal areas of dissent, from which much of the case law arises, relate to the definition of waste and the classification of recovery and disposal operations. Both *Abfall Service* and *Palin Granit* add to these debates.

The legal basis of EU waste law rests with the 1975 Directive and this is the source of the definition of a waste material for all Community waste law. As is well known, the Directive defines waste as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'. The fundamental question here is how to interpret 'discard'. In particular, in the case of non-hazardous materials, legal boundaries become

14. *ASA* ECJ at para. 71.
15. See also here *ARCO Chemie Nederland Ltd and Minister van Volkshuisverting, Ruimtelijke Ordening en Milieubeheer* (C–418/97).
16. *Palin Granit* at para. 37.
17. *Palin Granit* at para. 38.
18. Tromans, above n. 1 at 156.

blurred as attempts are made to distinguish between the definition of pollution and of waste. The question is whether these distinctions are inherently necessary and practicable in terms of finding an appropriate level of control in order to achieve the objective of environmental protection.

Classification of the Operation—Disposal or Recovery?

The debate over whether substances are to be disposed of or recovered has become particularly contentious when substances are reused. Tromans, for example, has highlighted 'the equivocal nature of the relationship between the meaning of discard and the descriptions of various types of disposal and recovery operations set out in Annexes IIA and IIB of the Directive'.[19] One crucial difficulty here is that even since 1991 when the Annexes were drawn up, any number of ingenious new uses for 'waste' materials has been developed.

This has led to some flexibility in the system, most notably following the *Tombesi* case, where an Italian law that simplified the regime for 'residues' was considered to be incompatible with existing waste law.[20] Here Advocate General Jacobs famously developed the '*Tombesi* bypass'[21] stating that something could be 'discarded' if it did not contribute to a recovery operation, 'working by example' from the operations listed in Annex IIB of the 1975 Directive (as amended in 1991). As Tromans notes, however, the approach is not foolproof, since the test gets round 'the need to consider in detail when waste is discarded, but really only shifts the problem to what is meant by "recovery" '.[22]

Similarly, in *ASA*, the ECJ was considering how to classify wastes destined for operations not listed in the Directive. It noted that neither the regulation nor the Directive contains a general definition of disposal or recovery of waste. Indeed, even the annexes do no more than list the most common disposal or recovery operations and do not 'precisely and exhaustively' specify all the disposal and recovery operations covered by the Directive.[23] However, operations must be either one or the other, not least so that shipments of waste for recovery can be regulated less stringently than shipments of waste for disposal. Consequently, it held, when as here the precise activity is not referred to in the annexes, that it must be classified on a case-by-case basis in the light of the objectives of the Directive.[24] Here, then, the waste need not necessarily constitute a disposal and might be a recovery if 'its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose'.[25]

This test should perhaps be treated with caution. For as Advocate General Jacobs concluded in his Opinion, 'whether waste can be re-used after a given operation is not a decisive criterion for the classification of that operation as disposal or recovery'.[26] If, as the ECJ held, it is the concept of 'useful purpose' which is to be the test of an operation, it may be difficult for judges to set a fine line between those operations which constitute a 'useful purpose' and those which would be classified as reuse.

19. Ibid. at 141.
20. The Court in *Euro Tombesi and Others* held that the concept of 'waste' as defined in the 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'. It is irrelevant that a substance is defined as a 're-usable residue' without its characteristics or purpose being defined. See [1997] ECR I-3561 at para. 54.
21. G. Van Calster, 'The EC Definition of Waste: The Euro Tombesi Bypass and the Basel Relief Routes' [1997] *European Business Law Review* 137.
22. Tromans, above n. 1 at 143.
23. *ASA* ECJ at paras. 58–60.
24. *ASA* ECJ at para. 64.
25. *ASA* ECJ at para. 71.
26. *ASA* Opinion at para. 82.

Certainly, the operations of disposal and recovery of a substance or an object manifest an intention to discard it. These operations include deposit into or onto land, which includes use as a landfill material, storage pending another disposal operation and storage pending a recovery operation. As regards the *Palin Granit* case, the storage of stone at the place of extraction or a storage site would therefore constitute a disposal or recovery operation. It is fundamental to ascertain correctly whether a shipment of waste is classified as a recovery or disposal operation as the procedures differ for each and the procedures for a recovery operation are less strict than those applied to a disposal operation.

In the *ASA* case, Germany and the Commission agreed that a particular use of waste may in practice be both a recovery and a disposal operation. However, they drew different conclusions from this. The German government argued that it is contrary to the Directive to regard such operations as disposal rather than as recovery operations because recovery operations are encouraged under the Directive.[27] The Commission, meanwhile, argued that the objectives of waste legislation dictate that the stricter procedures governing shipments for disposal should apply. It is the Commission's line that is perhaps more acceptable here since adopting the German government's argument could lead to operations being unduly subject to more lenient rules. It is better if doubt arises as to the classification of an operation to follow the safer and therefore stricter route and to err on the side of caution. Moreover, the German argument seems to proceed on the basis of wishful thinking. Simply because a classification as recovery would look more positive is not a reason to classify an operation in that way. Up until *Tombesi*, in cases where doubt surrounding a classification arose, it was necessary to rely upon the definition of a discard operation and if the operation did not apply then all else were recovery operations.[28] In *Tombesi*, as discussed above, Advocate General Jacobs certainly did shift the onus of defining a discard operation to definition of a recovery operation.

The Definition of Waste

A second concern about current EU waste law is that the definition of waste is unsuitable. Cheyne, for example, has argued that the definition of waste is too broad in that it encompasses processes which involve more than one use of a particular substance and which do not pose a threat to the environment.[29] In this sense, therefore, one finds that a lack of environmental danger is not relevant to whether a substance is defined as waste or not. The argument for this very interpretation is that the Court is reluctant to exclude substances which are potentially waste and in this sense this expansive approach follows the precautionary principle. Nevertheless, the system gives rise to problems. A substance may be listed but this alone does not make it waste; it is subject to a test of the holder's intent.

The situation relating to less harmful substances is also complicated. The use and disposal of highly toxic substances are controlled under both pollution and waste regulations. While less harmful substances may fall outside the scope of either pollution or waste controls, the disposal of such substances may still cause pollution. The definition of waste is bound up in the public perceptions of waste and the level of perceived and actual risk posed to human health and the environment. The public perception that waste is unpleasant will remain whether a substance poses a risk to the environment or not. Thus the tolerated levels of risk or discomfort are highly subjective. Tromans suggests that in support of the EU objective to promote recovery operations and to reduce the stigma attached to waste, a distinction should be made between

27. *ASA* Opinion at para. 74.
28. *Euro Tombesi* v *Others* [1997] ECR I-3561; [1998] JEL 116. The *Tombesi* case concerns the law relating to the reuse of residues and whether such residues are classified as waste.
29. I. Cheyne, 'The Definition of Waste in EC Law' (2002) 14 JEL 61.

recyclable waste as opposed to conventional waste.[30] The question remains, of course, whether the 'recyclable' waste might still be hazardous.

In *Palin Granit*, there was certainly no difference between the 'product' and the 'waste'. Though the mineral content argument was bandied around regularly, the fact that the composition of the leftover stone was the same as the quarried stone which went to be used was found to be an empty argument, as was the fact that the stone was not treated or altered. A product residue is defined as a product, which is not in itself sought for subsequent use, and a category into which leftover stone does not fit. As a company, Palin Granit attempted to limit the quantity of stone left over and so argued that leftover stone falls under the head Q11 of Annex I of the 1975 Directive (as amended in 1991), being a residue from raw materials extraction and processing. In essence the burden test is a more reliable test, to establish whether the stone was viewed as a burden by the holder. Thus the fact that the stone does not pose any real risk to human health or the environment is not relevant criterion for determining whether the stone is to be regarded as waste.[31]

Certainly, the ECJ has not developed a comprehensive definition of waste, with Article 1(a) of the 1975 Waste Directive defining waste as meaning 'any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force'. Inevitably, this definition of waste is dependent upon the meaning of the term 'discard', which is not defined. In addition to principles that have emerged from case law, the interpretation has been amended by Directive 91/156/EEC, which attempted to tighten up the legal definition of waste and introduced a list system. Thus, Annex I to the Directive now lists substances and objects which if the holder discards or intends to discard them are classified as waste. Within Annex I, Q1–Q15 contain descriptive categories, yet it is the catch-all category Q16 which is the controversial element. Q16 boldly states that 'any of the materials, substances or products which are not contained in the above categories' are to be defined as waste. Tromans has described this as 'one example of curious drafting' which 'perhaps gives EC waste law a bad name'.[32]

Lawyers have had significant difficulties delimiting the definition of 'discard' particularly in terms of its relationship to 'disposal' and 'recovery' operations set out in Annex IIA and IIB of the 1975 Directive (as amended in 1991). 'Discard' is taken as to mean beyond the concept of getting rid of an item and includes the situation where materials are sold or otherwise transferred for beneficial reuse. What is additionally problematic are the problems associated with the linguistics of the definition of 'discard' across the Member States' languages.[33]

CONCLUSIONS

The complexities of EU waste law may be too intractable to resolve in just two cases, but both *ASA* and *Palin Granit* have perhaps clarified the position. When determining whether waste is destined for recovery or disposal, judges and administrators have been encouraged to go beyond the listings in Annexes I and II of the 1975 Directive (as amended in 1991). To some extent *ASA* has also considered the policy choice that waste rules should subject waste destined for recovery to less stringent regulations than that destined for disposal.

It is possible that the decisions have also clarified debates on what constitutes waste. The ruling in *ASA* that each operation should be handled on a 'case by case' basis certainly

30. Tromans, above n. 1 at 137.
31. *Palin Granit* at para. 52.
32. Tromans, above n. 1 at 141.
33. Ibid.

recognises that the intractable problems relating to the definition of waste and classification will be an ongoing consideration.[34] Where the current law prevails and it is not possible for a single operation to be classified simultaneously as both a disposal and a recovery operation, difficulties arise. In practice, Annexes A and B are sufficiently vague to allow an operation to fall under a number of sections. It is noteworthy that each annex is prefaced by a note to the effect that it is intended to list the operations 'as they occur in practice'. Indeed, as regards the *Palin Granit* case, it is of significance that the Court ruled that the composition and the non-hazardous nature of the stone were not relevant criteria in the determination of the classified stone as waste. This raises issues surrounding the whole basis of waste law.

Perhaps, then, the case by case argument should be extended and the hazard posed to the environment and human health should be the primary assessment regardless of which type of operation is proposed. On the other hand, it is possible that the operation classification under Annex I of the Directive simplifies the process by delimiting the more hazardous shipments at the outset. Certainly the ECJ's conclusion confirming the ability of each competent authority to verify the classification indicates that the Court recognises that procedures relating to transparency and opportunities to question procedural rules are a necessity in a jurisdiction intent on effective waste law.

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34. *ASA* ECJ at para. 63.