THE DEFINITION OF WASTE:
THE RIDDLE OF THE SANDS

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Introduction

The definition of "waste" in the EC Waste Framework Directive (WFD), which is mirrored in the UK legislation, is "any substance or object . . . which the holder discards or intends or is required to discard".

The interpretation of "discard" is not straightforward. At one stage, it seemed that the law might follow the so-called *Tombesi by-pass*; ie the approach advocated by Advocate General Jacobs in the *Tombesi* case that "discard" refers to any object which has been or is to be dealt with by means of a "disposal operation" or "recovery operation" set out in Annexes IIA and IIB respectively of the WFD. However, the difficulty with that approach is that the listed operations can in many cases refer to operations concerned with material which is not waste. For example, the use of material as fuel can be either a means of recovering waste (see Annex IIB, R1) or the use of non waste material for a purpose. That consideration led the European Court of Justice (ECJ) in the *Arco/Epon* case (2000) ECR I-4475 to abandon the *Tombesi by-pass* and hold that the scope of the term "waste" is not determined by whether material has been subjected to disposal or recovery operations.

The burden principle

The ECJ in the *Arco/Epon* case indicated that the key question is whether the holder of material discards it or intends or is required to discard it. The Court held that the term "discard" must be interpreted in the light of the aim of the Directive. The fourth recital in the preamble to the WFD states that: "in order to achieve a high level of environmental protection, the Member States must, in addition to taking action *to ensure the responsible removal and recovery of waste*, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and reused, taking into consideration existing or potential market opportunities for recovered waste".

It is apparent from the first part of the recital (italics supplied) that at least one environmental problem posed by waste is that it is a burden to the holder who does not have

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any interest in looking after it properly. It is suggested that this is crucial to understanding the meaning of "waste" in the WFD.

The point is evident from (though implicit rather than explicit in) paragraphs 64-67 and 94 of the judgment in *Arco/Epon* which suggest that the critical factors in deciding whether material is waste is not whether it has economic value, nor whether processing it will be undertaken without endangering human health or the environment, nor whether the material has undergone a complete recovery operation. (As will be seen, these factors are only relevant to the extent that they may indicate that the material is or is not discarded). As the ECJ pointed out, even with any of these factors present "the substance may nonetheless be regarded as waste if . . . its holder discards it or intends or is required to discard it". The inference may be drawn that the ECJ considered that material should be treated as discarded if the evidence shows that it is unwanted by the holder.

This rationale is made explicit by the ECJ in its later decision in *Palin Granit* (2002) ECR I - 3533 which states in paragraph 37:

> "If, 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."

It follows that the Court's statement in both *Arco/Epon* and *Palin Granit* that "the concept of waste cannot be interpreted restrictively", has to be considered in the light of the real environmental danger posed by waste, as indicated above. The critical question is, therefore, whether or not the material is wanted by its holder.

Recent case law in the ECJ has demonstrated different approaches to production residues on the one hand and consumption residues on the other.

Production residues

The *Arco/Epon* cases relate to:

- the use of "LUWA bottoms", a by-product of a manufacturing process, as a fuel in the cement industry without further processing;
- the use of wood residues from the construction and demolition of buildings delivered in the form of wood chips, which were to be transformed into a wood powder and used as a fuel to generate electricity.

In formulating guidance for use in deciding whether or not those substances were discarded and, therefore, constituted waste, the ECJ held that any of the following circumstances may be evidence that the material is waste:

- the use of a substance as fuel is a common method of recovering waste;
- it is commonly regarded as waste;
- it is a production residue, ie a product not itself sought for use as fuel;
- the substance is a residue for which no use other than disposal can be envisaged;
- it is a residue whose composition is not suitable for the use made of it or where special precautions must be taken when using it, owing to the environmentally hazardous nature of its composition.

See paragraphs 69-71 and 83-87 of the ECJ judgment.

However, the Court emphasised that these indicators are not determinative by themselves. Rather, the question of whether material is waste has to be "determined in the light of all the circumstances, regard being had to the aim of the Directive and the need to ensure that its effectiveness is not undermined".

The *Arco/Epon* case was followed by the ECJ decision in *Palin Granit*. This involved the issue of whether leftover stone resulting from the operation of a quarry stored for its possible reuse as gravel or filling material was waste or not. The ECJ in general followed the reasoning in *Arco/Epon*. They held that the holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste.

However, the ECJ went further in clarifying the issue of production residues. The critical paragraphs of the Court's judgment are as follows:

"32. At paragraphs 83 to 87 of the judgment in *ARCO Chemie Nederland*, the Court pointed out the importance of determining whether the substance is a production residue, that is to say, a product not in itself sought for a subsequent use. As the Commission observes, in the case at issue in the main proceedings the production of leftover stone is not Palin Granit's primary objective. The leftover stone is only a secondary product and the undertaking seeks to limit the quantity produced. According to its ordinary meaning, waste is what falls away when one processes a

material or an object and is not the end-product which the manufacturing process directly seeks to produce.

33. Therefore, it appears that leftover stone from extraction processes which is not the product primarily sought by the operator of a granite quarry falls, in principle, into the category of "residues from raw material extraction and processing under head Q 11 of Annex I to Directive 75/442.

34. One counter-argument to challenge that analysis is that goods, materials or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking does not wish to discard, within the meaning of the first paragraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse.

35. Such an interpretation would not be incompatible with the aims of Directive 75/442. There is no reason to hold that the provisions of Directive 75/442 which are intended to regulate the disposal or recovery of waste apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products.

36. However, having regard to the obligation, recalled at paragraph 23 of this judgment, to interpret the concept of waste widely in order to limit its inherent risks and pollution, the reasoning applicable to by-products should be confined to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process.

37. It therefore appears that, in addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not that substance is waste for the purposes of Directive 75/442 is the degree of likelihood that that substance will be reused, without any further processing prior to its reuse. If, 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."

It follows that, in the view of the ECJ, a by-product which is not the main aim of production is not waste if its holder intends to use it without any further processing prior to reuse.

Another decision of the ECJ, *AvestaPolarit Chrome Oy* (2003) ECR I - 8725 has confirmed that view and taken the analysis further.

The question in *AvestaPolarit* was whether left over rock from mining operations should be considered as waste or not. Some of the left over rock was intended to fill in underground workings after the mining activity was completed; some was intended for processing into aggregates; and some might possibly be used as filling material in constructing breakwaters and embankments.

The ECJ relied heavily on its earlier judgment in *Palin Granit* . The ECJ stated:

"36 In this respect, a distinction must be drawn between residues which are used without first being processed in the production process for the necessary filling in of the underground galleries, on the one hand, and other residues, on the other.

37 The former are being used in that case as a material in the industrial mining process proper and cannot be regarded as substances which the holder discards or intends to discard, since, on the contrary, he needs them for his principal activity.

38 Only if such use of those residues were prohibited, in particular for reasons of safety or protection of the environment, and the galleries had to be sealed and supported by some other process, would it have to be considered that the holder is obliged to discard those residues and that they constitute waste.

39 Outside such a case, if a mining operator can identify physically the residues which will actually be used in the galleries and provides the competent authority with sufficient guarantees of that use, those residues may not be regarded as waste. In this respect, it is for the competent authority to assess whether the period during which the residues will be stored before being returned to the mine is so long that those guarantees cannot in fact be provided.

40 As regards the residues whose use is not necessary in the production process for filling in the galleries, they must in any event be regarded in their entirety as waste.

41 That is true not only for the leftover rock and ore-dressing sand whose use for construction operations or other purposes is uncertain (see *Palin Granit*, paragraphs 37 and 38), but also for the leftover rock which will be processed into aggregates, since, even if such use is probable, it requires precisely an operation for recovery of

a substance which is not used as such either in the process of mining production or for the final use envisaged (see *Palin Granit*, paragraph 36).

42 That is also true for the leftover rock accumulated in the form of stacks which will remain on the site indefinitely, and for the ore-dressing sand which will remain in the old settling ponds. Those residues will not be used for the production process, and cannot be used or marketed in any other way without prior processing. They are therefore waste which the holder discards. If they are landscaped, that constitutes merely an environment-friendly manner of dealing with them, not a stage in the production process."

The reasoning of the ECJ in *Palin Granit* and *AvestaPolarit* was applied by the court in *Saetti and Frediani* [2004] ECR I-1005. In that case it was held that:

" . . . petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste . . ."

The court held that:

"45 . . . petroleum coke cannot be classified as a production residue within the meaning of paragraph 34 of this order as the production of coke is the result of a technical choice (since petroleum coke is not necessarily produced during refinery operations), specifically intended for use as fuel, whose production costs are probably lower than the cost of other fuels which could be used to generate the steam and electricity which meet the needs of the refinery. Even if, as maintained by an adverse party in the main proceedings against Mr Saetti and Mr Frediani, the petroleum coke at issue automatically results from a technique which at the same time generates other petroleum substances which are the main results sought by the refinery's management, it is clear that, if it is certain that the coke production in its entirety will be used, mainly for the same purposes as the other substances, that petroleum coke is also a petroleum product, manufactured as such, and not a production residue. The file in the main proceedings sent to the Court appears to indicate that it is common ground that the petroleum coke is certain to be fully used as fuel in the production process and that all the resulting surplus electricity is sold."

The court appears to rely on the fact that the main product of the refinery as well as the petroleum coke are intended to be used for the same purpose, ie fuel. However, in the light

of the principles developed in the earlier cases, that point should not be considered as essential to the court's reasoning but rather as one that reinforces it.

The case is also notable for showing that even the existence of several of the waste 'indicators' does not necessarily lead to the conclusion that material is waste if it is genuinely wanted by its holder.

In *Saetti and Frediani*, the ECJ's finding that the petroleum coke was not waste in the circumstances of the case was unaffected by the fact that fuel is a standard waste recovery method, because as the court pointed out, 'the purpose of a refinery is precisely to produce different types of fuel from crude oil'. The ECJ also said that any evidence that (1) the only use of the material led to its disappearance and (2) special environmental protection measures are required in using the material were irrelevant in the present case, since those factors only applied to production residues. The petroleum coke, by contrast, was a petroleum product. The ECJ took the same approach with regard to evidence that the company considered petroleum coke to be waste.

It can be argued, however, that even if the petroleum coke had been classified as a production residue, the presence of any 'waste indicators' should not undermine a conclusion that in the light of all the circumstances, the material has not been discarded.

That case was followed by *EC Commission v Kingdom of Spain* (ECJ Third Chamber – 8 September 2005. This case concerned pig slurry used as fertiliser. The ECJ, following *Palin Granit*, *AvestaPolarit* and *Saetti and Frediani*, held that:

"60 . . . livestock effluent may, on the same terms, fall outside classification as waste, if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations.

61 . . . it is not appropriate to limit that analysis to livestock effluent used as fertiliser on land forming part of the same agricultural holding as that which generated the effluent. As the Court has already held, it is possible for a substance not to be regarded as waste within the meaning of Directive 75/442 if it is certain to be used to meet the needs of economic operators other than that which produced it (see, to that effect, *Saetti and Frediani*, paragraph 47).

65. In this case, as regards, first, the slurry generated by the livestock farms, it is clear from the contents of the case-file that the slurry is used as an agricultural fertiliser in the context of rules for spreading in accordance with good agricultural practice

laid down by the Autonomous Community of Catalonia. The persons running those farms are not therefore seeking to discard it, with the result that the slurry is not 'waste' within the meaning of Directive 75/442.

66. The fact that in the European Waste Catalogue 'waste from agricultural primary production' includes 'animal faeces, urine and manure (including spoiled straw), effluent, collected separately and treated off-site' is not such as to bring that conclusion into question. That general mention of the effluents from stock-rearing does not take into account the conditions in which the effluent is used and which are decisive for the purposes of assessing the meaning of 'waste'. In addition, the preliminary note in the annex to the European Waste Catalogue states that this list of waste is 'non-exhaustive', that 'the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances' and that 'the entry is only relevant when the definition of waste has been satisfied'."

It follows that the 'burden' principle is well established in relation to by-products and process residues.

The effect of processing

However, the ECJ has stated that the burden principle does not apply to residues which require further processing before use. In *Palin Granit* (paragraphs 30-37) and *AvestaPolarit* (paragraphs 30-43), the ECJ has ruled that left over rock which will be processed into aggregates is discarded material and, therefore, waste "because it requires precisely an operation for recovery of a substance which is not used as such either in the process of mining production or for the final use envisaged" (*AvestaPolarit* paragraph 41). This analysis is based on the ECJ judgment in *Arco* (paragraphs 83-87) which sets out certain indicators that material has been discarded:

- the substance used is a production residue, ie a product not in itself sought for use as [fuel];
- the substance is a residue for which no use other than disposal can be envisaged;
- the substance is a residue whose composition is not suitable for the use made of it or where special precautions must be used owing to the environmentally hazardous nature of its composition.

In *Arco*, the ECJ emphasised that these indicators are only evidence of whether a substance is waste. "Whether it is in fact waste within the meaning of the directive must be determined

in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined" (paragraph 88).

It follows that although the ECJ in *Palin Granit* and *AvestaPolarit* did unusually apply the law to the facts, they were not purporting to lay down any principle of law in holding that left over material destined for processing was waste. They were merely applying the evidential tests in *Arco* to the specific facts before them.

This conclusion is reinforced by the acknowledgement by the ECJ in *Arco* and *Palin Granit* that it may not be inferred from the mere fact that a residual substance undergoes a recovery operation listed in Annex II B to the WFD that it has been discarded. The reason is that some of those operations apply equally to raw materials and waste (see *Arco*, paragraphs 49-51; *Palin Granit*, paragraph 27).

Accordingly, the answer to whether material requiring processing or treatment is waste should depend on whether it has been discarded. That, in turn, depends on whether it is a burden to its holder. It should make no difference in principle that the material has to be processed or treated prior to reuse provided that reuse is sufficiently certain to satisfy the burden test.

In any event, the reasoning in *Palin Granit* and *Avesta Polarit* applies to production residues, and not to products which the holder wishes to retain but intends to repair or cleanse before further use. For example, dirty or torn clothes may need to be cleaned or repaired before they are worn again. It is suggested that there is nothing in the case law of the ECJ which requires them to be treated as discarded. That situation is distinguishable from the case of consumption residues (see post) where material is discarded and then has to be recovered before it loses its character as waste.

Consumption residues

In *Niselli* (ECJ Second Chamber – 11 November 2004), the court held that the burden principle enunciated in *Palin Granit* and *AvestaPolarit* does not apply to consumption residues. That case concerned scrap metal. The court said that:

"52 . . . the contentious materials were then sorted, and sometimes treated, and they constitute a secondary raw material to be used in steelmaking. In such a context, they must however continue to be classified as 'waste' until they have actually been recycled into steel products, that is to say, until the constitution of the finished products derived from the reprocessing for which they are intended. In the earlier phases, they cannot yet be regarded as recycled, since the reprocessing has not

> been concluded. Conversely, subject to the case where the products obtained are in their turn abandoned, the point at which the material in question cease to be classified as 'waste' cannot be fixed at an industrial or commercial stage subsequent to their reprocessing into steel products, because, from that point, they can hardly be distinguished from other steel products made from primary raw materials (see, for the particular case of recycled packaging waste, Case C-444/00 *Mayer Parry Recycling* [2003] ECR I-6163, paragraphs 61-75)."

Again, that conclusion should, in principle, follow only if the material has been discarded. Of course, material such as scrap metal or other consumer left-overs are likely to be a burden to their holder and in that case should be treated as discarded. However, it should not be overlooked that in some cases consumers may require their consumption residues for a purpose (for their own use or for the use of another person). In such a case where appropriate evidence is presented, it is suggested that the material should not be considered as waste. That view is supported by *Niselli* which implies that the burden principle in *Palin Granit* applies to "second-hand goods reused definitely and in a comparable manner, without prior processing" (paragraph 49). In such a case, the goods are required by the holder, are not a burden, and are therefore not discarded.

When does waste material cease to be waste?

The question is when do production residues or consumption residues which are waste cease to be waste? In *Arco/Epon* the ECJ stated that the fact that a substance has undergone a complete recovery operation does not necessarily mean that it is no longer waste. That will depend on whether the holder discards it (see above). However, the fact that the substance has undergone a complete recovery operation is one factor to be taken into consideration for the purpose of deciding whether the substance has been discarded.

Strong support for this approach is given by the judgment of ECJ in *Mayer Parry Recycling Ltd* (2003) ECR I - 6163 in which it was held that:

> "Once packaging waste has been recycled within the meaning of Directive 94/62 [the Packaging Waste Directive], it is no longer to be regarded as packaging waste for the purposes of that Directive or, therefore, of Directive 75/442 [the WFD]. Accordingly, ingots, sheets or coils of steel manufactured from Grade 3B material which derives from metal packaging waste that has been recycled is no longer packaging waste for the purposes of Directives 94/62 and 75/442."

Article 3(7) of the Packaging Waste Directive defines "recycling" as "the reprocessing in a production process of the waste materials for the original purpose or any other purposes

including organic recycling but excluding energy recovery". The ECJ emphasised that "the concept of recycling is not limited to the situation where the new material or new product, possessing characteristics comparable to those of the original. material, is used for the same purpose of metal packaging. Use for other purposes also features in the concept".

Although the decision in *Mayer Parry* is concerned primarily with the interpretation of the Packaging Waste Directive, the ECJ clearly stated that material would cease to be waste within the meaning of the WFD when it has been used in a production process.

However, it is clear from *Mayer Parry* and *Niselli* that waste loses its character as such when it has been processed into raw materials such as ingots, sheets or coils of steel, which are to be used in the production of final products.

It will be noted that in both *Mayer Parry* and *Niselli* the ECJ refers to the need for recycling before a consumer waste product ceases to be waste. That apparently imposes a higher threshold than *Arco*, which indicates that recovery is sufficient. It is suggested that in that respect *Mayer Parry* and *Niselli* turn on their own facts. In *Mayer Parry*, it had to be demonstrated that recycling had taken place in order to satisfy the requirements of the Packaging Waste Directive.

In *Niselli*, which also concerned scrap metal, the ECJ was clearly influenced by *Mayer Parry* and appears to take the view that, on the facts of that case, the point of recovery is coincidental with the point of recycling. It is clear form Annex IIB of the WFD that this can be so since the list of recovery operations includes certain recycling processes. However, recovery is a wider concept since the list includes a number of non-recycling operations, eg R1 use principally as fuel; R3 recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes; and R7 recovery of components used for pollution abatement. Reclamation conveys the concept of making usable, which may be less than a complete recycling operation. It must mean something different to recycling; otherwise the two terms would not be used in juxtaposition.

Mayer Parry relates to an undertaking which sorted, cleaned, cut, crushed, separated and baled waste packaging materials in order to make the materials suitable as feedstock for a steel producing furnace. Although the materials had not been recycled, it is certainly arguable that they had been recovered. In *Niselli*, on the other hand, the material in issue was unsorted scrap metal which had clearly not been recovered. The ECJ observed (in paragraph 52 of its judgment - see above) that the subsequent sorting and treatment was insufficient to remove the scrap metal from the category of waste. This is hardly surprising on the basis of the facts, since it appears that Mr Niselli's operations did not result in the production of usable material such as the feedstock produced by *Mayer Parry*.

It appears at first sight that *Niselli* has moved the goalposts for the exit point of waste categorisation from recovery to recycling. However, it is suggested that the better view is that *Niselli* is fact specific as suggested above. Where the evidence shows that full recovery has taken place (even if that is less than recycling), the material in question should no longer be considered as waste. If that were not so, it would involve the proposition that material can still be waste following recovery, which seems contrary to the very concept of recovery.

A different situation involves residual material which is stored without any intended purpose. In that case, it is likely to be waste. If a need for that material is subsequently identified, can its status change from waste to non-waste? This question does not appear to have been addressed directly by the courts.

It is suggested that there is nothing in principle which would prevent such a change of status. The burden principle should be applied, supplemented by the evidential indicators in *Arco*. If the material is genuinely required, eg if it can be established that in the absence of that material, similar material would have to be acquired for the same purpose, the material need not be considered as discarded any longer. It is suggested that this conclusion applies whether it is the holder, or a third party to whom the material is transferred, whose genuine need is under consideration. In the latter case, the material may only cease to be waste when in the hands of the third party (who has no intention to discard it).

The *Van de Walle* case

The *Van de Walle* case (2004) concerned a leakage of hydrocarbons from defective petrol storage facilities at a Texaco service station in Brussels. The hydrocarbons migrated to the cellar of the building on the adjoining property, which required remediation. The service station was owned by Texaco but operated by a manager who had full responsibility for maintaining the property in perfect condition. The manager operated the service station on his own behalf.

In the course of criminal proceedings against Texaco and its chief officers, the question of whether the contaminated soil was waste was referred to the ECJ. The ECJ held that the contaminated soil was waste within the meaning of the WFD. The reasoning of the ECJ was essentially as follows:

1 The accidentally spilled hydrocarbons are not a product which can be re-used without processing. They are therefore residues which are discarded, albeit involuntarily.

2 Under Articles 4 and 8 of the WFD, Member States have a duty to ensure that waste is recovered or disposed of by its holder.

3 It follows that the contaminated soil (which cannot be separated from the hydrocarbons) is required to be discarded and therefore disposed of and recovered in order that the obligation not to abandon and to recover or dispose of the waste hydrocarbons is complied with.

4 It follows further that the fact that soil is not excavated has no bearing on its classification as waste.

When does the WFD not apply to contaminated soil?

The question arises as to the extent to which the ECJ interpretation of the contaminated land in question as waste, should be interpreted as applying to all contaminated soil. The reasoning of the ECJ suggests that the *Van de Walle* judgment is limited to cases where spillage or leakage of material has occurred whilst under the control of an identified person, in circumstances so as to give rise to an obligation to recover or dispose of it.

There are a number of situations in which it can be argued that contaminated soil is not waste and is not subject to any positive obligation to recover or dispose of it.

Pre-1977 spillages

First, in the case of spillages or leakages which occurred before the implementation date of the WFD in 1977, the lost material was already abandoned before that date. There is nothing in the WFD to suggest that it is retroactive. It does not create a positive obligation to recover or dispose of any pre-1977 waste, unless it remains waste thereafter (see further below) and is subsequently handled (in which case Article 8 will apply). The reasons for this view are as follows:

1 There is no indication that the WFD is intended to apply in this way to waste produced and disposed of in the past. On the contrary, the language of the WFD is present and prospective. For example, in Article 1 the definitions of 'waste' and 'producer' use verbs in the present tense. Similarly, the duties on Member States, eg in Articles 3, 4 and 8, are all framed as present tense obligations. The same applies to the obligations on waste disposal or recovery undertakings to obtain a permit. On the other hand, specific language had to be included in the Environmental Liability Directive to avoid retrospective effect, because liability always relates to a past event. This is illustrated by Article 6 of the ELD which begins "Where environmental damage has occurred, the operator shall . . .". The

WFD, like the IPPC directive, regulates activities and operations taking place after the implementation date for the directive concerned.

2 The policy of the WFD as evidenced by its preamble is to manage waste from cradle to grave in a manner which protects the environment. There seems to be no suggestion that waste should be exhumed from the grave to check its condition posthumously.

3 A retroactive interpretation of the WFD could only be achieved if it is interpreted as a contaminated land regime (as well as a waste management regime) covering similar ground to Part IIA of the Environmental Protection Act 1990, and possibly going further in terms of clean up standards. Since the producer/holder responsible for the spillage may have disappeared, it would also require either that the definition of 'holder' be read as including an owner or occupier whose land has been contaminated by substances which he has never accepted or even known about (a departure from the concept of possession which is included in the definition of holder), or that, in the absence of any "holder", the Member States must deal with 'orphan' contamination in order to meet their obligations under Articles 4 and 8. However it is clear from Article 8 that the obligation to ensure disposal or recovery of waste falls on the holder. Any retroactive interpretation of the WFD can, therefore, only be achieved by straining the true purpose and the language of the legislation.

No remediation required

Second, if spilled substances which are waste do not require immediate remedial work (on the basis of an appropriate risk assessment), there should be no requirement under the WFD to have them disposed of or recovered before the site is developed or is required to be remediated under contaminated land legislation. It follows that there is no obligation to discard and then dispose of or recover the soil which is contaminated by the spilled substances.

At first sight, that reasoning seems contrary to the *Van de Walle* judgment (see paragraphs 52 and 53). However, it is suggested that that is not the case. It must be remembered that *Van de Walle* concerned contamination which required immediate remediation which had already been carried out before the ECJ hearing. The situation suggested in the previous paragraph presupposes that no immediate clean up is required on environmental grounds.

Article 8 of the WFD, which requires Member States to take the necessary measures to ensure that holders of waste have them recovered or disposed of, does not impose any time limit.

Article 4 of the WFD states that Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. (That provision has been held by the ECJ to be an objective not an absolute obligation, 'leaving to the Member States a margin of discretion in assessing the need for such measures': see eg *Commission v Italian Republic* ECR 1991 1-7773, paragraphs 66-68; *R (on the application of Thornby Farms Ltd) v Daventry DC* (2002) Env LR 28, paragraph 53.)

Given that the fourth recital in the preamble of the WFD states that the aim of the Directive is 'to achieve a high level of environmental protection', and the ninth recital states that 'movements of waste should be reduced', it would seem that there is no *obligation* to dispose of or recover any spilled substances unless and until the objectives of the WFD are being threatened. That conclusion applies even more strongly where it is better from an environmental point of view to leave contaminating substances where they are rather than remove or treat them.

On that basis, even though the spilled substances may be waste, the soil which is contaminated by them is not required to be discarded, and so does not become waste, until remedial work is necessary for environmental reasons or because the land is to be redeveloped.

This approach is consistent with the Opinion of Advocate General Kokott in *Van de Walle*. She states that soil is presumed to be waste where it cannot be used as normal due to pollution. However, she says that this conclusion is subject to evidence to the contrary. In particular, the presumption of intention to discard is rebutted by taking concrete measures to re-establish the use of the soils without discarding them (paragraph 35).

The Opinion of the Advocate General is reconcilable with the ECJ judgment in *Van de Walle*. The former deals with contaminated land generally. The latter deals with the problem of spillages of hazardous material causing contamination which requires remediation on environmental grounds.

Recovery by degradation or dispersal

Third, in some cases spilled substances which are waste may be recovered most effectively by leaving them in the ground and allowing them to degrade or disperse naturally. They

would then form part of the ground. This solution would not involve the need to discard (and then dispose of or recover) the contaminated soil. A decision to adopt this course would have to be made on the basis of an appropriate risk assessment in order to meet the objectives in article 4 of the WFD. It is arguable that this type of recovery falls within exemption 15 of the Waste Management Licensing Regulations 1994, Schedule 3, on the basis that it is of more benefit to the environment to leave the material where it is than to remove it. However, this would not apply to hazardous waste material.

Made ground

Fourth, if waste has been deposited on land to create made ground that material has been recovered by the act of depositing it and is no longer waste provided that it is suitable for the purpose.

Recovery by becoming part of the ground

Fifth, waste deposited in the ground by way of disposal may have been recovered subsequently, eg by becoming part of the ground, whether as surface or sub-surface material. That applies irrespective of the date of the deposit. An obvious example is a prehistoric waste tip which, when discovered, is considered not as waste but as part of the cultural environment. Similarly, a landfill site which has been closed, covered and used for other suitable purposes can be considered as recovered. In the case of a licensed site, that would be when the licence has been surrendered.

Recovery must in principle result from lawful activity, so in the last two scenarios, it must be assumed that the deposits were made lawfully. (However, in some cases lawful recovery may take place by means of the subsequent treatment of material which was deposited unlawfully.)

On the basis of the analysis in the five scenarios considered, since there is no obligation under articles 4 and 8 of the WFD to dispose of or recover the spilled/leaked or other substances, the soil which has been contaminated by them does not have to be discarded and so is not waste.

Conclusion

Unfortunately, there is little certainty on the meaning of waste. The approach of the ECJ has changed over the years and may change again. Lawyers often disagree as to how the judgments of the court should be interpreted. An English judge has confessed to finding important parts of the judgment of the ECJ in *Arco* 'Delphic'.

The quest for a better definition which does not generate its own uncertainties may prove elusive. Under those circumstances, it may be better to regulate particular activities (whether or not they amount to waste disposal or recovery) by means of permits or exemptions which are proportionate to the potential for environmental harm of the activity concerned. Provided that the requirements of the WFD are met, it would no longer be necessary to consider whether particular material is or is not waste. In that way, some of the uncertainties inherent in the definition of waste may be circumvented.