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Case Notes

CJEU (Case C-629/19: Sappi Austria Produktions-GmbH & Co. KG, Wasserverband 'Region Gratkorn-Gratwein' v Landeshauptmann von Steiermark: Suitable Recovery and Recycling Operations Surrounding Sludge in the EU)

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Abstract

Even with extensive case law before the CJEU on the notion of 'waste', questions remain around classification of substances as waste and end-of-waste status of certain waste streams. This uncertainty hampers the transition to a circular economy. In the case at hand, a mixture of sludge from paper production and sludge from a municipal wastewater treatment plant was used as fuel for the paper plant. Although the majority (97%) of the mixture came from the paper production process and therefore would be a by-product (and hence not waste), and only 3% of the mixture stemming from the

municipal waste water facility qualify waste, the mixture as a whole is assumed to be waste. Whether the 'end of waste-criteria' of Article 6(1) Waste Framework Directive can successfully be applied to the case, is up to the national court to decide. In addition, the case is interesting as an affirmation of the 'Rheinmühlen/Elchinov-doctrine'.

Keywords

waste classification – end-of-waste – circular economy – waste treatment

Introduction

Even alongside extensive case law before the CJEU around waste, Case C-629/19 demonstrates that questions remain around classification of substances as waste and end-of-waste status of certain waste streams. The fact that there is still much discussion about what qualifies as waste and what does not is a substantial hindrance for the transition to a more circular economy. Operators who make new products from secondary materials have to have a permit as a waste operator and have to meet additional requirements if the secondary materials qualify as waste. In Case C-629/19 a regional Administrative Court in Austria (Landesverwaltungsgericht Steiermark) brought a request for a preliminary ruling under Article 267 TFEU. The legal issues in this case mainly concern the classification of a substance, namely sewage sludge, as waste or as a by-product, as well as the possible criteria for the substance to achieve end-of-waste status. Though it is certainly not the first time these issues have come up before the CJEU,[1] the present case highlights uncertainties that remain around classification of substances as waste. To a certain extent, it could lead to a shift in approach to how these substances are dealt with by national authorities and businesses, making the case relevant to discuss here. The case is also interesting from a general EU law perspective, as it is an illustrative example of the 'Rheinmühlen doctrine'.

1 CJEU Judgment: Case C-60/18, AS Tallinna Vesi v Keskkonnaamet [2019] ECLI:EU:C:2019:264; *J. Alaranta and T. Turunen*, The Role of the CJEU in Shaping the Future of the Circular Economy, Eur. Energy Environ. Law Rev. 2021 30(2), p. 51.

1 The Facts

The preliminary ruling request brought by the Austrian administrative court concerns the interpretation of several articles from Directive 2008/98/EC on waste (herein: the Waste Framework Directive or WFD).[2] The request was made in proceedings in which parties on one side were an industrial waste plant (Sappi) and an Austrian regional water board (Wasserverband), and the party on the other side was an Austrian regional Authority (Styria regional authority).

Sappi conducts a large industrial paper and pulp production plant in the municipality of Gratkorn, in Austria. On the same site as this plant, there is also a sewage treatment plant, which is jointly operated by both Sappi and the Wasserverband. The sewage plant treats wastewater from the paper and pulp plant, as well as the municipality's wastewater – resulting in a sludge that is a mixture of both industrial wastewater (from the paper/pulp plant) and substances from the municipal wastewater. In the EU, sludge is defined as the material left over following the treatment of domestic and urban wastewaters, sewage plant wastewaters and wastewaters of a similar composition to those.[3] The sludge produced by the plant falls under this definition, and is the central focus of the proceedings in question.

However, the journey of the sludge does not end there, as the dried sludge is incinerated in Sappi's boiler and in the Wasserverband's waste incineration plant, with the steam then being reclaimed as part of energy recovery and used to power Sappi's paper and pulp production plant.[4] The Styria regional authority assessed the functioning of the Sappi and Wasserverband plant(s) and came to the conclusion that the sewage sludge incinerated in the industrial plants of Sappi and of the Wasserverband must be classified as 'waste'.[5] This is because even though the majority of sewage sludge used for the incineration (97%) came from the paper production process, the remaining percentage came from the wastewater treatment process.[6] While the sludge coming

2 Namely, Article 2(2)(a), point 1 of Article 3, Article 5(1) and Article 6(1) of the Directive: European Parliament and Council Directive 2008/98/EC on waste and repealing certain Directives, OJ 2008 L 312/3.

3 Directive: Council Directive 86/278/EEC concerning the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture OJ 1986 L 181/06, art. 2(a).

4 CJEU Judgment: Case C-629/19, Sappi Austria Produktions-GmbH & Co. KG and Wasserverband 'Region Gratkorn-Gratwein' v Landeshauptmann von Steiermark [2019] ECLI:EU:C:2020:824, para. 12.

5 Id. at para. 15.

6 Id. at para. 14.

from the paper production process could be regarded as a by-product under Austrian Federal Law on Waste Management (herein: AWG 2002), the sludge coming from wastewater is considered to be waste.[7] The regional authority argued that the total substance already has to be qualified as waste within the meaning of Paragraph 2(1) of the AWG 2002, including the substances coming from paper and pulp production, and even if only a very small percentage of the total substance comes from wastewater (without any minimum). This qualification would imply that processing of the substance would be subject to a separate authorisation.[8]

1.1 *National Proceedings and Arguments*

Despite the fact that the Austrian Supreme Administrative Court (Verwaltungsgerichtshof) had held in earlier cases that "there is no *de minimis* limit for the classification of a substance as 'waste'",[9] in 2016 Sappi and the Wasserverband appealed against the decision of the regional authority before Styria's Regional Administrative Court (Landesverwaltungsgericht Steiermark). The Regional Administrative Court upheld their appeal and annulled the decision.[10] However, on the 27th of February 2019, the Supreme Administrative Court, on appeal on a point of law ('Revision') against that judgment, repealed the judgment of the Regional Administrative Court and remitted the case back to this court, which then brought the present request for a preliminary ruling to the CJEU.[11]

Essentially, the Regional Administrative Court doubted the finding by the Supreme Administrative Court that sewage sludge resulting from the joint treatment of industrial and municipal waste water in this case constitutes 'waste' within the meaning of EU law.[12] The regional court noted that the sewage sludge of the plant is conveyed by means of a closed, automated system within the plant, that it is used without interruption, as well as that the process does not present a risk to the environment or human health.[13] It also highlighted that the plant's approach pursues the objective of waste prevention and the substitution of fossil raw materials with renewable energy sources, such as those that result from waste-to-energy processes.[14]

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7 Paragraph 2(3a) of the AWG 2002.
8 Id. at paras. 13–15.
9 Id. at paras. 13–15.
10 Id. at paras. 15–16.
11 Id. at para. 16.
12 Id. at paras. 18–20.
13 Id. at para. 19.
14 Id. at para. 19.

2 The Judgment of the Court

2.1 *Rheinmühlen-Doctrine*

It does not happen too often that a court of lower instance objects a clear ruling of a supreme court and refers a preliminary question about the interpretation (or validity) of EU law to the CJEU after the supreme court had decided that there was no doubt about the interpretation of EU law in the respective case. Usually, the lower courts have to apply and follow decisions on questions of law of their upper courts (in this case the supreme court) – national law often obliges them to do so. However, if lower courts still doubt whether a decision of their court in last instance is in accordance with EU law and the EU law is interpreted correctly by their supreme or other highest court, they may (and are even obliged to) refer preliminary questions to the Court of Justice EU. This EU law obligation, which was established for the first time in the Rheinmühlen-case in 1974,[15] was reiterated ever since, with the Elchinov-case as a prominent and pronounced example.[16] Such a situation was at stake in the case discussed here.

2.2 *Relation Waste Framework Directive to Other Directives*

After determining the admissibility of the preliminary ruling,[17] the CJEU's approach to answering the regional court's question in this case was threefold. Firstly, the Court went about determining whether wastewater, and thereby also the sludge at the centre of the issue, is excluded from the scope of the Waste Framework Directive (herein: WFD).[18] The WFD classifies wastewater as 'waste', but provides that in certain circumstances that waste may fall outside the scope of the directive, namely if it is covered by other EU legislation.[19] As such, it would be possible for the case in question to fall under another EU directive, such as the Directive concerning urban wastewater treatment.[20] However, the Court reminds that for other EU legislation to apply it must meet

15 CJEU Judgment: Case 166/73, Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1974] ECR I-00033.

16 CJEU Judgment: Case 173/09, Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kas [2010] ECR I-08889; See further: M. Eliantonio & C.W. Backes, Taking Constitutionalization on Step to Far?, ERPL 2012 23(3), p. 839.

17 C-629/19, supra note 4. at para. 30.

18 Id. at paras. 32–39.

19 Id. at para. 35.

20 Council Directive (EC) 91/271/EEC concerning urban waste-water treatment [1991] OJ L 135/40.

the provisions of Article 2(2) of the WFD, which calls for the other legislation to have precise provisions organising the management of waste, ensuring a level of protection that is at least equivalent to that in the WFD.[21]

While the urban wastewater directive regulates wastewater, it contains no specific provisions on the management of sewage sludge. For this reason, the Court deems the WFD applicable.[22] This is largely in line with previous case law from the CJEU on exclusions from the scope of the WFD. For instance, in the 2007 *Retec* case regarding meat-and-bone meal, the AG opinion argued that the case should be excluded from the scope of the WFD as there was plenty of other legislation that already covered the use of animal carcasses.[23] However, the CJEU disagreed, finding that meat-and-bone meal specifically was not covered by the legislation on animal carcasses within the meaning of the WFD, so they did not exclude it from the scope of the WFD.[24] The Court followed a similar argumentation in other cases like *Palin Granit* and *Themes Water*.[25] All this case law makes clear that the applicability of the WFD is only excluded if other directives fully regulate how to deal with certain substances once they have become waste.

2.3 *No de minimis Threshold for Mixed Substances*

Secondly, the CJEU reminded the regional court of the extensive case law and precedent surrounding the notion of waste in the EU, but decided to provide the regional court with input on this specific case nonetheless.[26] The input the CJEU provided was essentially that based on "common knowledge" and previous case law, the sludge in the present proceedings is waste because it is a residue from wastewater treatment, which the holder typically discards.[27] The CJEU stressed that the fact that municipal waste water is added to the waste water stemming from the paper mill only to a very little extent, is 'irrelevant' for determining whether the sewage sludge of this water mix constitutes 'waste'. Therefore, even if only a very small part of a compiled, not separable substance is to be qualified as waste, the whole substance is waste.[28] The CJEU further found that the regional court does not need to concern itself with whether or not the wastewater stemming from the paper production is a by-product, as this would not have any consequences for the classification of the sludge

21 C-629/19, supra note 4. at para. 36.
22 Id. at para. 38.
23 Geert Van Calster, 'EU Waste Law' (2015) p. 42.
24 Id. at p. 42.
25 Id. at p. 44.
26 C-629/19, supra note 4. at paras. 40–42.
27 Id. at paras 42, 59, 62.
28 Id. at paras. 58–59.

derived from the mixed water, after some municipal wastewater had been added.

2.4 *End of Waste Criteria*

Thirdly, the CJEU left room for the Austrian regional court to classify the sludge in this specific case with "end-of-waste" status, if they deem the sludge to meet the requirements of Article 6(1) of the WFD. This essentially would be the case if the sludge is, already before it is incinerated, 'harmless'. An important question then becomes whether it is ensured to a sufficient degree that the sludge does not contain hazardous substances. Only once this is ensured does the incinerated substance become excluded from the waste treatment process, and is determined to no longer be waste, but a fuel instead.[29] The CJEU followed this argument with a reference to the circular economy, highlighting how sewage sludge re-use provides a significant benefit to the environment because of the use of recovered material to preserve natural resources and to enable the development of a circular economy.[30]

3 Comment

Despite the judgment in Case C-629/19 not having been accompanied by an opinion of the advocate general, it is our opinion that the case raises interesting questions around classification of substances as waste and end-of-waste status, as well as adding to the small-handful of CJEU cases that specifically reference the CE.

3.1 *Classification of Waste and By-Products under EU Law*

As mentioned by the CJEU, there is extensive case law on waste that is relevant for the present case. The areas where case law on waste is most relevant relate to the definition of waste and the intricacies around the action of a waste holder's intent to discard.

Article 3(1) of the WFD defines 'waste' as any substance or object, which the holder discards or intends or is required to discard. The main requirement for classifying a substance as waste therefore relates not so much to its own composition, as to its holder's intent to 'discard'. This is supported by the CJEU's settled case law with, amongst others, the *Inter-Environnement Wallonie* case

29 Id. at paras. 63–66, 67.

30 Id. at para. 68.

in 1997,[31] and then more recently with the *Commission v Italy*, *Commune de Mesquer*, *Shell Nederland* and *Tronex* cases.[32] When it comes to defining the term 'discard', however, there are more intricacies. Since it is the purpose of the WFD and EU policy on the environment more generally to minimise the negative effects of the generation and management of waste and to achieve a high level of environmental protection, a holder's intent to discard is assessed through this lens.[33] In the present case, the CJEU recommends three criteria to look for when determining whether a holder intends to discard, these are:

1. If the waste substance is a residue of another process and was not itself intended by the holder[34]
2. If the substance in question is a production residue for which special precautions must be taken if it is used, because of its environmentally hazardous nature[35]
3. If the substance is no longer of any use to the holder[36]

These three are only some of the criteria that the CJEU uses to identify the intention to discard. Literature in this area has identified six criteria in the existing case law.[37] These criteria are used as it pleases the Court. In fact, often one criterion is developed in a case, only to be negated in another case. For example, in *Arco Chemie* the Court held that a holder is more likely to discard if the composition of the substance is not suitable for the use made of it, or that special environmental precautions must be taken when it is used.[38] However, just two years later in *Palin Granit* it was concluded that neither risk to the environment, nor the possibility of immediate use are conclusive elements that a holder intends to discard.[39] As such, it is difficult to predict the

31 "it follows from the wording of Article 1(a) of Directive 75/442, as amended, that the scope of the term 'waste' turns on the meaning of the term 'discard'", CJEU judgment: Case C-129/96, Inter-Environnement Wallonie ASBL v Région wallonne [1997] para. 26.

32 Opinion of Advocate General: Opinion of Advocate General Kokott in Case C-188/07, Commune de Mesquer v Total France SA and Total International Ltd. [2008] ECR I-04501.; CJEU judgment: Case C-241/12, Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV [2013] ECLI:EU:C:2013:821.

33 C-629/19, supra note 4. at para. 43.; Directive: Council Directive 2008/98/EC on waste OJ 2018 L 312, recital 6; TFEU, Article 191(2).

34 C-629/19, supra note 4. at para. 46.; C-188/07, Commune de Mesquer [2008] 4.

35 C-629/19, supra note 4. at para. 47.

36 C-629/19, supra note 4. at para. 49.

37 G. Van Calster & L. Reins, EU Environmental Law (2017) p. 273.

38 Van Calster & Reins, supra note 37 at p. 273.; CJEU judgment: Joined Cases C-418/97 and C419/97 Arco Chemie v VROM and Vereniging Dorpsbelang Hees et al v provincie Gelderland [2000] ECR I-04475, para. 87.

39 Van Calster & Reins, supra note 37 at p. 273.; CJEU judgment: Case C-9/00 Palin Granit Oy [2002] ECLI:EU:C:2002:232, paras. 45, 47.

outcomes of the Court's rulings in this area. This type of case law emphasizes that these criteria are merely indications, and "do not, in themselves, suffice to classify a given substance as 'waste".[40]

In the present case the CJEU mainly deals with the question of how a mixture – which is composed, in the utmost part of a byproduct (and hence not waste), but (to a very small degree) also of waste – should be qualified. In practice, there are a number of situations where this question is relevant. In answering this question, the court applies a very strict approach. A *de minimis* threshold cannot be accepted (if EU law does not explicitly provide a *de minimis* rule). This strictness can be explained easily. Even a small percentage of a larger substance can cause major risks to the environment. If the applicability of the waste law and the protection of the environment it provides could be circumvented by mixing (possibly harmful) waste with large amounts of non-waste, this would encourage improper, dangerous and criminal action to stow away (dangerous) waste.

3.2 *End-of-Waste Status*

Since the mixed sludge produced by Sappi and Wasserverband is not a by-product, and is definitely waste under EU legislation, it is at this point that it becomes apparent whether the sludge *could* be awarded end-of-waste status. If waste is recycled or otherwise recovered it can stop being waste at a certain moment, and become a substance or product again.[41] The exact moment when this happens is sometimes difficult to determine, but Article 6 of the WFD outlines the following criteria:[42]

a. the substance or object is to be used for specific purposes;
b. a market or demand exists for such a substance or object;
c. the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
d. the use of the substance or object will not lead to overall adverse environmental or human health impacts

In the case at hand, it probably may be argued that both criteria a) and b) are met by the sludge produced by Sappi and Wasserverband. The sludge is to be used for the specific purpose of energy recovery for paper production and a demand exists for the substance because Sappi's paper plant procures an

40 Van Calster & Reins, supra note 37 at p. 273.
41 C. Backes, The Waste Framework Directive and the Circular Economy, in: M. Eliantonio and M. Peeters (eds) Research Handbook on EU Environmental Law, 2020, p. 332.
42 Directive: Council Directive 2008/98/EC on waste OJ 2018 L 312, art. 6.

economic advantage from using said sludge.[43] When it comes to criteria c) and d), however, the Austrian regional Court will have to review a more in-depth scientific and technical analysis to determine if the sewage sludge meets the statutory limit values for pollutants and whether or not its use leads to adverse environmental or human health impacts. Union-wide criteria on end-of-waste have only been developed for a few waste streams and developing such criteria for other waste streams has been intentionally halted due to efficiency issues. This is why the national end-of-waste criteria are still decisive.[44]

The Court argues that 'in connection with this assessment' (to determine whether the sludge leads to environmental and human impacts) it is particularly relevant (for the development of the circular economy) that the heat generated during the incineration of the sewage sludge is re-used in the paper and pulp production.[45] With the addition of this argument, the Court added to the small hand-full of CJEU case law with specific reference to the circular economy. The circular economy is increasingly mentioned by parties in various cases,[46] but this case is one of only two in which the CJEU specifically refers to re-use of waste as an important contribution to the development of the circular economy. The other being the 2019 *Tallinna Vesi* case.[47] This type of explicit connection between the two sends a message that circular economic thinking ought to be considered when zooming in on the definition of waste and when developing criteria for end-of-waste status. This is important at a time when both of these concepts are, to a degree, in flux at both the EU and national level – as highlighted by the case discussed here.

It is, however, a pity, that this important part of the judgment remains unclear and to a certain extent contradictory. One could think that the Court argues that the environmental advantages of incinerating the sludge could somehow be balanced against environmental risks due to the composition of the sludge. This, however, would be a misunderstanding. The sludge, before being incinerated, can only be a product (no longer being waste) if all the

43 C-629/19, supra note 4 at para. 55.

44 Directive: Council Directive 2008/98/EC on waste OJ 2018 L 312, recital 6(2).

45 C-629/19, supra note 4. at para. 68.

46 CJEU judgment: Case C-556/19, Société Eco TLC v Ministre de la Transition écologique et solidaire and Ministre de l'Économie et des Finances [2020] ECLI:EU:C:2020:844; CJEU judgment: Case C-429/19, Remondis GmbH v Abfallzweckverband Rhein-Mosel-Eifel [2020] ECLI:EU:C:2020:436; CJEU judgment: Case C-212/18, Prato Nevoso Termo Energy Srl v Provincia di Cuneo and ARPA Piemonte [2019] ECLI:EU:C:2019:898; CJEU judgment: Case C-689/17, Conti 11. Container Schiffahrts-GmbH & Co. KG MS "MSC Flaminia" v Land Niedersachsen [2019] ECLI:EU:C:2019:898.

47 C-60/18, supra note 1.

criteria set in Article 6 of the WFD are met. The various criteria cannot be balanced against each other. In this context, it does not seem relevant that the heat generated during the incineration of the sewage sludge is re-used in a paper and pulp production other than that 'a market or demand exists for such a substance or object'.

4 Conclusion

Despite the Court's view that matters around the classification of sewage sludge substances as waste are largely settled, cases like C-629/19 demonstrate that from the point of view of waste operators and national courts legal issues remain. One issue is a lack of clarity around classification of a substance as waste or as a by-product, and the other a lack of criteria for end-of-waste. It is a concern that the absence of clarity around these two issues is a hindrance to waste operator's ability to include more circularity in their business models and to national authorities and courts' ability to guide relevant actors in the transition to a more circular economy.