

Product, By-Product or Waste – The Finnish'ing of a burning Issue and the Inverse Burden of Proof



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DISCLAIMER

- These slides are adapted from a presentation to an Environmental Law Conference in Cork, Ireland, in April 2006.
- The following guidance represents an operational interpretation of elements of EU jurist prudence on waste as of that date.
- The guidance herein should not solely be relied upon as a legal interpretation of EU case law.
- The EPA makes no warranty as to the accuracy of the interpretation of EU Case Law set out herein.

INTRODUCTION

- Scope: Product ⇔ Residue/waste, Burning issue, Finland
- Long lasting and controversial debate on what is waste and what is not. Implications are significant for holders.
- The issue of production residues has in the jurisprudence been problematic. I believe some recent European Court of Justice (ECJ) rulings are helpful in resolving some questions.
- This paper will endeavour to provide a logical framework for the determination of when residues of processes can be considered a resource/product and not a waste.
- No universal panacea offered herein, but I believe the decision as to what is waste or not, is now more straightforward – thanks mainly to two ECJ judgments in relation to cases referred by Finland.

Products & By-products/residues – the inverse burden of proof

- The presumption from the ECJ waste jurisprudence is that residues (i.e., not the primary product) can be de-classified as waste if **certain proofs** are available. That is, the residue is presumed to be waste until proven otherwise. This presumptive burden is thus different than in the case of a primary product, where the presumption is the material is a product, unless it is necessary, or there is an intent, to discard.
- So what is the essential architecture of these proofs?
- There are five: but first, the ground-rules.

Products, by-products/residues: the inverse burden of proof – The basis for the Proofs

- In advance, I should state that the basis for decision making articulated herein is a practitioners one (as opposed to theoretical or academic). The proof architecture is thus pragmatic and constructive, and needless to say is always subject to change.
- The EPA has no interest in applying the burden of '*Waste*' to materials that can be usefully and economically reused without risk to the environment and in a way that conserves other natural resources.
- At the same time our decision making must be underpinned by the need for precaution and the avoidance of unsustainable precedence.

Proof Architecture – ECJ framework principles (1)

- *Palin Granit C-9/00 Para 22*: Waste is something that someone discards, is required to discard, or abandons.
- *Niselli C-457/02 Para 33*: The scope & meaning of 'waste' depends on the verb 'to discard'. And this term must be interpreted in light of the aim for the Waste Framework Directive (75/442) – which is the protection of human health and the environment; and Article 174(2) of the EC Treaty which requires in relation to the environment, the need for precaution.
- *Arco Chemie C-418/97 & C-419/97 Para 40*: ... [accordingly] the concept of waste cannot be interpreted restrictively.
- *Arco Chemie C-418/97 & C-419/97 Para 54 & 69*: In ones decision making it is relevant to consider if the substances are commonly regarded as waste; and the method of treatment may also serve to indicate the existence of waste.

Proof Architecture – ECJ framework principles (2)

- *Arco Chemie C-418/97 & C-419/97 Para 51*: Not all substances treated by the Recovery or Disposal processes detailed in Annex II of the Waste Framework Directive are necessarily waste.
- *Commission V Spain C-121/03 Para 66*: A material entry in the European Waste Catalogue is only relevant when the definition of waste has been satisfied.
- *Wallone C-129/96 Para 33 & 34*: The waste definition does not exclude materials that are part of an industrial process, however a distinction must be drawn between waste recovery, and normal industrial treatment of products which are not waste – no matter how difficult that distinction may be.
- *Niselli C-457/02 Para 34*: In relation to the determination of a holders intention to discard Member States are free to choose the modes of proof.
- *Commission V Spain C121/03 Para 61*: Whether the material is used on the site of production or off-site is immaterial to the definition as to waste

Product - By-product – Production Residue/Waste (1)

Product

- *Saetti & Frediani C-235/02 Para 42, 45 & 47*: A material is a product and not a residue of a production process when it is intentionally produced, i.e., as a matter of technical choice, and certain to be used for the purpose intended.
- *Palin Granit C-9/00 Para 35*: ... there is no reason to hold that the provisions of the Waste Framework Directive, 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.
- In the ECJ jurisprudence the terms '*goods*', '*materials*' or '*raw-materials*' tend to be used in relation to non-waste materials, i.e., products, and are thus interchangeable with the term Product.

Product - By-product – Production Residue/Waste (2)

By-Product

- *Palin Granit C-9/00 Para 34*: ... goods and 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 waste but as a by-product which the undertaking does not wish to discard ... but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing.
- For the purposes of the definition of waste, the difference between a Product and a By-product is not significant: though a by-product can more quickly become a waste than would likely a product, as by-products they are generally more susceptible to market forces.

Product - By-product – Production Residue/Waste (3)

Production Residue

- *Arco Chemie C-418/97 & C-419/97 Para 84 & Palin Granit C-9/00 Para 32:* A production residue is a product not in itself sought for a subsequent use.
 - *Arco Chemie C-418/97 & C-419/97 Para 86 & 87:* The fact that a substance is a residue for which no use other than disposal can be envisaged may also be regarded as evidence of discarding (termed 'its disappearance' by the ECJ in *Saetti & Frediani C-235/02 Para 39*). The same may apply for residues whose composition is not suitable for the use made of it or where special precautions must be taken when it is used.
 - Production residues are waste until proven otherwise.
 - Production residues can be elevated to by-products if it is possible to ... exploit or market them on terms which are advantageous to the holder, in a subsequent process, without any further processing, and where no special precautions are necessary.
- This paper mainly concentrates on the proofs necessary to promote a substance from being a residue to being a by-product

Proofs Architecture – Level 0

- What proofs are relevant for *prima facie* evidence of a product/by-product ?
 - Economic value
 - Produced intentionally
 - Subject to product/use regulations
 - Use is permitted
 - Use for purpose intended

 - Degree of processing not relevant (*Palin Granit C-9/00 Para 35*)
 - Environmental impact not relevant (*Saetti & Frediani C-235/02 Para 46*)
 - Special measures not relevant (*Saetti & Frediani C-235/02 Para 46*)
- In the case of a product the presumption is that they are not waste until proven otherwise.

Proof Architecture – Level 1

- *Palin Granit C-9/00 Para 37:* ... [a] relevant criterion for the determination as to whether or not [a] material is a waste is the degree of likelihood that that substance will be reused, without any further processing prior to its reuse. If, in addition, there is a financial advantage to the holder in doing so, then in such circumstances the substance in question must no longer be regarded as a burden which its holder seeks to discard, but a genuine product.

Residue ⇒ [By-] Product: Proofs So Far ! (1)

1. Certainty of use
2. Financial advantage
3. Without further processing

Proofs Architecture – Level 2

- In relation to the possibility of residues becoming by-products *ECJ Case Avesta Polarit C-114/01 in Paragraph 38* states:

... only if the use of the residues were prohibited in particular for reasons of safety or environmental protection, ... would it be considered as discarded or required to be discarded.

- *Arco Chemie C-418/97 & C-419/97 Para 87*: [there is evidence of discarding where a] ... substance is a residue whose composition is not suitable for the use made of it or where special precautions must be taken when it is used owing to the environmentally hazardous nature of its composition.

Residue ⇒ [By-] Product: Proofs ! (2)

1. Certainty of re-use
2. Financial advantage
3. Without further processing
4. no special environmental precautions required
5. used appropriately / suitable for use

Proofs Architecture

1. Certainty of use (in same or other process, on or off-site)
2. Financial advantage (legitimate ! – savings or revenue)
3. Without further processing (other than normal industrial treatment of products – Wallonne C-129/96 Para 33)
4. no special environmental precautions required (over and above those normal for equivalent products/raw-materials, e.g., abatement, character of emissions)
5. used appropriately / suitable for use (in a manner equivalent to the material it is replacing or appropriate for the purpose proposed, e.g., low grade fuel – low calorific value; C & D derived material placed on a field to improve land - but no topsoil)
 - material standards
 - material certification

Regard must be had to the intent of the holder as well as the proposed use

CONCLUDING REMARKS

- No one proof on its own is enough, all are needed.
- The 'presumption' that residues are waste is precautionary and preventative; i.e., there is a need to demonstrate that there is no unacceptable environmental risk, and that there is lawful use before the residue could be promoted to being a product. The language of paragraph 60 of ECJ Case C-121/03 (Commission V Spain) clearly emphasises this precautionary, preventative, and presumptive burden: to be discharged by the producer of the residue.
- This is the inverse burden of proof.
- And you now have the five principle Proofs to assist you in framing decisions as to when a Residue becomes a Product.
- The main issue going forward will be 'what is recovery' and 'what is disposal', and at what stage does a recovered material cease to be waste.
- Revision of the Waste Framework Directive is in hand – 'end of waste' is an issue in this revision.