

STUDIO LEGALE GIAMPIETRO - CONSULENZE AMBIENTALI

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THE NEW CRITERIA OF DEFINITION OF "BY- PRODUCT" ACCORDING TO THE EUROPEAN COURT OF JUSTICE

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1. The recent ECJ case law. The most recent decisions of the Court of Justice on the crucial distinction between the *production residue*¹ and the residue with the features of a "by-product" (to be considered as a commercial good),² provide us with significant clarifications on some relevant aspects of this essential distinction, on which we should think more about.

In particular, within the interpretative approach towards a progressively wider and wider definition of "by-product", there have been recently three important decisions of the Court of Justice.³ The three rulings deal with economic-commercial issues of utmost importance⁴ and have the merit to discuss again the result of a complex and often not very coherent case law orientation, getting over a mere legally-formal approach of the issue. Such a formal approach was driven by doubts about the real and actual reuse of production residues "in their original state", also in the light of several findings of irregular waste/residues management.

¹ To be qualified, broadly speaking, as *waste*, according to the EC Directive 75/442, as amended by the EC Directive 91/156, because it is destined for a recovery or a disposal operation. These activities, as it is known, are the typical contents of the notion of "discard" on which depends "the scope of the term 'waste'" (Court of Justice, 15 June 2000, Joined Cases C-418/97 and C-419/97 Arco Chemie, ECR 2000, p. I - 44757, paras. 46-47). This decision confirms what clearly stated by the Court on 18 December 1997, Case C-129/96, Inter-Environment Wallonie, para. 26, ECR 1997, p. I - 7411.

² At least since the decision of the Court of Justice 18 April 2002, Case C- 9/2000, Palin Granit Oy, ECR 2002, p. I -3533 which, with respect to that specific residue adds that: "... 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" (para. 34 of the decision).

³ We make reference to the Order 15 January 2004, Case C - 235/2002, Saetti and Frediani, ECR 2005, p. I 1005, relevant to reuse of refined crude oil: see paras. 47, 87 and 88 and the two decisions of 8 September 2005, respectively Case C- 416/2002 and C-12/2003, commented by the same author in *Ambiente&Sicurezza*, 2006, N. 3, p. 93. The full text of the last two decisions can be found on <http://www.ambientesicurezza.ilsole24ore.com>.

⁴ Relevant to reuse of residues (in its original state) deriving from oil refining, of sludge reused as fertilizers in agricultural activity, and residues from extractive and manufacturing activities.

The *explicit confirmation* of the essential features of the notion of "waste" (and, accordingly, of "by-product"), as established over the last ten years, has not prevented the Court from rewriting, on more realistic and commercially sustainable grounds, the *statute* of factual and logical-legal criteria which allows to overcome the complexity of the distinction (waste/by-product). In particular, the Court tries to change *some essential features* (see below) of the previous case law orientations, providing the national judges - who are asked to determine the notion of waste on a case by case basis⁵ - with a decisive means for establishing a certain and uniform notion of waste, in accordance with European Community law.

Therefore, in these most recent decisions, first *the Court confirms* one of her leading and basic principles, according to which the notion of waste depends on the notion of "discard", within the meaning of Article 1, lett. a) of the EC Directive 75/442,⁶ referring to the intention of a substance producer/holder to destine such substance for a recovery or disposal operation.

Then, the Court *does not ignore* that her reasoning resulted in a breach of the above basic principle/criterion, when affirming that:

(a) carrying out "an operation listed in Annex II A or II B to Directive 75/442 *does not, of itself, justify the classification* of that substance as waste"⁷ and it cannot be excluded that *a raw material* could be destined for a treatment or disposal operation⁸ and/or, from a different perspective, that a raw material (deriving from a recovery operation) holder determines, for example, to dispose of the raw material instead of using it;⁹

(b) conversely, "the concept of waste...is not to be understood as excluding substances and objects which are capable of economic reutilization...and are collected on a commercial basis for recycling, reclamation or re-use."¹⁰

However, by indirectly *acknowledging* that she has renounced to set out **certain criteria for determining** the notion of waste - in our view in light of too a complex and intrusive discussion of the issue, not always necessary (and almost never useful for operators) - the Court **has been adding**, over the last two years, **new evidence or indicators** "...from which it may be possible to infer *the holder's intent*"¹¹ or *directly distinguish*, with respect to a specific substance, between waste and by-products.¹²

⁵ Performing a function that has produced, so far, different and uncertain results, (also) because of the complexity of the criteria to apply.

⁶ See footnote No. 1.

⁷ Expression used in para. 27 of case law 18 April 2002, Palin Granit Oy (see above), but already contained in case law 15 June 2000, Arco, para. 49.

⁸ See para. 50 of case law Arco above, with regard to the applicability of operations R9 (combustion processes) under Annex IIB to raw materials such as fuel oil, gas or kerosene.

⁹ See para. 94 of case law Arco above, where it is analysed the theoretical case where, having obtained a raw material as a result of a recovery operation, pursuant to Annex IIB, the operator decides to discard it through a disposal operation (therefore, converting it into waste!).

¹⁰ See Judgement 28 March 1990, Joint Cases C-206/88 and C-207/88, Vessoso and Zanetti, ECR 1990, p. I - 1461; and, subsequently, Judgement 25 June 1997, Tombesi and others, para. 52.

¹¹ On the significance of the *subjective element of the notion of waste*, which is sought in the "holder's intention", see para. 25 of the case law Palin Granit Oy, above: "...Nevertheless the Court, which has been asked on a number of occasions...on whether various substances are to be regarded as waste, has provided a number of indicators from which it may be possible to infer the holder's intent..."

¹² In other words, the European Community Institution referred to possible evidence which consists of a number of certain circumstances from which public administrations and judges will be able to draw,

2. Update of the criteria for determining the notion of waste. In the context of the case law tendency, as it has developed over the years, the three mentioned decisions¹³ *added and clarified* some essential parameters on the basis of which a production residue is to be defined as a "by-product", by introducing, for some of them, a number of *slight amendments*¹⁴:

- 1) as a general rule, the operator must assess the *holder's intention* in order to ascertain whether he has (or he does not have) the intention to "discard" the substance or object, in the absence of other criteria set out by law (absent in the Directives);¹⁵ the result being that - in practical terms - a *production or consumption residue* that is a *secondary product* and *whose production the producer wishes to limit*, must be considered as "discarded". It follows that: "...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";¹⁶
- 2) a substance 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 subparagraph of Article 1(a)..., but intends to exploit or market on terms and conditions which are advantageous to it, in a subsequent process,¹⁷ without any further prior processing";¹⁸

in a litigation, with the aid of rules of experience, and at the end of their proof - acquisition phase, the existence (or non existence) of waste. On the Courts decisions relevant to the substance being waste or not (left to the national judges of 25 Member States...with very different, if not contrasting, outcomes), see para. 70 of case law Arco, above, which explicitly introduces the principle [according to which "it is for the national court to apply the provisions of its own legal system in that regard"], that can have negative consequences, of theoretical and practical nature. The definition of waste, in fact, if unknown (or not clearly known) in advance by the operator, leads to serious uncertainties in its daily application, with the risk for the operator to be charged also as a criminal offender. If it is known later, following time-consuming administrative procedures or litigations, it is known too late with respect to the rules hypothetically infringed and, in any case, with respect to the market pace.

¹³ See above, footnote No. 3.

¹⁴ The following list takes into account, chronologically and logically, the criteria established by the old and current case law of the Court of Justice, mentioned in the footnotes above. The reasoning and citations which follow are directly taken from the Courts' decisions.

¹⁵ Reasoning of the Court: see para. 25 of the case law Granit Palin Oy, above.

¹⁶ Said *objective* criteria are already listed under paras. 83 and 87 of case law Arco, and they are also mentioned under para. 32 of case law Palin Granit Oy, above. They are among the criteria which have been subject to a deep rethinking, *loosing their weight in favour of the subjective criterion*: see below, para. 2) and 4).

¹⁷ This general statement, while revising and overcoming the previous criteria, represents the most significant "opening view" of the Court in the Palin Granit Oy Judgement (paras. 34/35), above all if compared with the previous judgments, and it seems to be inspired (*always*) by the *willingness to emphasize the holder's intention*.

¹⁸ To be interpreted, according to the reasoning of the Court, as those operations ("complete recovery operation") "which has the consequence that the substance in question [waste] has acquired the same properties and characteristics as a raw material" (see para. 94 of Arco Judgement: properties and characteristics that, before the "preliminary treatment", the substance [waste] did not clearly have). To the same extent, see Article 183, para. 1, lett. n) of the new Consolidated Act on environmental matters, in the process of being approved by the Italian legislator, which defines "by-products" as those "products which, *despite not being the primary purpose...are directly used by the operator...without the need of preliminary treatments...which make the by-product lose its identity...in other words the product quality and quantity characteristics which it already has...*"

- 3) the circumstances that "...materials have an economic value as products, regardless of any form of processing..." and that there is not "the mere possibility of reusing the substance but...high likelihood...(and) there is also a financial advantage to the holder in so doing", *are considered as objective possible evidence for the purpose of establishing the producer's intention* (not to discard the production residue);¹⁹
- 4) a production residue, despite not being the principal outcome of the production process or the purpose of the production process, is to be considered as a "by-product" (not waste) if it has been *voluntarily* produced and thus "it is the result of a technical choice",²⁰ *even if it is not "the primary objective" of the production process nor "...the end-product which the manufacturing process directly seeks to produce"*;²¹
- 5) the production residue is to be defined as a by-product even if "...it automatically results from a technique which at the same time generates other substances..." whose production is *the objective of the producer*, as long as its use is certain and it is wanted as a product (not as a superfluous residue);²²
- 6) the fact that a by-product is treated through processes that correspond to "standard waste treatment method(s)"²³ does not lead to the conclusion that such a by-product is to be considered as a residue/waste, if the aim of the production process²⁴ is precisely to derive, *from a unique raw material* (for example, crude oil), *different types of products*, clearly with different economic values (and thus with different markets and different prices), and if these products are all *sought* by the producer who has chosen those specific production processes. With the adding consideration - provided by the Court - that, in this case, the *mere treatment of the by-product* does not mean

¹⁹ "In such circumstances", the Court further affirms (Palin case law, above, para. 37), "the substance in question must no longer be regarded as a burden which its holder seeks to `discard', but as a genuine product"... "which, as such, (is) subject to the legislation applicable to those products." (para. 35)

²⁰ This is a *new parameter of qualification*, introduced by the Order 15 January 2004, Saetti and Frediani, above, (para. 45), which refers to a still bottom (coke) that, despite not being the primary purpose of the petroleum refining (destined to "primarily" produce mineral oils with specific characteristics), cannot be considered as *secondary or accidental* (according to the criteria listed in the text, sub 1), *because it is intended to be produced* and therefore it is "... the result of a technical choice since petroleum coke is not *necessarily* produced during refinery operations."

²¹ According to the traditional evidence established principally in Arco Judgement and recalled in Palin Granit Oy (see para. 32), above.

²² Also the criterion of the "*objective of the producer*" - as the five criteria which follow - *are de facto new* and of utmost importance, above all in those productive sectors (for example, chemical industry) where, in addition to the product whose production is the "primary aim"... , other residues are "*automatically*" produced and can be directly reused - or marketed with third parties - as by-products. From a *subjective* point of view, the Court explicitly reckons that, because the operator knows *the technology* (chosen and adopted) - which produces different products (principal and secondary) - it is right to affirm, as it is reasoned in the case law above, that, by purchasing that production plants, he has voluntarily pursued the relevant specific production "objective", which includes secondary products. Therefore the latter (such as, for example, coke), *instead of being considered as "accidental" or "secondary"* have been expected and looked forward to by the operator (who could have chosen different technologies with different residues). Therefore, such products must be considered as "by-products" if it is reused as such (see paras. 45 and 46 of the Order Saetti - Frediani).

²³ Such as *combustion process*, according to Annex II B of Directive 91/156, R9, which reads: "Use principally as a fuel or other means to generate energy".

²⁴ Thus, in the Order Saetti - Frediani, above: "...the purpose of a refinery is precisely to produce different types of fuel from crude oil" (see para. 46).

- that such a by-product is waste, given that even a raw material may be subject to one of the "recovery operations";²⁵
- 7) the by-product remains a by-product even if *its use leads to its disappearance*, because the issue of disappearance (which could lead us to think that it is waste),²⁶ besides not being decisive, can be overcome by showing that the by-product is used as a raw material for the purpose of manufacturing other products;²⁷
 - 8) the circumstance that a by-product must be treated with particular *precaution for the protection of the environment and health* (which could lead us to consider it as waste)²⁸ does not automatically "convert" the by-product into waste because said precautions are requested *also when dealing with raw materials or dangerous goods* and, therefore, the duty of precaution does not change the nature of the substance if it has all features for being considered as a by-product (I refer to those features listed here above and below);²⁹
 - 9) the circumstance that the holder mistakenly considers, in some occasions or documents, a particular substance as waste is not "enough" to convert said by-product into waste if, *with reference to his actual behaviour*, he is reusing it in its "original state", satisfying all the above conditions, without "discarding" it or being required to discard it pursuant to a "legal request" by a public authority;³⁰
 - 10) the by-product does not convert into waste *if it is conveyed to other enterprises*, without preliminary treatments,³¹ in order to satisfy their needs. In terms of definitions, this significant change in case law tendency determines, as it has been stressed, *the removal of a strict limit*³² to the definition of "by-product", which is the requirement of a direct use of the production or consumption residue "in the production process" from which it is originated and, as a result, a use *in* the same producer's plants.³³

3. Conclusions - If considered perspectively, the most recent decisions examined above can be read as a *progressive* step (even if not concluded) towards a slow and complex evolution of European case law on the notion of waste,

²⁵ To that effect, see para. 50 of Arco Judgement, according to which some descriptions of recovery operations "... are formulated in more abstract terms and, accordingly, *may be applied to raw materials which are not waste*. Thus, category R9 of Annex IIB, entitled 'Use principally as a fuel or other means to generate energy', may apply to fuel oil, gas or kerosene, while category R10, entitled 'Spreading on land resulting in benefit to agriculture or ecological improvement', may apply to fertilizers (thus, to fuel raw material).

²⁶ See Arco Judgement, para. 69.

²⁷ For example, petroleum coke is used as a raw material "for many carbon and graphite products" (see Order Saetti-Frediani, para. 46).

²⁸ According to a traditional parameter already mentioned in the Arco Judgement, above, paras. 72 and 86.

²⁹ See para. 46 of the Order Saetti-Frediani, above.

³⁰ It is a *completely new* criterion of definition which can be welcomed because it implies that the *effective behaviour* of the holder of the "by-product" prevails over *his erroneous opinion* (which could be sometimes considered justified by...the law in force, in addition to the complexity and inconsistency of case law [not limited to EC case law]) about the nature of the residue which is *reused in its original state without any preliminary treatment* (see para. 46 of the Order Saetti-Frediani).

³¹ On the basis of the most recent criterion of definition explicitly established in the two decisions of 8 September 2005, above (see para. 90 of case law C-416/02 and para. 61 of case law C-121/03) which stress the same principle already expressed in the Order Saetti-Frediani, para. 47.

³² See, for example, Palin Granit Oy Judgement, above, para. 36, but this was already affirmed in Arco Judgement, above, paras. 37/38.

³³ See above, footnote No. 11.

characterized by important news - if compared with the past - above all in terms of a *greater weight to be paid to the holder's intention* when establishing that a substance - resulting from a production process - is not to be considered as waste but as a by-product.³⁴

In the new line of case law, driven by the recent decisions, the Court of Justice assigns to the "intention" of the producer/holder a key role, allowing the classification of "*secondary residues*" (whose production is not the primary aim of the producer) and "other (secondary) substances" automatically generated by complex technologies, as "by-products". They are, anyway, considered as by-products as long as they result from a technological plan sought by the producer and provided that they are *effectively* reused.

Within this context, the *intention* of the producer is to be valued from an *objective* point of view (by reference to the technologies of the chosen process) as well as from a *subjective* point of view, with respect of his 'psychological' intention, even if it is defective because of a mistake of law or a mistake of fact (the holder's behaviour overcomes any mistake and *his real intention* prevail over the intention mistakenly declared).

The enlarged concept of "by-product" is not denied, according to the same Court, if it is carried out any *of the operations listed in the "recovery operations" list* (for example, combustion process), which lead to the substance's disappearance when it is reused, even if particular *conditions of precaution for the environment and health* are needed, when reusing it.

The last, but not the least important consideration, is that the three decisions examined above³⁵ clearly clarify that "*...it is not appropriate to limit the use (of the by-product) in the same... holding as that which generated it*"; it is thus removed an additional obstacle to the finding of a "by-product", which was against one of the leading principles of the European Union (the free circulation of commercial goods within the common market).

On this last issue we cannot have doubts, given the clear latest statement of the European Court: "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".

In conclusion, even if "the Directive 75/442 does not propose any criteria for determining the holder's intention to <<discard>> a substance or a specific object",³⁶ the Court has been setting forth, over the last five years, a complex, increasingly elaborated and precise bunch of *substantial criteria for finding such an intention* (which results in the activity of "discarding"), which are meant to facilitate - and usefully restrict - the degree of competence (and "discretion") of national judges. We

³⁴ This is against a different view, which consists of privileging an "objective" interpretation of the notion of waste over a "subjective" one, according to an improbable and uncertain criterion linked to the product or commercial value of the substance as such - and thus regardless of the holder's intention. This meant checking the perpetual suitability of the substance to be reused in the same process as that one from which it was originated, excluding the option to confer the substance to third parties (thus to a different production process), in order to satisfy their needs (such an unreasonable exclusion *no longer exists*).

³⁵ See above footnote No. 3.

³⁶ See Palin Granit Oy Judgement above, para. 25.

cannot be but agreeable to this outcome, considering the fragility of a supranational system whereby *the exegesis and the implementation* of common rules (such as those set forth by the directives on waste management in the EU) are - in practical terms - left to national administrative authorities and national judges, according to rules established by different jurisdictions...of 25 Member States.

The integration of customs within the European internal market also depends, indirectly, on the domestic jurisdictions being consistent with each other. In this context, the European case law represents a common limit and constraint³⁷ to domestic jurisdictions. The *uniformity and coherence* of the European case law allow us to reach - hopefully soon - greater "legal certainty"; this represents a "benefit" (not only legal) which cannot be renounced and which economic operators, the global market and public administrations have the right to look forward to (and to reach).³⁸

³⁷ In the sense of obligation for national judges to apply the EC law as interpreted by the Court of Justice.

³⁸ Even before any implementing intervention, in the context of domestic proceedings, with multiple and unforeseeable outcomes.