

**QUESTIONNAIRE ON NATIONAL CASE LAW REGARDING ISSUES OF
WASTE**

ENGLAND AND WALES

SECTION A: GENERAL ISSUES OF CASE LAW & IMPLEMENTATION

See discussion below.

SECTION B: SPECIFIC ISSUES OF CASE LAW & IMPLEMENTATION

Article 1(a)

Special meaning of Discard/Uncertainty

1. In England and Wales, there have been complaints that the meaning of waste is so wide and uncertain as to make regulation impossible. In *Rackham* [2004] EWHC 1417 (Admin), one ground of an application for Judicial Review of two magistrates' decisions was that the legislation under which the prosecution was made was not compatible with Article 7 of the ECHR; following *Arco*, the law was not formulated with sufficient certainty to enable the claimant to regulate his conduct. The application in that case failed.

Disproportionate regulation/Barriers to use

2. This is a frequent complaint by those subject to waste regulation. One recent example relates to whether the requirements of the Waste Incineration Directive should apply to the burning of tallow. The Commission received a number of representations suggesting that the costs of applying the Directive at rendering plants and slaughterhouses outweigh the benefits and will inhibit their use of tallow as a fuel. The Commission agreed that there is a problem, and undertook to carry out further analysis to assess whether the legislation

needed to be changed. It also suggested that measures to be put in place following the Thematic Strategy on prevention and recycling of waste would help address issues like this.

Products, by-products and residues

3. In England and Wales, there is much debate over the criteria which apply to distinguish between by-products and residues and in particular whether a material can only be a by-product if used in the production process that gave rise to it.
4. The UK intervened recently in an infraction against Spain concerning the disposal of slurry from a pig farm (Case C-416/02). The Court made it clear that the slurry could be considered a by-product where it was used as a fertiliser and that use did not need to be on the agricultural holding that gave rise to it.

Complete recovery operation

5. The leading case in England and Wales is *Castle Cement* ([2001] EWHC Admin 224). The case concerned the burning of an alternative waste derived liquid fuel (“Cemfuel”) at a cement works. Stanley Burnton J. agreed with criticism of the approach of the Advocate General in *Arco Chemie* (Case C-417/98) that a waste might cease to be waste if it doesn’t pollute the environment any more than an equivalent primary raw material as lacking in certainty. Instead in accordance with the judgment in that case, it was necessary even in the case of a complete recovery operation to consider all the circumstances. The conclusion was that Cemfuel was waste. This approach was endorsed by the Court of Appeal in *Attorney-General's Reference No 5 of 2000* ([2001] EWCA Crim 1077).

Substitute fuels and complete recovery operations

6. *Castle Cement* is the leading case. There have been no cases where a waste derived fuel has been found to cease to be regarded as waste before being

burnt. Operations carried out on waste fuels have been regarded as simple pre-treatment rather than complete recovery.

End of waste and recycling

7. The main debate in this area is between a 'long' definition which retains the waste label until the material is incorporated into a product and a 'short' definition which loses the label at an earlier stage, perhaps when it forms a raw material prior to final incorporation in a product. A reference from a UK case (Case C-444/00 *Mayer Parry*) resolved this debate in the context of the Packaging Waste Directive for scrap metal packaging waste – it is only at the stage at which a new product is derived which possesses characteristics comparable to those of the original product that the result can no longer be regarded as packaging waste. It seems from Case C-457/02 *Niselli* that this logic applies to the waste status of scrap metal under the Waste Framework Directive (see paragraph 52).
8. If this is the case, it suggests that the approach of comparing with a comparable raw material may not apply to cases where the material is to be recycled (so scrap metal which is similar to primary raw materials is still waste until incorporated into steel products).

Article 2(1)(b) – Other legislation

9. There are no national decisions. Though we note the application of the test set down in Case C-114/01 *Avestapolarit* to Community legislation (Directive 90/667/EEC (the Animal Waste Directive)) in Case C-416/02.

Article 7 – Waste Plans and permits

10. *Derbyshire Waste Limited v Blewett* ([2004] EWCA Civ 1508) dealt with the question of whether a permit could be issued for a landfill if it were not in line with the relevant waste management plan. The Court found that the Landfill Directive requirement for the permit to be in line with the plan was no stricter

than the Waste Framework Directive requirement for the permit to implement the plan. Fulfilment of article 4 of the Waste Framework Directive is an objective to aim for which is reflected in both planning and permitting decisions but there are also domestic planning factors which need to be taken into account in any permit decision.