EUFJE
Questionnaire concerning EU waste law
Finland
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Section A: General Issues of Case Law & Implementation

In a recently published case (the Supreme Administrative Court, SAC, of Finland, 9.9.2005 nr 2292) concerning the environmental permit of a power plant and a plant for gasification of waste to produce recovered fuel (REF), the application of EC Directive on the incineration of waste (2000/76/EC) was discussed.

The project consisted, i.a., of a change of a steam boiler (230 MW, coal as the main fuel) of an existing power plant so as to make it possible to burn fuel recovered from waste. The fuel (REF product gas) would be generated by a new gasification plant (80 MW) to be erected on the same site as the power plant. The emissions into the air from the boiler would be reduced by partly replacing coal by REF product gas. As raw material, the gasification plant would annually use 160 000 tons recycled fuel to be manufactured of separately collected and carefully sorted dry waste, non-disposed crushed wood which has been used in building activities or clean wood etc. The process in the gasification plant would not cause emissions into the sewer, air or water courses.

The Environmental Permit Agency granted permits for the power plant and the gasification plant 26.11.2002 and 11.12.2002, i.e. before the end of the implementation period of the WID 28.12.2002 and before the Directive was implemented in Finland by a governmental Decree under the Environmental Protection Act.

The Vaasa Administrative Court, on the basis of appeals lodged by certain environmental organisations, repealed the permit decisions and remanded the case back to the permit agency. The Court stated that the permit agency had regarded the gasification plant as an incineration plant in the meaning of the WID, but it had treated the power plant neither as a waste incineration plant nor a co-incineration plant. The Court found the definitions of incineration and co-incineration plant in the WID liable to different interpretations, and, hence, interpreted the scope of the Directive in the light of its objectives. The Court did not regard the gasification plant as a separate incineration plant, because gasification is a form of thermal treatment and the plant did not have incineration lines. The gasification plant alone does not give rise to such emissions which the WID is intended to regulate, but waste disposal is not accomplished in the gasification plant, but the gas developed in the thermal treatment will be conveyed to be burnt in the boiler of the power plant. In effect, the emissions of waste disposal will be originated in the burning process in the power plant. The Court found the gasification plant and the power plant which was to burn the REF product gas to form a co-incineration plant in the meaning of the WID. No other interpretation should be derived from the national legislation which was in force at the time of the permit decisions in question. Hence, the permit procedure should have covered the both plants together. In the new permit procedure the governmental decree (362/2003) by which the WID has been implemented shall be taken into account.

The Supreme Administrative Court, on the appeals of the permit applicants, repealed the decision of the administrative court and brought the permit decisions of the Environmental Permit Agency into force. The Court stated that a directive does not have direct legal effect before the end of the period for its implementation. The Court referred to the case C-129/96 (Inter-Environnement Wallonie), where the ECJ obliged the Member States, during the period laid down in the directive for its

implementation, to refrain from adopting measures liable seriously to compromise the result prescribed. Irrespective of whether the rule of Inter-Environnement Wallonie could be applicable even for individual administrative decisions and court decisions, the Court had the opinion that in the present case the result of the directive would not be seriously compromised, because 1) the normal operation of the gasification plant would not cause emissions regulated in the WID, and the objectives of the directive would nor be compromised, and 2) the simultaneous use of REF product gas and coal as fuels in the power plant boiler would be less harmful from the viewpoint of atmospheric emissions than the present burning of coal. On these grounds the SAC stated that the administrative court should not have repealed the environmental permit decisions on the basis that the non-implemented WID should have been applied.

The SAC did not refer the case to the ECJ for a preliminary ruling and did not either take a clear stand, whether the plants in question would form a waste incineration or a co-incineration plant. However, between the lines of the reasoning it might be read that the SAC did not regard the plant combination as an incineration or co-incineration plant under the WID. The Court stated that according to the WID only solid or liquid waste means waste, and, furthermore, that waste means any substance and object which is intended to be discarded. Using of energy which is originated by gasification of non-recyclable waste (REF product gas) increases proper disposal of non-recyclable waste. The properties of the REF product gas can be compared to commercial fuels. The express intention of the gasification plant is to produce cleaned, gaseous fuel, the energy contents of which is utilised by using it as an additional fuel. Hence, the objective of the gasification plant is not discarding of waste. The REF product gas cannot be regarded as waste, even though it is produced of waste, but the harmful substances of the recycled waste used as raw material would be remained in the ashes, the proper treatment of which had been guaranteed by apt provisions in the permit decision.

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There are also many more cases of interest from the viewpoint of EC Waste Law which have been resolved by the Court in recent years. Some of these cases, including the case SAC 2002:82 which was based on the preliminary ruling in C-9/00, Palin Granit, and the case SAC 2004:60 which was based on the preliminary ruling in C-114/01, AvestaPolarit Chrome Oy, will be referred to in Section B, below.

Section B: Specific Issues of Case Law & Implementation – Directive 75/442/EC – Waste Framework Directive

Definition of Waste

1. The Finnish Supreme Administrative Court (SAC) has decided a series of cases linked to the pilot cases Palin Granit and AvestaPolarit Chrome, where it was to determine whether leftover stone resulting from stone quarrying or from the extraction of ore and ore-dressing sand resulting from the dressing of ore in mining operations were to be regarded as waste. Departing from the preliminary rulings of the ECJ in these cases and the case law of the ECJ, the SAC has – if a generalisation is allowed – interpreted that e.g. (non-harmful) leftover rock is not to be classified as waste as long as it is guaranteed by definite plans that the rock type in question will soon be utilised in the very same (mining) activity.

In the case SAC 2004:60 the Court held that boulders with a volume of 1,5-5 m^3 which were stockpiled in an area belonging to the mining site about one year as a maximum and immediately

thereafter used for production, were not to be classified as waste, because they were at least primarily reused and could be reused in the production process without any prior processing measures. Smaller boulders, ore-dressing sand etc. were not to be classified as waste if the conditions defined above were fulfilled. Even if there was evidence that a part of that material could be reused for producing certain objects of steatite or to be sold to other companies, a considerable part of the material which was stored was to be regarded as waste. Because the company had not presented any detailed plan for reuse, the permit decision was in part repealed and the case remanded back to the permit authority, which was to, after the hearing of the company who should produce a plan for reuse, reconsider certain permit provisions.

The main principles of ECJ case law have been enriched and clarified over time. Still, every new case before a national court seems to be slightly different. Therefore, it is always worth considering if the case can be solved by applying the principles of valid ECJ case law or if a preliminary ruling should be asked.

2. It is evident that the definition of the concept of waste is commonly regarded to be very wide in the ECJ case law. Often companies strongly oppose to certain interpretations which have their origins in the case law of the ECJ, because these interpretations, in their opinion, contradict with common sense and bring no environmental benefits. Hence, a national court may sometimes – if a wide definition of waste could not be seen as environmentally profitable but in some situations even the contrary – be tempted to interpret the case law in that case in such a way that might be described as daring.

3. See section 1, above.

4. In a recent case (SAC 20.9.2005 nr 2413) it was held that granulated nickel slag from a metal factory (A) which was transported to a factory which was operating a refining and storage plant of nickel slag (B) was to be classified as waste when it arrived to plant B (otherwise it would have been stored on the storage area of plant A). However, after treatment consisting i.a. of drying and sifting (separation) in plant B the slag in question was no more to be regarded as waste, because after the treatment granulated slag was immediately passed on as a packed product to be used in sand blasting and as raw material in roofing felt industries without causing any environmental harm or risk in normal use. Plant B had processed nickel slag for these kinds of purposes already for some 20 years. The use of nickel slag for these purposes was therefore established and likely to go on in the future. Plant B took economic advantage of the treatment. On these grounds nickel slag could not be regarded as a burden that plant B would try to discard, but, on the contrary, a product to be used in sand blasting activity and as raw material in roofing felt industry.

I would also like to refer to the case SAC 9.9.2005 nr 2292, presented in Section A, above. Waste was subject to thermal treatment in a gasification plant and fuel was produced. The product (REF product gas) was, if you read between the lines of the court decision, not to be classified as waste, though.

5. See Section A, above.

6. A very interesting case concerning e.g. scrap metal is pending at the SAC. If it will be decided before December, I will report it in our meeting in London. The case might, however, better fit under nr 4, above.

7. The definition of waste in the Waste Framework Directive and basic concepts of the WID have been copied into the relevant Finnish legislation. Hence, the national Courts apply legislation keeping in mind the interpretative effect (the indirect effect) of EC Law and the case law of the ECJ.

Other Legislation

In SAC 2004:60 the Court referred to the preliminary ruling of the ECJ (AvestaPolarit Chrome) and held that the national Mining Act did not include sufficient provisions to guarantee that demands of e.g. EC Waste Law would be followed. The Court declared that the Mining Act which was not given to implement the EC waste legislation and in the provisions of which environmental concerns had only a very limited scope did not lead to a high level of protection of the environment presupposed in the Waste Framework Directive.

Definition of Recovery

In certain cases the annexes in the national Waste Decree where a number of Recovery operations (R1-13) and Disposal operations (D1-15) have been enumerated have been studied as guidelines, when deciding whether a certain operation falls within the scope of EC and national waste legislation, but I cannot recall any important case.

General Objective of the Directive

I do not know any national case where section 4 of the Waste Framework Directive would have been referred to. National legislation (especially the Environmental Protection Act of 2000 and the Waste Act of 1993) seems to include a covering set of rules to ensure that these demands are met. When waste management is at stake, most often the national critique seems to be directed towards the ECJ´s rigid interpretation of the concept waste.

Waste Plans and Permits

The national waste plan has originally been adopted 2.7.1998 on the basis of section 40 of the Waste Act – in order to implement the Waste Framework Directive. The present plan (1.9.2002-31.12.2005) is currently under revision. The national waste plan is very general and includes policy statements. As far as I know, it has not been referred to in individual permit cases.

On the contrary, environmental impact assessment (EIA) procedure and land use planning under the Land Use and Building Act (1999) have been influential in permit procedures. EIA brings important basic material to the permit authorities who consider e.g. the location of a land fill, but land use plans are directly relevant in the environmental permit procedure. According to sections 6 and 42(2) of the Environmental Protection Act, environmental permit shall not be granted if the location contradicts with a detailed plan. Also more general plans (a municipal master plan or a regional plan) shall be taken into account, when it is decided if the site is suitable for the waste management plant.