RECYCLING AND THE DEFINITION OF WASTE

CAIN ORMONDROYD

1. The definition of "waste" under the Waste Framework Directive[1] ("WFD") has by now acquired a reputation as a notoriously technical and complicated area of the law. This paper does not attempt to deal with the topic comprehensively, but rather focuses on one particular aspect which arises from the latest in a string of cases on the interpretation of the definition. This is the interaction between activities designed to reuse/recycle old products or materials and the definition of waste.

2. The importance of the issue can be seen from the number of cases on the definition of waste which involve what might broadly be called re-use and recycling operations. In particular there have been two recent decisions of the divisional court which deal with the definition of waste in this context. The result is a degree of uncertainty. The revised Directive,[2] which is due to replace the WFD, aims to simplify the law and place a greater emphasis on re-use and recycling. Its provisions are dealt with below. The extent to which it will be successful remains to be seen.

Previous legislative context

3. Waste is defined in article 1 of the WFD as:

> *any substance or object in the categories set out in Annexe I which the holder discards or intends or is required to discard*

4. It has often been observed that this is apt to cover any number of different substances or objects. The reference to Annexe I does not provide any clarification as, alongside a list of more specific categories, it contains a category for "[a]ny materials, substances or products which are not contained in the above categories". Thus the only element of the definition which operates to distinguish waste from non-waste is that centred around 'discarding'.

5. Attention has therefore focussed on what it means to 'discard' something. For a time, extensive reliance was placed on the lists of disposal and recovery operations contained in Annexes IIA and IIB to the WFD respectively. In the case of *Euro-Tombesi and Others*[3] the court considered whether material which still had commercial value could be waste.[4] The answer was yes. The scheme of the directive was designed to cover all items that had been 'discarded' by their owners "even if they

[1] Council Directive 75/442/EEC on waste, now replaced by the Directive 2006/12/EC, a consolidating directive incorporating later amendments. It is cited throughout in the 2006 version unless otherwise stated.
[2] Directive 2008/98/EC on waste and repealing certain Directives. It replaces the WFD and also the Waste Oils Directive (75/439/EEC) and the Hazardous Waste Directive (91/698/EEC).
[3] Joined cases C-304/94, C-330/94, C-342/94 and C-224/95, [1997] ECR I-3561.
[4] Para [41].

have commercial value and are collected on a commercial basis for recycling, reclamation or re-use".[5]

6. This of course leaves open the question of whether the thing in question had indeed been 'discarded'. The Advocate General's opinion[6] in this case, however, did appear to venture some broader guidance on that topic. He put the matter as follows:

> *the term `discard' employed in the definition of waste in Article 1(a) has a special meaning encompassing both the disposal of waste and its consignment to a recovery operation. The scope of the term `waste' therefore depends on what is meant by `disposal operation' and `recovery operation'.*[7]

7. This famously became known as the 'Tombesi bypass' because it 'bypassed' the issue of whether something had been discarded by concentrating instead on the issue of whether it had been made subject to a disposal or recovery operation. This would involve close attention to Annexes IIA and IIB, although they did not purport to contain exhaustive lists of such operations.

8. This reasoning was relied on heavily by the High Court in the domestic case of *Mayer Parry Recycling Limited v The Environment Agency*.[8] Carnwath J (as he then was) drew the obvious conclusion from the reasoning which had confined the meaning of 'discard' to disposal and recovery operations, holding that:

> *Accordingly, materials which are to be reused (rather than finally disposed of) but which do not require any recovery operation before being put to their new use, are not treated as waste.*

9. This approach was, however, contradicted by the judgment of the ECJ in *ARCO Ltd v Minister van Volkshuisvesting*.[9] The court concluded that:

> *it does not necessarily follow from the fact that certain methods of disposing of or recovering waste are described in those Annexes* [IIA and IIB] *that any substance treated by one of those methods is to be regarded as waste.*[10]

10. The court, however, declined to provide any other clear guidance or approach to take the place of the 'Tombesi bypass'. The formulation which the court repeated, with variations, three times in the judgment[11] was this:

> *Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in article 1(a) of the Directive, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the Directive and the need to ensure that its effectiveness is not undermined.*

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[5] Para [52].
[6] The opinion was provided by Advocate General Jacobs, who is held in high regard by environmental lawyers.
[7] AG Opinion, para [50].
[8] [1999] Env LR 489.
[9] Joined Cases C-418/97 and C-419/97, [2002] QB 646.
[10] Para [49].
[11] Paras [73], [88], [97].

11. This appears to go back to the simple test of whether or not something has been 'discarded'. However, it is clear that it was not the Court's intention to reduce the question to a subjective one of whether or not the owner thought he was 'getting rid of' the substance or item in question. Thus 'all the circumstances' include matters which would not immediately seem to be relevant to the issue of whether something has been 'discarded', and lead to the conclusion that valuable material in the hands of an operator who intends to reuse it may nevertheless be regarded as waste.

12. The Court of Appeal had occasion to consider this position in the case of *R (OSS Group) v Environment Agency.*[12] The leading judgment was given, interestingly enough, by Carnwath LJ, whose own careful and comprehensive judgment in *Mayer Parry* had itself been largely superseded by the ruling of the ECJ in *ARCO*.

13. In a somewhat scathing treatment of the European authorities,[13] Carnwath LJ summarised the position as follows:

> *although the Court continues to pay lip-service to the "discarding" test, in practice it subordinates the subjective question implicit in that definition, to a series of objective indicators derived from the policy of the Directive. What is required from the national courts is a value judgment on the facts of the particular case in the light of those indicators.*[14]

Conflicting policy objectives

14. The clear references by Carnwath LJ to making a "value judgment" and "the policy of the Directive" make plain that a purposive approach to the issue is required. The problem is that there are conflicting values, policies and purposes involved in an activity as ubiquitous as dealing with waste.

15. The ECJ in *ARCO* was very clear about one particular policy objective. In a series of preliminary remarks it drew attention to the need to interpret the Directive in line with two statements of policy. Firstly, the third recital in the Preamble,[15] which states that "the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste". Secondly, article 174(2) of the amended EC Treaty, which states that Community policy on the environment is to aim at a high level of protection and is to be based on the precautionary principle and the principle that preventative action should be taken.[16]

16. The policy of securing a high level of environmental protection, and protection for human health, is a worthy one. However, it seems that the ECJ equates the need for environmental protection simply with the effectiveness and scope of the waste regime.

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[12] [2007] EWCA Civ 611, [2008] Env LR 8.
[13] He states that "a search for logical coherence in the Luxembourg case-law is probably doomed to failure" ([55]). Passages in *ARCO* are incomprehensible ([39]), "extremely obscure", "Delphic" ([43]) and "a mystery" despite repeated re-reading ([47]).
[14] Para [59].
[15] Of the original version.
[16] See *ARCO* at para [37] – [39].

Thus these policy considerations militate in favour of a broad construction of the term 'discard', in order to ensure that as many activities as possible are caught by the waste regime. This is put simply but conclusively in *ARCO*, after the policy references set out above: "It follows that the concept of waste cannot be interpreted restrictively".[17]

17. However, another valid environmental policy objective is that positive activities should not be stifled by over-regulation. The nature of our environmental problems is such that they cannot be solved simply by carrying on business as usual subject to certain prohibitions to 'protect' the environment (perhaps the model of environmental protection that was prevalent when the WFD was first introduced). They are too firmly rooted in our way of life for that to be effective. Positive action is required to reconfigure the economy on ecological lines. The law must be able, therefore, to encourage activities which deal with waste in a constructive way. Recycling businesses will often be innovative, relatively recently established, and with a lower profit margin due to the costly reprocessing/reconditioning that is required. They will therefore be acutely sensitive to regulatory burdens. Too stringent a set of 'environmental' controls (conceived narrowly in the sense of environmental 'protection') can actually prove detrimental to the overall policy of environmental sustainability.[18]

18. A graphic illustration of how this could happen in practice occurs in the case of *OSS*. The OSS Group recycled oils into a product called 'clean fuel oil' ("CFO"). Following the implementation of the Waste Incineration Directive,[19] those burning this fuel oil would be required to comply with the terms of that directive if CFO was 'waste' within the terms of the WFD. A finding that CFO was waste would effectively destroy the market for CFO and thus prevent what was said to be an environmentally valuable recycling activity.

19. The Court of Appeal was not required to decide whether the CFO was waste. Instead it was considering the narrower issue of whether it was *possible* for lubricating oil burnt as fuel to be anything other than waste. Did the very fact that it was not initially fuel oil but was later burnt mean that it was automatically defined as waste? The Court answered this narrow question in the negative. However, Carnwath LJ did venture some thoughts on the application of the test in that particular case, saying this of the approach taken in the Dutch case of *Icopower BV v Secretary of State* that 'waste pellets' produced from rubbish in order to be burned as fuel were not waste:

> *It seems to me a practical and common sense approach to the issue, which is consistent with the letter and spirit of the Directive and with the case-law. It is also* ***consistent with the objective of encouraging the recovery of waste materials for uses which replace raw materials****. It should be enough that the holder has converted the waste material into a distinct, marketable product, which can be used in exactly the same way as an ordinary fuel, and with no worse environmental effects. It cannot be said that the material is being "discarded" in any ordinary sense of the term, and there is nothing in the*

[17] Para [40].
[18] See Waite, *The quest for environmental law equilibrium*, [2005] Env L Rev 34. The example of the application of waste management controls to the remediation of contaminated land, which apparently discourages redevelopment of brownfield land and the use of innovative technologies, is given there.
[19] Council Directive 2000/76/EC on Waste Incineration.

> *objectives of the Directive which requires any fictitious assumptions to that effect.* (emphasis added)

20. The ECJ has, however, seemingly been unwilling to recognise the environmental benefit of an activity as being relevant to the issue of whether or not the source material and/or product is to be regarded as waste. In *ARCO*, the Court said in terms that the "environmental impact of the processing of that substance has no effect on its classification as waste."[20] It continued:

> *An ordinary fuel may be burnt without regard to environmental standards without thereby becoming waste, whereas substances which are discarded may be recovered as fuel in an environmentally responsible manner and without substantial treatment yet still be classified as waste.*

21. Understandably, the ECJ is keen to preserve the integrity of the waste management regime. It appears to stress one facet of environmental policy above all others. Thus it does not engage in the exercise of weighing up the competing policy objectives.

22. This issue is addressed to an extent by the WFD, which allows Member States to offer exemptions from the permitting regime to operators who were involved in waste recovery.[21] This allows for lighter touch regulation of environmentally beneficial enterprises, although where the discretion has not been exercised by a Member State the issues remain.

23. An attempt to address the issue of how waste is defined and to introduce specific rules on the re-use and recycling of materials has now been made, in the form of the revised Directive. This is considered below.

24. In the meantime, however, the domestic courts in this jurisdiction have been applying their own brand of 'common sense' to the questions involved.

Recent cases

25. The judgment of the Court of Appeal in *OSS* has already been noted. There are two other recent decisions by the Divisional Court dealing with similar subject matter. Both arose out of prosecutions by the Environment Agency ("EA"). In both, the operator was successful in avoiding a classification of the materials they were using as 'waste'.

26. The case of *Environment Agency v Thorn International* [22] concerned the repair and resale of consumer electrical goods. They would come into the hands of Thorn International ("Thorn") in the following way. Retailers of electrical goods supplying a replacement appliance to a consumer would contract to take the old appliance away. A company called Wincanton retrieved these items and sorted them. Around 80% were beyond repair and were disposed of by Wincanton. The other 20% were offered for sale to companies in the refurbishment and resale trade, including Thorn. Thorn's

[20] Para [66].
[21] WFD, art 11(1)(b).
[22] [2008] EWHC 2595, [2009] JPL 597.

employees would come to inspect the goods offered. If satisfied that an appliance was capable of repair, they would buy it from Wincanton.

27. The items that Thorn bought from Wincanton were removed to Thorn's premises where they were stored outside for a week at most before being taken to be repaired. Smaller items like computers were never left outside. It was items left outside that had apparently drawn the attention of the EA. They were said to be waste, and Thorn was thus required to obtain a waste disposal licence under the relevant legislation.

28. Once taken to the repair workshop, the items would be repaired by trained engineers. They would then either be sold direct to the public through Thorn's own outlet store or sold on to second-hand retail outlets. Only a small minority of goods were found to be unsuitable for repair, and these were disposed of to a licensed waste carrier.

29. The question for the High Court on the EA's appeal by case stated was whether or not the justices were entitled to find that the used electrical goods, before they had been repaired, were not waste within the meaning of the Environmental Protection Act 1990 and the WFD. The domestic legislation, of course, refers back to the WFD for the definition of 'waste'.[23]

30. The justices had found that the purpose for which the goods had originally been purchased had never changed. As such they had not been 'discarded'.

31. The EA took the line that the items had been discarded when the consumer contracted to hand them back in exchange for a new item, and that they did not cease to be waste by virtue of being sorted into repairable and non-repairable groups. They relied on *ARCO* in support of this submission.

32. The court, in a lead judgment given by Moses LJ, distinguished *ARCO* and indeed *OSS* on the basis that those cases were ones involving something that was undoubtedly waste to begin with. Therefore they were considering at what point, if at all, it had ceased to be waste. The question here was whether the electrical items had ever been waste to begin with. Moses LJ said:

> *I reject the contention that the justices were bound to conclude that the electrical goods were waste in the circumstances that there was a contractual arrangement between consumer and retailer, who agreed to take the particular item in question on purchase of another new item.*[24]

33. That was the focus of the High Court's thinking. However, the court acknowledged that the justices had "focussed on the later transactions".[25] In that context, the court emphasised that:

> *the goods seen at Thorn's store… had been by that time subject to two separate and independent processes of selection from the retailer since they had been held in the hands of the consumer.*[26]

[23] See, e.g. Waste Management Licensing Regulations 1994, sch 4 para 9.
[24] Para [22].
[25] Para [23].
[26] Para [23].

34. Based on that observation, the court was equally happy to say that the justices were entitled to find that, even if the goods had been waste, they were no longer waste when they came into the hands of Thorn. Moses LJ went on to say:

> *None of the purposes of the Directive are achieved by so regarding them. Thorn regarded them as capable of reuse with some repair and refurbishment. The mere fact that that which in one form is undoubtedly waste remains waste until its character is changed by a process of recycling does not establish a rule of law that any item which requires repair or refurbishment is waste until that process is concluded… it depends on all the circumstances.*

35. The key circumstances here were that the goods retained their form and purpose and contained no hazardous materials.

36. In effect, the High Court has distinguished the European jurisprudence on the point that it was dealing with materials or substances which were changed in form, whereas this case was dealing with a consumer product requiring only repair.

37. The court was also prepared to take a purposive approach. The purposes of the Directive are mentioned several times in the judgment, in conjunction with the justices' finding of fact that there had been no hazardous material stored on the site. Moses LJ in fact described this as "an important finding of fact in the context of the purposes of the Framework Directive".[27] This is significant, because it indicates that the domestic courts are prepared to take a broader approach to the purpose of the directive than the ECJ appears prepared to do (see above).

38. It is also significant that the court was prepared to uphold the justices' findings on two bases – that the goods did not become waste, because of the circumstances in which they were removed from the consumer's home, and that if they had been discarded then they had ceased to be waste through a process of sorting.

39. This will provide comfort and/or opportunities for those repair operations which have a different business model. For example, some collect direct from consumers, otherwise than under a contractual arrangement to supply a replacement product. Others accept unwanted goods direct from consumers at their own sites. Following the logic in *Thorn*, there would be a strong case to say that, at least after sorting, such goods were not to be regarded as waste. That argument would be all the stronger if there are no hazardous substances involved.

40. The second, more recent decision, is *Environment Agency v Inglenorth.*[28] This was another appeal by case stated from the decision of the magistrates to acquit a Defendant. This case concerned the deposit of hardcore in order to make good a car park. The hardcore came from the demolition of a greenhouse on another site in the same ownership.

41. The owner of the greenhouse had demolished it to make way for a new building and stored the resulting hardcore there for a few weeks. He intended to put it to some use

[27] Para [12].
[28] [2009] EWHC 670 (Admin).

in his business of running garden centres, but there was no finding from the justices about when he had formed a specific intention to use it to repair the car park.

42. In the event, he did decide to use it for this purpose, and contracted with Inglenorth (who ran a licensed landfill site and licensed waste transfer site and had approached him offering to dispose of the hardcore) for them to take around 20% of the material to the other site so that it could be used in repairing the car park.

43. The owner of the material had, when pressed by the EA, removed it and accepted a caution. He was not therefore prosecuted. Inglenorth, however, presumably refused to accept a caution and were prosecuted for failing to inform the site owner that he would need a licence and for depositing the waste when there was no licence in place at the time.[29]

44. The justices found as a fact that the material was not waste when it was deposited on the land. The main question for the High Court was whether this finding had been open to them.

45. Sir Anthony May, giving the lead judgment, set out to answer the question trenchantly. He began by drawing a parallel with a possible situation in which he had asked for hardcore to be delivered to his house to repair his drive. The main question was whether this material was waste. He said:

> *The common sense answer reached by the Justices is that it was not because the hardcore is material which I am going to use, not material which I am going to discard. I am not going to discard it, I am not going to throw it away or get rid of it.*
>
> *… This appeal by the Environment agency seeks to say that the Environmental Protection Act 1990 and the* [WFD] *are not or not always instruments of common sense.*

46. Unsurprisingly, perhaps, he went on to find that the hardcore had not been waste when it was deposited.[30]

47. At first sight, such a decision might have seemed unlikely when the ECJ's decision in the case of *Palin Granit Oy* [31] is considered. That was a case concerning material from a granite quarry. This material was not the granite which was quarried but rather stone that was left over from the quarrying process and which was stored on an adjacent site for possible future use. Having regard to the objective of defining the meaning of waste widely, the ECJ had held that "the reasoning applicable to by-products should be confined to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process".[32] As such the material was regarded as waste.

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[29] Contrary to s34(1) and s33(1)/s36(6) of the Environmental Protection Act 1990 respectively.
[30] Para [38].
[31] [2002] 1 WLR 2644.
[32] Para [36].

48. The High Court's approach to the *Palin Granit* case was in three respects somewhat strained, apparently in the interests of maintaining the 'common sense' position which it had set out to define.

49. Logically, the justification for finding that the material was waste in *Inglenorth* would seem to have been even stronger than that in *Palin Granit*. The main aim was to demolish the greenhouse, and the hardcore was a by-product of that process. However, the court distinguished *Palin Granit* on the basis that the hardcore was "not material resulting from a mining or extraction process".[33] It is difficult to see the relevance of the fact that the primary process was demolition rather than extraction.

50. The Court's approach to intention was also somewhat surprising. The fact that intention is to be inferred from a series of indicators, regard being had to the policy of the directive, was acknowledged with reference to the exposition of this point by the ECJ in *Palin Granit*. This reflects the fact that 'intention' is not defined, in the European jurisprudence, simply with reference to what the intention of the operator actually was. It is assessed against objective criteria. However, the High Court in *Inglenorth* effectively disregarded this approach by finding that "in the present case it is not necessary to infer Mr Evans' intent because the Justices have made a clear finding of fact as to what that intent was".[34] This seems to miss the point that the ECJ has never considered itself bound by the actual intention of the operator.

51. A third unusual finding was made by the Court, about 'disposal'. The point was made, again with reference to *Palin Granit*, that whether or not a substance has been subject to a disposal operation as listed in Annexe IIA is *relevant to* but not *determinative of* its status as waste. The justices in *Inglenorth* had held that there had been no Annexe II disposal/recovery operation.[35] The High Court acknowledged that the material had been deposited onto land, and that this treatment of it would fall within the disposal operation listed as 'deposit onto land'[36]. This would imply that the magistrates had mistakenly failed to take into account a relevant factor. This point was raised by the advocate for the Environment Agency[37] but apparently not dealt with by the court in what appears to be an extempore judgment.

52. The real heart of the case was (a) the small scale nature of the activity, (b) the fact that the owner of the material did not regard it as 'waste' in the normal sense and that he had conveyed this message to Inglenorth and (c) nothing "toxic, harardous to health or a danger to the public" was included in the material.[38] These three factors together appear to have grounded the perception, expressed as common sense, that this was simply not the sort of activity that should be regulated. The European jurisprudence has then been moulded around that conclusion, as can be seen above.

53. It shows how far the courts are prepared to go in construing the European legislation so as to do justice in individual cases.

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[33] Para [19], and see para [25].
[34] Para [22].
[35] Para [24].
[36] D1 of Annexe IIA.
[37] See para [31].
[38] Para [8].

54. At the end of the hearing, the Agency applied for certification of a point of law of general public importance and leave to appeal to the House of Lords (as it then was!), on the question of whether there should be a subjective or an objective approach to the question of intention. Certification was not granted. The Agency now confirm that they do not intend to appeal the decision, regarding it as being confined to its own facts.

The revised Directive

55. The revised Directive on waste set out with the objective of tackling some of the issues identified so far. The recitals mention the need for clarification, including in the definition of waste.[39] The need for a new approach to waste more generally is also recognised, with references throughout the recitals to the need to define (and promote) recycling, the need to deal with waste according to an expanded version of the 'waste hierarchy' (with prevention at the top and disposal at the bottom) and the need to move to a 'recycling society' in the EU.[40] The European Commissioner for the Environment, Stavros Dimas explained the legislative intention thus in June 2008:

> *The legislation marks a shift in thinking about waste from an unwanted burden to a valued resource and helps make Europe a recycling society. It introduces a modernised approach to waste management with clearer definitions, greater emphasis on prevention of waste and ambitious new recycling goals.*[41]

56. The Directive does not actually attempt a radical overhaul of the definition of waste. It now reads: "any substance or object which the holder discards or intends or is required to discard".[42] The only change is thus the deletion of the reference to a list set out in an annexe. However, as mentioned above the list in the annexe was of no practical effect in narrowing the definition due to the inclusion of a final 'catch all' category. The definition is therefore substantially the same.

57. The changes that were introduced, which may have a bearing on the definition, are as follows:

    a. **'End of waste'** (art 6): the revised Directive introduces a structure for determining when waste will cease to be waste. This is intended to meet some of the uncertainty that had developed in this area. The waste must fall within a specified category and must have undergone a recovery operation (including a 'recycling' operation, which term is defined in the revised Directive). Specific criteria must also be met by the end product, which will be set in accordance with the following conditions:
        i. The substance/object is commonly used for specific purposes;
        ii. A market or demand exists for such a substance/object;

[39] Directive 2008/98/EC, recitals (2) and (5).
[40] Ibid., recitals (3), (6), (7), (8), (18) and (28).
[41] Europa press release, 17 June 2008, cited in Nash, *The Revised Directive on Waste: Resolving Legislative Tensions in Waste Management?*, [2009] JEL 139.
[42] Directive 2008/98/EC art 3(1).

iii. The substance/object fulfils the technical requirements for the specific purposes and meets existing legislation and standards applicable; and
iv. The use of the substance/object will not lead to overall adverse environmental or human health impacts.

b. **'By-product'** (art 5): By-products are officially defined for the first time and exempted from the definition of waste. Such rules are presumably directed at the situations which have given rise to much of the litigation before the ECJ and elsewhere. A substance or object produced by a process but not as the primary aim of this process may be regarded as a by-product rather than as waste if:
   i. Further use of the substance/object is certain;
   ii. The substance/object can be used directly without any further processing other than 'normal industrial practice';
   iii. The substance/object is produced as an integral part of the production process; and
   iv. Further use is lawful (i.e. legislative requirements are met and use will not result in adverse impacts on the environment or human health).

c. **Re-use and recycling** (art 3(13) and (17)): Both these terms are expressly defined in the revised Directive. The relationship between them is a little convoluted, however, as re-use is defined as applying to products or components which are not waste being used again for the purpose for which they were conceived. Recycling, on the other hand, is 'any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes'. The distinction is not simply that waste will be recycled whereas non-waste will be re-used, however, as another term employed by the revised Directive in relation to waste is 'preparing for re-use' (art 3(16)). This is defined as checking, cleaning or repairing recovery operations by which waste products or components are prepared so that they can be re-used without any other pre-processing. This implies, of course, that such products/components will at some point cease to be waste so that they can then be 're-used' (which is only possible for 'non-waste'). This is a complicated procedure and the important point to note is that as long as the input is 'waste' (as it will always be for 'recycling' and 'preparing for re-use' operations) the operator will still be subject to the requirement to obtain a permit.

58. Further guidance will be provided on when a substance/object reaches 'end of waste' status and when it is to be considered a 'by-product'. The revised Directive retains at this point a framework character, and much will depend on the specifics of the measures supplementing it. At present, the 'end of waste' criteria are being considered from a scientific/technical perspective by the Joint Research Committee. This will be followed by the formal process of consideration by the Commission with scrutiny by the European Parliament.[43] Certain of the criteria set out in the revised Directive itself nevertheless seem likely to give rise to litigation, for example the requirement that in order to qualify as a by-product a substance/object must be usable

[43] http://ec.europa.eu/environment/waste/framework/end_of_waste.htm accessed on 3 November 2009.

'without any further processing other than normal industrial practice'. What counts as 'further processing'? What is 'normal industrial practice'?

59. The other potential problem with the revised Directive is that the test for 'end of waste' is not a comprehensive one; it will only apply to 'specified' waste. The priority areas for the formulation of criteria at the moment are ferrous metals, aluminium, copper, paper and glass. Art 6 of the revised Directive appears to offer no guidance in relation to other sorts of waste. Presumably the approach of the ECJ articulated in *ARCO* and based on the definition of waste will continue to apply. In particular, it is not clear from the terms of the revised Directive when waste which is being 'prepared for re-use' ceases to be waste and becomes something capable of being 're-used'. This may have implications for those, like Thorn, dealing in second hand goods.

60. The new test for a 'by-product' is also to be elaborated further, although it does not appear that much progress has yet been made in the production of such guidance. The revised Directive alone effectively does no more than embody in legislation the formula that had been developed by the ECJ in relation to non-waste 'by-products'.[44]

61. The revised Directive must be implemented by 12 December 2010. DEFRA has recently consulted on the broad policy issues arising from the revised Directive.[45] A second stage of consultation, based on decision ministers have taken on the policy issues and directed at the drafting of the requisite regulations, will open in early 2010. Until such implementing regulations come into force, or until the deadline passes causing the Directive to have direct effect, the current rules will continue to apply.

Practical implications

62. The situation exists whereby the Court of Appeal, in the *OSS* case, has effectively held that the European case law is not coherent, and has declined to provide any further clarification itself. It may fairly be said that the law is in a state of uncertainty. That is of course bad news for the system of control over waste as a whole, but it does present an opportunity for determined litigants.

63. This is illustrated by the two recent cases dealt with. Following *Thorn International*, it appears that there is now a more favourable climate for operators, particularly those running reuse/repair operations, to claim that they are not dealing with 'waste'. This represents a way for such an operator to avoid a significant regulatory burden.

64. There is also a potential avenue for smaller operators to resist prosecution by analogy with *Inglenorth* where they are dealing with something which, on a 'common sense' interpretation, is not to be regarded as waste.

65. In the longer term, the implementation of the revised Directive may provide more clarity. The issues over the definition of waste will remain, but there may be more specific guidance on the 'end of waste' test (for specified types of waste) and on the 'by-product' test. There is also a much greater emphasis on recycling in the preamble;

[44] For a helpful review of the case law on 'by products' under the WFD see the Commission Communication on that subject, COM final (2007) 59.
[45] http://www.defra.gov.uk/corporate/consult/waste-framework/index.htm accessed on 3 November 2009.

it will accordingly be interesting to see if this affects the way in which the terms of the revised Directive are construed by the national courts and/or the ECJ.

Cain Ormondroyd
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