

Case C-1/03, *Paul Van de Walle*, Judgment of the Court (Second Chamber) of 7 September 2004, not yet reported.

1. Introduction

Probably no other piece of EC environmental legislation has caused as much controversy as Directive 75/442/EEC. In particular, the broad definition of waste laid down in Directive 75/442/EEC has caused heated debate over the years. Indeed much ink has been spilt as to whether that definition encompasses residues, by-products, marketable waste, re-usable waste, and so on. The basic problem associated with defining waste stems from the fact that the concept cannot properly be understood without an appreciation of the scope of a number of other concepts, among which the concepts of holder, of discarding and of residue. The Court's judgment in the case annotated here is an important step in the clarification of some of those concepts. In particular, it provides a valuable analysis of the meaning of the terms "discard" and "holder".

2. Facts

Texaco leased a service station in Brussels and signed an operating agreement with the operator. In particular, the operating agreement provided that the manager would operate the service station on his own behalf but did not have the right to make changes to the premises without prior written permission from Texaco, which supplied the service station with petroleum products. Due to defective storage facilities, fuels seeped into the cellar of the building on the adjoining property, which required the taking of remedial action.

Following the discovery of the hydrocarbon leak, Texaco took the view that the station could no longer continue to operate and decided to terminate the management contract in 1993. Although disclaiming liability, Texaco proceeded to decontaminate the soil and replaced part of the storage facilities that had caused the hydrocarbon leak. Since Texaco did not pursue decontamination, the Public Prosecutor brought charges against three officers of the petroleum company who were charged with criminal offences under certain provisions of the regional law on waste, implementing Directive 75/442/EEC obligations.

At first instance, the accused were acquitted and the civil claim against Texaco was struck out. The case was appealed by the Prosecutor and the Brussels-Capital Region to the Brussels *Cour d'appel*, which was uncertain among other things as to whether the contaminated soil under the service station could be regarded as waste. The *Cour d'appel* referred to the European Court of Justice questions for preliminary ruling with a view to establishing whether soil contaminated by leaked fuel could be regarded as waste and whether Texaco could be regarded as the producer or holder of any such waste.

3. Judgment of the Court

On 7 September 2004, the ECJ answered the questions referred by the Belgian court.¹ To a large extent, the ECJ followed the line taken by Advocate General Juliane Kokott. To begin with, the Court had to address the issue as to whether the accidentally discarded fuels fell under the scope of the definition, even though the spillage had not been intentional. In this respect, the Court acknowledges the central importance of the term “discard”.² Applying various criteria (existence of a production residue, environmental impact, inappropriateness of the substance to be traded, ...), the Court reached the conclusion that all types of pollutant which the holder unintentionally discards by way of an uncontrolled release into the soil are to be classed as waste within the meaning of Article 1(a) of Directive 75/442.³ In other words, it is not necessary that the substance be considered to be waste prior to its being accidentally discarded in order for it to fall within the meaning of this definition.

As to the classification of the soil contaminated by hydrocarbons as waste, the Court took the view that it “does indeed therefore depend on the obligation on the person who causes the accidental spill of those substances to discard them.”⁴ The Court reached that conclusion on the grounds that, as a

1. This judgment has already spawned several critical analyses in national environmental law and EU journals alike, e.g. McIntyre, “The all-consuming definition of waste and the end of the contaminated land debate?”, 17 *Journal of Environmental Law* (2005), 109–127; De Bruycker and Morrens, “Is verontreinigde grond een afvalstof?”, 6 *Tijdschrift voor Milieurecht* (2004), 666–668; Sambon, “Les terres contaminées sont des déchets au sens de la directive 75/442”, (2005) *Aménagement-Environnement*, 53–57; Idot, “Commentaire”, (Nov. 2004) *Europe*, 25–26; Wrede, “Kontaminiertes Boden als Abfall”, (2005) *Natur und Recht*, 28–31.

2. Judgment, para 42.

3. Judgment, para 50.

4. Judgment, para 52.

matter of fact, the hydrocarbons could not be separated from the soil contaminated as the result of the accidental spillage. It follows that the contaminated soils which cannot be distinguished from the discarded fuels must be discarded in order to comply “with the aims of protecting the natural environment and prohibiting the abandonment of waste pursued by the Directive”.⁵ In other words, contaminated soil is considered to be waste within the meaning of Article 1(a) of Directive 75/442 by the mere fact of its accidental contamination by hydrocarbons.

Furthermore, the Court stressed that the classification could not “result from the implementation of national laws governing the conditions of use, protection or decontamination of the land where the spill occurred.”⁶ In addition, the fact that the soil is not excavated has no bearing on its classification as waste. Finally, the hazardous properties of the contaminated soils are not relevant.⁷ In particular, the court took a more radical view than that of its Advocate General. With regard to the obligation to discard, the Advocate General had stressed that “the property of being waste derives rather from the interplay between waste law and the specialized law regulating the relevant risks.”⁸ It follows that the obligation to remove contaminated soil arises from the regulations on water, nature conservation or soil conservation. Such an obligation can also be founded in civil law.

The Court was further asked to decide whether the petroleum undertaking and its officers could be considered to be the holder of that waste within the meaning of Article 1(c) of Directive. The answer of the Court is rather nuanced. As a matter of principle, it is the service station’s manager “who, for the purpose of his operations, had them in stock when they became waste and who may therefore be considered to be the person who ‘produced’ them within the meaning of Article 1(b) of Directive”.⁹ Nevertheless, the Court took the view that an oil company selling hydrocarbons to the manager of a petrol station can, in certain circumstances, be considered the holder of the land contaminated by hydrocarbons that accidentally leak from the station’s storage tanks within the meaning of Article 1(c) of Directive 75/442, even where the petrol company does not own them.¹⁰ In other words, the “polluter” should be the person who causes waste and thereby pollution. The Court left to the national court to determine whether the poor condition of the service station’s storage facilities and the leak of hydrocarbons can be at-

5. Judgment, para 52.

6. Judgment, para 52.

7. See Case C-9/00, *Palin Granit Oy*, cited *infra* note 23, para 48.

8. Opinion, para 38.

9. Judgment, para 59.

10. Judgment, para 60.

tributed to a disregard of contractual obligations by the petroleum undertaking which supplies that service station.

4. Comments

4.1. *General remarks*

Dictionary definitions are hardly enlightening with regard to the exact significance of the term waste. Indeed, waste is defined in a relatively vague manner as: “unwanted matter or material of any type, often that which is left after useful substances or parts have been removed”,¹¹ “no longer useful and to be thrown away”¹² or “eliminated or thrown aside as worthless after the completion of a process.”¹³ Such definitions are of minimal use for lawyers. As far as EC law is concerned, the lawmaker has attempted to develop a framework definition which runs as follows: “any substance or object in the categories set out in Annex 1 which the holder discards or intends or is required to discard” (Art. 1(a) of Council Directive 75/442/EEC on waste).

It is important to stress at the outset that the definition laid down in Directive 75/442/EEC on waste is of particular importance because Directive 75/442/EEC, as amended by Directive 91/156/EEC, has been elevated to the status of framework directive¹⁴ and has underpinned, since 1993, the whole of the Community’s policy on waste.¹⁵ Thus the definition of the concept of waste constitutes the keystone of all sectoral regulation on waste products. Essentially, any substance or object that is discarded but which, in the light of the particular circumstances, does not fall under this definition is not subject to the administrative obligations relating to collection, sorting, storage, transportation, international transfer and treatment methods that are applicable to waste.

Despite the changes brought by Directive 91/156/EEC, the Community definition has lain at the root of various controversies in nearly every Member State where national authorities and public officials cross swords with business on the issue of whether such and such a residue constitutes a waste

11. *Cambridge International Dictionary of English* (Cambridge, CUP, 1995).

12. *Oxford Advanced Learner’s Dictionary* (Oxford, OUP, 1989).

13. *The Shorter Oxford English Dictionary*, 3rd ed. (Oxford, Great Clarendon Press, 1956).

14. Case C-114/01, *AvestaPolarit Chrome Oy*, [2003] ECR I-8725, para 48.

15. However, the wide scope of Directive 75/442/EEC is nevertheless limited with respect to by-products. In addition, a number of substances are excluded from the ambit of that directive provided certain conditions are met (Art. 2(1)). Accordingly, the ECJ has ruled that national lawmakers were empowered to restrict the scope of Directive 75/442/EEC (*Avesta Polarit Chrome Oy*, *supra* note 14, para 49).

or not. The case annotated here is a typical example of the diametrically opposed views of undertakings and national authorities with regard to the classification of substances as waste. Indeed the core issue is whether the leaked oil and the soil it contaminated fall within the scope of the definition of waste.

Since the Article 1(a) definition is based on a number of different terms, it is necessary to analyse the judgment by distinguishing between its different elements. In order to do this the three essential components of the definition will be examined: first the terms “substances and objects” (4.2), then the act of “discarding” (4.3) and finally the concept of “holder” (4.4).

4.2. *The classification of the “substance” or “object” under Appendix I of the Directive*

Listing waste by name has the advantage of providing clarity. However, this technique has proved exceptionally difficult to utilize given technical and scientific difficulties. As will be seen, the different EC lists are not decisive in classing a substance or an object as waste. At the outset, it should be pointed out that the Community’s waste definition requires that substances or objects capable of becoming waste have to belong to one of the categories set out in Annex I of the Directive. This annex sets out sixteen categories of substance or objects which are to be considered as waste (production or consumption residues, off-specification products, ...).

One of the categories deserves particular attention with respect to the classification of discarded hydrocarbons as waste. Category Q.4 refers to “materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap”. Nevertheless, the Court took the view that the reference to this category “cannot suffice to classify as waste hydrocarbons which are spilled by accident and which contaminate soil and groundwater.”¹⁶ It merely indicates that such materials may fall within the scope of “waste”. Another category (Q15), which, in particular, covers excavated soil, was mentioned by the Advocate General. Nevertheless, the Advocate General took the view that there was no reason to believe that waste category Q15 would conclusively define the circumstances in which soil can be waste.¹⁷

In order to flesh out the broad categories of Annex I in more specific guidelines, the Commission has adopted the “European Waste Catalogue (EWC)” pursuant to Article 1(a) of the Directive.¹⁸ Since the principal pur-

16. Judgment, para 43.

17. Opinion, para 29.

18. Commission decision 2000/523/EC (3 May 2000), as amended by the decision of 16

pose of the EWC is to establish a “reference nomenclature providing a common terminology throughout the Community”, the list of wastes contained within it is neither binding nor exhaustive. As a result, the fact that a material or substance is not included in the list does not mean that it cannot be classed as waste. Inversely, the inclusion of a substance in the ECW appears to be an excellent indicator that the material meets the definition of waste.¹⁹ In this respect, the Advocate General highlighted that several categories of the ECW could cover unexcavated soil.²⁰

Other EC lists could also be useful for determining whether a substance is to be classed as waste. In this respect, the Court points out that hydrocarbons spilled by accident are, moreover, considered to be hazardous waste under Council Directive 91/689/EEC on hazardous waste and Council Decision 94/904/EC establishing a list of hazardous waste.²¹

4.3. *The act of “discarding”*

4.3.1. *General comments*

According to Article 1 (a) of the Directive, any substance or object in the categories set out in Annex I is to be considered as waste, provided that “the holder discards or intends or is required to discard”. Repeated three times, the verb “to discard” occupies therefore a central place in this definition.²² Consequently, the scope of the applicability of the concept of waste and, by extension, of both Community and national rules, depends on the meaning given to this term. Because the EC lawmaker has avoided specifying what precisely is meant by the verb “to discard”, one is left with little guidance as to the meaning of the term. Nonetheless, the action of discarding can be understood from two completely different viewpoints: on the one hand, waste can be defined by means of an intrinsic approach founded on objective elements whilst, on the other hand, recourse to more subjective elements allows for the development of an extrinsic approach. This calls for a few words of explanation.

Jan. 2001. This list has also been amended by Commission decisions 2001/118/EC and 2001/119/EC and the Council decision 2001/573/EC, dated respectively 16 and 22 Jan. and 23 July 2001 (O.J. 2001, L 47/1 & 32, & L 203/18) and entered into force on 1 Jan. 2002.

19. Opinion, para 29.

20. The Advocate General indicated in this regard that subsection 17 05 of the European Waste Catalogue, which is headed “soil (including excavated soil from contaminated sites), stones and dredging spoil” includes the items 17 05 03 “soil and stones containing dangerous substances” and 17 05 04 “soil and stones other than those mentioned in 17 05 03” (Opinion, para 14).

21. Judgment, para 51 could serve as a relevant criterion to class polluted soils as waste.

22. Case C-126/96, *Inter-Environnement Wallonie*, [1997] ECR I-7411, para 26; Joined Cases C-418/97 & C-419/97, *ARCO Chemie*, [2000] ECR I-4475, para 36.

First of all, the intrinsic approach refers to the process of material transformation of a product or substance into a waste. That approach allows one to qualify waste with regard to the substances of which it is composed, or the characteristics which it displays. In other terms, it allows for the qualification of the waste in objective terms, such as the constituent elements of the substance or their particular characteristics. This means that waste containing particular metals or displaying particular poisonous properties can be classed as dangerous on the basis of these characteristics. However, many objects which do not represent any particular danger on account of their physico-chemical composition or of their particular characteristics (waste plastics, biological waste), must nonetheless fall under the law on waste because of nuisance they may cause when they end up outside controlled management procedures. Therefore, a subjective element should be introduced into the definition, involving an analysis of the holder's intention. This is an extrinsic approach: a substance can be classed as waste not simply on the basis of its composition or physico-chemical characteristics, but rather with regard to the presence or absence of a use to which it can be put. Due to the fact that they are no longer wanted by their producers, the threat of pollution they pose is subjective.

As will be seen, the Court places in its judgment emphasis on the subjective, as well the objective, aspect of waste. Whereas, with respect to soil pollution, the Court endorses implicitly an objective approach, as regards the accidental spilling of fuel it endorses a subjective approach. In that case, the hydrocarbons have become, in the light of different circumstances, useless. It is therefore necessary to consider when the holder has the intention (section 4.3.2) or the obligation (section 4.3.3) to discard an object.

4.3.2. *The subjective approach as regards spilled hydrocarbons: The interpretation of "discarding" according to concrete criteria*

Various criteria have been proposed for determining when and how an object or substance is discarded and consequently falls within the scope of Directive 75/442/EEC. In particular, the Court has emphasized that the application of the concept of discarding implies that all the "circumstances" indicating whether the holder has the intention or obligation to discard be taken into consideration.²³ Needless to say, these criteria are merely indicative. Taken in

23. *Arco Chemie*, cited *supra* note 22, paras. 73, 88 & 97; C-9/00, *Palin Granit Oy*, [2002] ECR I-3533, para 24. A complete discussion of all the relevant criteria is impossible in the space available here. For a critical analysis, see e.g. de Sadeleer, "Les déchets, les résidus et les sous-produits. Une trilogie ambiguë", (2004) *Revue du Droit de l'Union Européenne*, 457-497; "Waste, Products and By-products", (2005) *Journal of European Environmental & Planning Law*, 46-58.

isolation, it is not possible to conclude from them whether a given substance falls under the definition of waste or not.²⁴ No *a priori* preference can be given to any one criterion over another, but rather the criteria must be applied on a case-by-case basis in the light of the particular circumstances.

The following paragraphs will highlight the criteria which were chosen by the Court in order to determine whether the oil leaking from the service station and consequently the soil contaminated as a result of this leakage were to be classed as waste. Although the Court in its decision to a large extent restates settled case law, it applies these criteria for the first time to accidentally spilled substances.

a) *The interpretation of the discarding is underpinned by the objectives and different environmental principles.* Of particular importance in this respect is the teleological interpretation endorsed by the ECJ in the judgment annotated. Accordingly, the concept of waste should be interpreted broadly on the basis of the objective to pursue “a high level of protection” of the environment, the need to render the Directive efficacious and the principles of precaution and preventive action.²⁵ It follows that Member States cannot interpret the notion of waste in a restrictive manner.²⁶ Such restrictions would undermine the effectiveness both of Article 174 EC and of the Directive.²⁷

b) *The interpretation of “discarding” involves the assessment whether the waste is a financial burden for the holder.* The absence of an economic benefit can constitute a criterion that could tilt the balance in favour of the waste regime.²⁸ This is particularly important where the holder of a waste tries to get rid of the substance because it no longer has any economic value. The annotated judgment provides the most striking evidence of the importance of that criterion. The Court reached the conclusion that the spilled hydrocarbons were “a burden which the holder seeks to ‘discard’” on the ground that the holder was unable to re-use those fuels economically without prior processing.²⁹ Furthermore, the Court stressed that “their marketing is

24. Case C-235/02, *Saetti*, Order of 15 Jan. 2004.

25. Joined Cases C-206/88 & C-207/88, *Vessoso & Zanetti*, [1990] ECR 1461, para 12; *ARCO Chemie*, *supra* note 22, para 37; *Palin Granit Oy*, *supra* note 23, para 23; judgment, para 45.

26. Case C-422/92, *Commission v Germany* (1995) ECR I-1097; Joined Cases C-418/97 & C-419/97 *ARCO Chemie* (cited *supra* note 22), para 38; *Palin Granit Oy*, *supra* note 23, para 23; judgment, para 58; Case C-208/04, *Inter-Environnement Wallonie*, Order of 28 Jan. 2005, unpublished.

27. *Arco Chemie*, cited *supra* note 22, para 42.

28. Joined cases C-304, 330 & 342/94 & 224/95, *Tombesi*, [1997] ECR I-3561, paras. 47, 48, 52.

29. Judgment, para 46.

very uncertain and, even if it were possible, implies preliminary operations would be uneconomical for their holder.”³⁰

c) *The interpretation of “discarding” where the substance is a “production residue”*. In other judgments, the Court had already considered that where the holder discards residues, this is indicative of an act, intention or obligation to discard waste.³¹ Accordingly, in the case annotated here, the Court highlighted that “when the substance or object in question is a production residue, that is to say, a product which is not itself wanted for subsequent use and which the holder cannot economically re-use without prior processing, it must be considered to be a burden which the holder seeks to ‘discard’”.³² In other words, a residue may be defined as the product remaining at the end of the production process which is not purposely produced in that process.

d) *The interpretation of “discarding” in the light of the inappropriateness of the substance for the particular production process*. The fact that a substance is a residue whose composition is not suitable for the use made of it, or where special precautions for the environment must be taken when it is used, tends to reinforce the conviction that it is a waste product.³³ Reasoning along similar lines, the Court stressed in *Van de Walle* that it was “clear that accidentally spilled hydrocarbons which cause soil and groundwater contamination are not a product which can be re-used without processing. Their marketing is very uncertain and, even if it were possible, implies preliminary operations would be uneconomical for their holder.”³⁴ It follows that both accidentally spilled hydrocarbons and contaminated soils are inappropriate for any development (land planning) or production process (industrial).

e) *The interpretation of “discarding” in the light of the environmental impact of the substance*. The environmental impact of the substance or its method of treatment can be indicative of its status as waste, especially because the Directive is intended to limit the creation of nuisances.³⁵ Reasoning along similar lines, the Court stressed in the case at hand the importance of Article 4 of the Directive which provides, *inter alia*, that Member States

30. Judgment, para 47.

31. *Arco Chemie*, cited *supra* note 22, paras. 83–87; *Palin Granit Oy*, *supra* note 23, para 33; Case C-457/02, *Niselli*, [2004] ECR I-10853, para 43.

32. Judgment, para 46.

33. *Arco Chemie*, cited *supra* note 22, para 87; *Palin Granit Oy*, *supra* note 23, paras. 32–37.

34. Judgment, para 47.

35. C-318/98, *Fornasar*, [2000] ECR I-4785; *Arco Chemie*, cited *supra* note 22, para 87; *Palin Granit Oy*, *supra* note 23, para 38. It seems that this criterion would not apply in the case of petroleum products clearly used as fuel for the energy requirements of an oil refinery (*Saetti Order*, 15 Jan. 2004, para 46).

are to take the measures necessary to ensure that waste is recovered or disposed of without endangering human health and the environment.³⁶

4.3.3. *The objective approach with regard to contaminated soils: The “obligation to discard”*

At first glance the issue of contaminated soils is more complex than the issue of spilled hydrocarbons. Whereas there is a consensus among practitioners that excavated polluted soils are deemed to be waste, such consensus does not exist as regards polluted soils which have not yet been excavated. The Brussels *Cour d’appel* and the Advocate General alike emphasized the extent to which this issue was still controversial.

It should be pointed out that waste is defined as “any substance or object ... which the holder is required to discard”. In particular, category Q.13 of Appendix I of the Directive (above section 4.2) mirrors that hypothesis in permitting both national and Community legislators to broaden the concept of waste simply by banning the use of certain products. In doing so, an obligation is created to discard the relevant substance or product. This obligation operates independently of any possibility of re-use of the object by the holder. Legislation which requires holders to discard an object is essentially based on the intrinsic or objective approach set out above (section 4.3.1).

It is worthy of note that the Court’s judgment attests the importance of the obligation to discard in assessing whether a soil contaminated as the result of an accidental spillage of hydrocarbons has to be classified waste.³⁷ In finding this, the Court suggests that the existence of waste can be inferred from the fact that there is an obligation to discard the spilled substances from the contaminated soils.³⁸ In other words, the heart of the matter is whether there is an obligation on the person who causes the accidental spillage of those substances to discard them. Of course, the answer is clearly yes. According to Article 4 of the Directive, waste can neither be abandoned nor dumped. In other words, it is the obligation to manage the waste with a view to avoiding its abandonment which is the crucial criterion.

However, the broad approach endorsed by the court might entail specific problems as regards the implementation of the national regimes seeking to allocate responsibility for the remediation of contaminated sites. We will discuss those problems below (section 5).

36. Judgment, para 48.

37. Judgment, para 52.

38. Indeed, the Court stresses that the holder is required to discard the polluting substances and not the contaminated soils (para 52). The French version of the judgment leads to the same conclusion.

4.4. *The concept of “holder”*

In the case of a contaminated site, it is not always easy to identify who has actually caused pollution. The person in charge of the installation, the manufacturer of the defective plant, the owner of the property and the licence-holder or his representatives may be liable for pollution. This question becomes even more complex in the case of diffuse pollution, where multiple causes produce single effects and single causes produce multiple effects. Texaco officers contended that they could not be considered holders of the waste. The Court had therefore to decide whether the Directive's obligations were applicable to a petroleum company which produces hydrocarbons and sells them to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to the company. Bluntly speaking, is the petroleum undertaking holding waste?

As far as the scope of the term “holder” is concerned, it appears to be much broader than that of “owner” because it covers all persons likely to get rid of waste. Similarly, the central importance of the concept of holder is testament to the autonomy of the definition of waste from the concept of abandonment for the purposes of private law, which presupposes full proprietary rights over an object.³⁹

In order to answer the question whether Texaco could be deemed holder of the waste, the Court emphasized the importance of Articles 8 and 15 of the Directive.⁴⁰ With respect to Article 8, it must be borne in mind that the waste, being a substance or an object which the holder “discards”, may be either “discarded” or “managed”. As simply discarding waste is forbidden (Art. 4), the only legitimate means of “discarding” waste is through waste “management”. This “management” covers the collection, transport, recovery and the disposal of waste (Art. 1(d)). In any event, neither the collection nor the transportation may lead to any operations other than recovery or disposal (Art. 8). In the final analysis, all waste must be the object either of “disposal” or of “recovery”. As regards Article 15, it must be pointed out that “in accordance with the polluter pays principle”, the operator must be the one who bears the cost of disposing of waste. Indeed, the importance accorded by the Court to the principles set out Article 174 (2) EC (above sec-

39. It should be pointed out that the concept of “holder” embraces both “the producer of waste” and “the natural or legal person who is in possession of it”. Whereas Art. 1(b), of the Directive defines the producer, possession is not however defined, neither in the Directive nor in Community law in general. The received view on this is that possession entails simply effective control and does not presuppose any proprietary or other legal rights in the object. E.g. A.G. Opinion, para 56.

40. Judgment, paras. 56–57.

tion 4.3.2) is also reflected in the expansive interpretation of the concept of holder.

It follows that the Directive draws a dividing line between, on one hand, “practical recovery or disposal operations, which it makes the responsibility of any ‘holder of waste’, whether producer or possessor”, and on the other hand, “the financial burden of those operations, which, in accordance with the principle of polluter pays, it imposes on the persons who cause the waste, whether they are holders or former holders of the waste or even producers of the product from which the waste came.”⁴¹ Accordingly, the Court took the view that the petroleum undertaking which supplied the service station can be considered to be the holder of that waste only if the leak from the service station’s storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking.⁴²

In this respect, it is important to stress that the violation of a contractual obligation clearly constitutes a condition of imputability, even where the pollution is accidental, and that furthermore this may have serious consequences in terms of both civil and criminal liability.⁴³ Furthermore, the decision of the Court to limit the application of the Directive’s obligations to the producer provided that producer’s conduct has given rise to the waste must be approved. For reasons of economic efficiency and administrative simplicity, the law need not necessarily adhere to reality, and it is sometimes preferable to apply the qualification of polluter or waste holder to a single person rather than a number of people. For instance, the polluter may be the agent who plays a determining role in producing the pollution rather than the person actually causing the pollution (for example, the producer of pesticides rather than the farm worker).⁴⁴

Last, it is important to mention that the legal framework within which the activity of waste production is carried out is irrelevant for the purposes of defining waste producers. The Court has accordingly held that the obligation to keep a register of dangerous wastes under Article 4 of Directive EEC/91/689 applies to all persons, irrespective of whether they constitute an under-

41. Judgment, para 58.

42. Judgment, para 60.

43. Holders of waste might incur liability for the costs of remediation. In addition, criminal liability might arise even where the contaminated soils would not entail significant risks.

44. The fact that the hydrocarbons were accidentally spilled does not preclude that there is no obligation to decontaminate the land in the light of the polluter pays principle. Indeed, the OECD Recommendation of 5 July 1989 on the Application of the Polluter-Pays Principle to Accidental Pollution confirms the intention to apply the principle to accidental as well as chronic pollution and to thereby require potential polluters to contribute financially to preventive measures adopted by public authorities.

taking or establishment, provided that they produce dangerous wastes or carry out activities covered by this Article.⁴⁵

5. The impacts of *Van de Walle* on other national and EU legislation

Following the *Van de Walle* judgment, polluted soils must be regarded as waste within the meaning of Directive EEC/75/442, and which the holder is obliged to discard. This decision which reinforces the position of waste law in relation to other administrative policies did not take root on virgin soil. There may very well be difficulties in applying this requirement in Member States which have specific regulations on the decontamination of soils (section 5(1)), and also as regards the implementation of 2004 Environmental Liability Directive (section 5(2)). The European Commission has already consulted with Member States over whether it would be advisable to exclude contaminated soils from the scope of application of Directive 75/442.⁴⁶ The organization of this consultation is clearly testament to the depth of unease which implementation according to EC law principles of interpretation, that are all things considered too classical, could cause.

5.1. *The impact on Member States' soil decontamination policies*

In addressing the questions raised by the Brussels Court of Appeal, the Court of Justice founded its thinking entirely on EC law, in particular the law regulating wastes. This without doubt constitutes the acid text for Member States which have implemented more sophisticated regulations. As will be shown below, there can be various difficulties in their implementation.

Although several Member States have already adopted legislation specifically covering soil pollution, generally assuming an absolute liability, Community lawmakers have yet to adopt a directive harmonizing national rules on soil protection. The Commission has up until now only identified soil protection as a pressing concern in the Communication "Towards a Thematic Strategy for Soil Protection". As a result, national approaches have varied tremendously ranging from soft policies to more elaborate regimes imposing strict and even retrospective liability. A few Member States have enacted ad hoc regimes seeking to allocate responsibility for the remediation of the contaminated soils. Others have been dealing with that issue through a patch-

45. Case C-115/03, *Eco Eridani*, Order of 28 Sept. 2004, paras. 22–24.

46. E.g. EC Commission, *Final consultation on the legislative elements of the Thematic Strategy on the prevention and recycling of waste*.

work approach, by applying land planning, water, nature conservation, listed installations, and waste management regulations.

At first glance, the *Van de Walle* judgment enhances the applicability of waste management law to contaminated sites in the absence of an ad hoc statutory framework. It follows that all soils contaminated by discarded objects or substances should be treated as waste on the grounds that they fall within the scope of the Directive. Accordingly, by virtue of the obligations laid down in Directive 75/442/EEC, those contaminated soils must be the object either of “disposal” (land filling operations) or of “recovery” (decontamination in order to produce secondary raw materials). Of particular salience in this respect is the question as to whether the obligation placed on the person holding the waste to discard it is exclusively derived from the waste legislation, irrespective of “other national laws governing the conditions of use, protection or decontamination of the land where the spill occurred.”⁴⁷ At first glance, no easy answer can be given to that question.

A literal reading of paragraph 52 of the annotated judgment would lead to the conclusion that national laws on waste implementing the obligations enshrined in Directive EEC/75/442 must now take precedence over other national provisions specifically covering the decontamination of soils which have been adopted, among others, in the United Kingdom, Belgium, Denmark and Germany. The classification as waste of contaminated soils leads to the application of the whole corpus of provisions contained in Directive 75/442 and, where the relevant waste is dangerous, of Directive EEC/91/689. It should also be noted that some sites could fall within the ambit of Directive 1999/31 on the landfill of waste which applies “to any landfill” (Art. 3(1)), which in turn is defined as “a waste disposal site for the deposit of the waste onto or into land...” (Art. 2(g)). Member States which have adopted such legislation may always structure their regulatory frameworks such as to reconcile EC waste law with national rules on the decontamination of polluted soils.

This does not however mean that any soil polluted by waste must be treated or excavated in accordance with the provisions of waste law. Nonetheless, where the pollutants can be eliminated, the soils decontaminated *in situ* will no longer be considered to be waste.⁴⁸ Where treatment *in situ* is not feasible for either technical or economic reasons, the polluted soil must be

47. Judgment, para 52.

48. The administrative control, required as soon as the substance stops being used in accordance with its normal use, must be maintained until the waste is definitively disposed of or recovered (*Niselli, supra* note 31, para 52). Unless and until the residue has been entirely transformed into a secondary raw material through recovery, it must be considered as waste (Case C-444/00, *Mayer Parry*, [2003] ECR I-6163, para 83).

regarded as waste. Where decontamination would not be viable under a cost-benefit analysis, the adoption of specific administrative measures targeted at preventing any expansion of the polluted area is expedient. The adoption of such measures would indicate that the situation were not tantamount to the abandonment of the waste, outlawed under Article 4 of the Directive. Moreover, this pollution containment measure is to be equated to a waste disposal operation within the meaning of Directive EEC/75/442.

5.2. *The impact on the 2004 Environmental Liability Directive*

After fifteen years of delays and setbacks, the European Parliament and Council of Ministers managed on 21 April 2004 to adopt Directive 2004/35/EC on environmental responsibility with regard to the prevention and remedying of environmental damage. This Directive occupies the territory of both civil and administrative law, containing concepts particular to both fields. Directive 2004/35/EC is founded on a presumption of responsibility on the part of the operator of the listed installation, if not of the State authorities, which focuses on the causal origin of the damage (high-risk activities, classified installations, transport of dangerous substances) as well as on the actual nature of the ecological damage (damage to species and protected areas, damage to waters and soils). It is furthermore important to draw a distinction between ecological damage and activities likely to cause such damage. On the basis of the presumption that they are dangerous to biodiversity, waters or soils, a range of activities (the majority of which are already subject to EC environmental law) are listed in Annex III of Directive 2004/35/EC. It is in this context important to stress that no EC obligations related chiefly to soil decontamination are included in this Annex. Therefore, a soil can be contaminated within the meaning of Directive 2004/35 only by one of the activities listed in Annex III (e.g. waste management operations), provided that such activity is “occupational” in nature.⁴⁹

Environmental damage unfolds in a similar way to Russian matryoshka dolls. Nonetheless, the framers of the Directive thought fit to specify that damage was envisioned as “a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”.⁵⁰ Both direct and indirectly caused damages are therefore covered.⁵¹

49. Art. 2(7).

50. Art. 2(2).

51. Fourth recital of the preamble.

Damage is characterized by either the adverse change to a “natural resource” or the impairment of a “service”. The former term is read in a sense that is narrower than the general understanding of that term, whilst “resources” refers exclusively to “protected species and natural habitats, waters and land”.⁵² Even if the contamination of soils could cause damage to biodiversity and to waters, it goes without saying that the majority of decontamination measures for industrial sites falls under the concept of “damage affecting soils”.⁵³ Although the concepts of “damage to protected species and natural habitats” and “water damage” have more of an ecological than an anthropocentric dimension, the notion of “land damage” is itself located within a purely anthropocentric perspective. In fact, in order for there to be a damage to the soil, it is necessary that the contamination create “a significant risk of human health being affected”.⁵⁴

How is the *Van de Walle* case to be reconciled with Directive 2004/35? There are a number of a priori difficulties. First, the obligation to remove polluted soils (understood as waste within the meaning of Directive 75/442/EC) is binding irrespective of whether the soils must be excavated due to an obligation under administrative law (nature, soil and water protection, regulation of classified installations) or private law. On the other hand, according to Directive 2004/35, this obligation only applies when the contamination is likely to have “adverse effects on human health”. Second, Directive 2004/35 stresses the necessity of carrying out, prior to the adoption of preventive or remedial measures, a risk assessment study for the decontamination of the soils.⁵⁵ Proving the risk of adverse effects on human health is known not to be an easy task. Moreover, the “significant danger for human health” factor appears to take a back seat in the determination of the intervention thresholds provided for under the majority of national soil protection regimes. These generally require the clean up of contaminated soils once a particular threshold of pollutants (hydrocarbons, heavy metals) has been crossed, without the need for the authorities to demonstrate the presence of a significant danger for human health. Therefore, in some Member States, a heavily polluted soil must be decontaminated even where it does not represent a direct

52. Art. 2(12).

53. McIntyre, cited *supra* note 1, 125.

54. Art. 2(1)(c).

55. Preamble, seventh recital. Furthermore, Annex II, which sets out a common framework for choosing the most appropriate levels for ensuring the reparation of environmental damage, provides that the existence of a significant risk of adversely affecting human health must be assessed through risk-assessment procedures which take “into account the characteristic and function of the soil, the type and concentration of the harmful substances preparations, organisms or micro-organisms, their risk and the possibility of their dispersion” (point 2).

threat to human health. The same considerations apply in respect of Directive 75/442/EEC.

Third, the regime specific to soils provided for under Directive 2004/35 has been criticized on the grounds that the limitation of its applicability to future damage compromised its efficacy,⁵⁶ in spite of the fact that Europe now faces a historic problem of soil pollution.⁵⁷ Of course this non-retroactivity clause should be nuanced by a reading of the *Van de Walle* case.⁵⁸ That the waste might have been discharged into the soil ten or even twenty years earlier does not prevent its holder from still being subject to the obligations flowing from Directive 75/442/EEC. The conclusion follows, as inexorably as night follows day, that the application of the law on waste in the light of *Van de Walle* is thus clearly enhanced in relation to the regime provided for under Directive 2004/35/EC in terms of both flexibility and speed.

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56. Art. 17 of the directive provides that it shall not apply to damage caused by an emission, event or incident that took place before its entry into force.

57. European Environment Agency, *Europe's Environment: The Third Assessment* (Copenhagen, 2003), 47–48.

58. McIntyre, *op. cit. supra* note 1, 124.

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