

# Waste in the EU Law

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## **Abstract**

*Definition of waste in the EU legal regulations is very vague. Therefore, the Court of Justice of the EU and the European Commission (by its guidance) try to help to the national courts with the interpretation of the concept of waste. There are many judgements that offer examples and circumstances that should be considered when defining a substance as waste. However, the fact that the concept of waste depends on the verb 'discard' which should be interpreted according to the relevant circumstances in the particular cases causes that the concept of waste remains still very vague. The situation is also complicated by the fact that the concept of waste does not have the same meaning with other relevant international documents. The aim of the paper is to collect the last development of the concept of waste in the judgements of the Court of Justice of the EU. In the paper, there are pointed out how the relevant circumstances of the word 'discard' should be considered in the present view of the Court of Justice of the EU. In conclusions, we try to summary the main categories of waste regarding the interpretation of the verb 'discard'.*

**Keywords:** waste, discard, by-products, circumstances, environment protection, Waste Framework Directive (WFD).

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## **1. Introduction**

The European Union has one of the strictest environmental policies in the world. The EU waste management policy sets priority targets on waste prevention in the ascending order of reuse, recycle and energy recovery and the deposition of waste in landfills and incineration without energy recovery is the most undesirable options.<sup>3</sup> In the primary law, article 191 (2) TFEU point out that *Union policy on the environment shall aim at a high level of protection*. This is the legal base for adoption of secondary legislative tools to protect the environment including the waste management. There was

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<sup>3</sup> Stoeva, K., Alriksson, S. 2017. Influence of recycling programmes on waste separation behaviour. In: *Waste Management*, vol. 68, pages 732–741. <https://doi.org/10.1016/j.wasman.2017.06.005>.

adopted three framework directives on the waste. The first one was adopted in 1975. It was replaced by the new one in 2006. The last one was adopted two years later, in 2008, and it is still valid after several amendments. The last one is seen as a milestone of modern waste management in the EU<sup>4</sup> and a progressive step towards improving the whole life-cycle of products and resources.<sup>5</sup> In order for this modern management to work, it is necessary to have clearly defined concepts, especially basic concepts, such as the concept of waste.<sup>6</sup> Therefore, all three directives were accompanied by the judgements of the Court of Justice of the EU (hereinafter as ECJ) in relation to the concept of waste.<sup>7</sup> The effort of the ECJ is to help national courts understand the concept of waste; however, the uncertainty of the interpretation persists even after 30 years whether the substance is waste or non-waste. 'It remains unclear exactly how the concept should be defined.'<sup>8</sup>

Moreover, the ECJ 'confirmed the very broad reach of the definition of waste'.<sup>9</sup> This also confirms Tromans when argued that the EU 'legislation has developed considerably since the 1989 Waste Strategy, but robust definitions of waste still remain elusive, despite extensive litigation; it is a sophisticated and infuriatingly complex system which can sometimes lead to absurd results.'<sup>10</sup> Moreover, 'The extensive interpretation of waste can possibly result in redundant regulation of materials that are otherwise harmless and may in large constitutes a detriment to the fulfilment of a circular economy.'<sup>11</sup>

The distinction of waste and non-waste is very important with regard to the dealing of the substance. 'Knowledge of what specifically constitute a waste and the

<sup>4</sup> Zhang, Ch., Hu, M., Di Maio, F., Sprecher, B., Yang, X., Tukker, A. 2022. An overview of the waste hierarchy framework for analyzing the circularity in construction and demolition waste management in Europe. In: *Science of the Total Environment*, vol. 803, 149,892. <https://doi.org/10.1016/j.scito.tenv.2021.149,892>.

<sup>5</sup> Nash, H. A. 2009. The Revised Directive on Waste: Resolving Legislative Tensions in Waste Management? In: *Journal of Environmental Law*, vol. 21 (1), pages 139–149. <https://doi.org/10.1093/jel/eqp001>.

<sup>6</sup> e.g. Smith, J. T. 1993. The Challenges of Environmentally Sound and Efficient Regulation of Waste – The Need for Enhanced International Understanding. In: *Journal of Environmental Law*, vol. 5 (1), pages 91–107. <https://doi.org/10.1093/jel/5.1.91>. Bradshaw, C. 2018. Waste Law and the Value of Food. In: *Journal of Environmental Law*, vol. 30 (2), pages 311–331. <https://doi.org/10.1093/jel/eqy009>.

<sup>7</sup> One of the first cases related to the interpretation of waste according to the directive from 1975 were the joined cases: Judgment of the Court (First Chamber) of 28 March 1990. Joined cases C-206/88 and C-207/88. Criminal proceedings against G. Vessoso and G. Zanetti.

<sup>8</sup> Tieman, J. 2000. The Broad Concept of Waste and the Case of ARCO-Chemie and Hees-EPON. In: *European Energy and Environmental Law Review*, vol. 9 (12), pages 327–335. <https://doi.org/10.54648/321034>.

<sup>9</sup> Bontoux, L., Leone, F. 1997. The legal definition of waste and its impact on waste management in Europe. A report prepared by IPTS for the Committee for Environment, Public Health and Consumer Protection of the European Parliament. European Commission, Joint Research Centre (JRC), Institute for Prospective Technological Studies (IPTC), Isla de la Cartuja, Sevilla, Spain.

<sup>10</sup> Tromans, S. 2001. EC Waste Law – A Complete Mess? In: *Journal of Environmental Law*, vol. 13 (2), pages 133–156. <http://www.jstor.org/stable/44248314>.

<sup>11</sup> Johansson, O. 2023. The End-of-Waste for the Transition to Circular Economy: A Legal Review of the European Union Waste Framework Directive. In: *Environmental Policy and Law*, vol. 53 (2023), pages 167–179. <https://doi.org/10.3233/EPL-220064>.

categories of wastes determine how wastes are dealt with or managed.’<sup>12</sup> ‘For example, waste can only be accepted by those operators permitted to receive waste, which reduces the number of potential outlets.’<sup>13</sup> The conditions for dealing with the substance as waste are regulated by the directive 2008/98/EC often named as Waste Framework Directive (WFD).

According to the article 3 of WFD *waste means any substance or object which the holder discards or intends or is required to discard*. We can compare this definition with the definition of waste according to the Cambridge dictionary: ‘*Waste is unwanted matter or material of any type, especially what is left after useful substances or parts have been removed.*’ Both definitions have a common subjective element. It is the holder’s intention. This subjective element could be inferred only from his actions. Fluck defined the verb discard as ‘an action whose purpose is to desist from using a substance or object for its original purpose, to liberate it from that intended purpose, or to de-dedicate it, without immediately allocating it to a new intended purpose, certain recovery activities being necessary to make it fit once again for its former purpose (recovery), or the substance or object being definitively being withdrawn from any further use (disposal)’.<sup>14</sup> Fluck’s definition of the verb ‘discard’ is very broad because the waste is all substances and objects that lost their original purposes without immediately allocating it to a new purpose. However, the EU definition of waste as well as the general approach in the EU legislation does not make a distinction whether waste is used for other purposes (e.g. re-use, recycle, energy recovery, etc.) or disposed of. The ECJ ‘has not made a sufficiently clear distinction between the two regulatory objectives of the Directive, namely the provision of an overarching definition for all waste regulation in EC law and the imposition of an obligation of care when waste is subjected to disposal or recovery operations’.<sup>15</sup> This is the important distinction between the terminology used in legally binding EU law and in nonbinding international guidelines and standards. ‘The latter define “waste” only when “waste” cannot exercise any further functions and cannot be recovered, in all the other cases the preferred terminology is “material”’.<sup>16</sup> ‘This fact gave rise to conflicting opinions as to whether reused materials should fall within or outside the ambit of waste legislation.’<sup>17</sup> Some authors argue that ‘the current waste definitions at the European level are not satisfactory and will not lead toward sustainable waste management’.<sup>18</sup> Therefore they

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<sup>12</sup> Amasuomo, E., Baird, J. 2016. The Concept of Waste and Waste Management. In: *Journal of Management and Sustainability*, vol. 6 (4), pages 88–96. <https://doi.org/10.5539/jms.v6n4p88>.

<sup>13</sup> Johansson, N., Forsgren, C. 2020. Is this the end of end-of-waste? Uncovering the space between waste and products. In: *Resources, Conservation and Recycling*, vol. 155, <https://doi.org/10.1016/j.resconrec.2019.104656>.

<sup>14</sup> Fluck, J. 1994. The Term ‘Waste’ in EU Law.’ In: *European Environmental law Review*. In: *European Energy and Environmental Law Review*, vol. 3 (3), pages 79–84. <https://doi.org/10.54648/eelr1994013>.

<sup>15</sup> Cheyne, I. 2002. The Definition of Waste in EC Law. In: *Journal of Environmental Law*, vol. 14 (1), pages 61–73. <http://www.jstor.org/stable/44248349>.

<sup>16</sup> European Commission. 2021. Guidance on Waste Definitions. <https://ec.europa.eu/docsroom/documents/46954/attachments/8/translations/en/renditions/pdf>.

<sup>17</sup> De Sadeleer, N. 2005. New Perspectives on the Definition of Waste in EC. In: *Journal of European Environmental & Planning Law*, vol. 1(4), pages 46–58. <https://ssrn.com/abstract=2293356>.

<sup>18</sup> Pongrácz, E., Pohjola, V. J. 2004. Redefining waste, the concept of ownership and the role of waste

try to create their own waste classification. The first one came from the year 1997: 'Class 1: Non-wanted things created not intended, or not avoided, with no purpose; Class 2: Things that were given a finite purpose thus destined to become useless after fulfilling it; Class 3: Things with well-defined purpose, but their performance ceased being acceptable; Class 4: Things with well-defined purpose, and acceptable performance, but their users failed to use them for the intended purpose.'<sup>19</sup> Their rewrite definition of waste was published in 2004: 'Waste is a man-made thing that has no purpose; or is not able to perform with respect to its purpose.'<sup>20</sup> The definition, they are further refined to: 'Waste is a man-made thing, which in a given time and place, in its actual Structure and State, is not useful to its owner, or an output that does not have any owner.'<sup>21</sup> On the other hand, Thürer et al. considered waste as 'any system input (transformed resources, transforming resources) that is not transformed into a system output that is valued by customers (fulfilled customer demand, this is neither unfulfilled nor exceeded) just-in-time'<sup>22</sup> and they outlined, 'two distinct waste types: (i) obvious waste, to refer to any waste that can be reduced without creating another form of waste; and (ii) buffer waste, to refer to any waste that cannot be reduced without creating another waste.'<sup>23</sup> 'If waste categories are clearer and the ways in which the wastes can be used are properly codified, then it is likely that the valuable "resources" contained in the waste could be recovered more effectively.'<sup>24</sup> However, the ECJ is only entitled to provide an interpretation of EU law including the concept of waste. The ECJ took into account the subjective element of the holder's intention and not the objective fact that the material should be re-use or recovery.<sup>25</sup> 'Therefore, a material can only be regarded as a waste when the owner labels it as such.'<sup>26</sup> It is a true statement for many cases judged by the ECJ; however, there are also cases when the intention of the holder is not given clearly. The aim of the paper is to collect the last development of the concept of waste in the judgements of the Court of Justice of the EU. In the paper, there are

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management. In: *Resources, Conservation and Recycling*, vol. 40, pages 141–153, [https://doi.org/10.1016/S0921-3449\(03\)00057-0](https://doi.org/10.1016/S0921-3449(03)00057-0).

<sup>19</sup> Pongrácz, E., Pohjola, V. J. 1997. The conceptual model of waste management. In: *Proceedings of the ENTREE '97*, 12–14 November 1997, Sophia Antipolis, France, 1997, pages 65–77.

<sup>20</sup> Pongrácz, E., Pohjola, V. J., op. cit. (Redefining waste...), p. 141–153.

<sup>21</sup> Pongrácz, E., Pohjola, V. J. 1999. The importance of the concept of ownership in waste management. In: *Proceedings of the 15<sup>th</sup> International Conference on Solid Waste Technology and Management*, 12–15 December 1999, Philadelphia.

<sup>22</sup> Thürer, M., Tomašević, I., Stevenson, M. 2017. On the meaning of 'Waste': review and definition. In: *Production Planning & Control*, vol. 28(3), pages 244–255. <https://doi.org/10.1080/09537287.2016.1264640>.

<sup>23</sup> Ibid, p. 244–255.

<sup>24</sup> Gharfalkar, M., Court, R., Campbell, C., Ali, Z., Hillier, G. 2015. Analysis of waste hierarchy in the European waste directive 2008/98/EC. In: *Waste Management*, vol. 39, pages 305–313. <https://doi.org/10.1016/j.wasman.2015.02.007>.

<sup>25</sup> Judgment of the Court (First Chamber) of 28 March 1990. Joined cases C-206/88 and C-207/88. Criminal proceedings against G. Vessoso and G. Zanetti: *The concept of waste, within the meaning of Article 1 of Council Directive 75/442/EEC and Article 1 of Council Directive 78/319/EEC, is not to be understood as excluding substances and objects which are capable of economic reutilization*.

<sup>26</sup> Dijkema, G. P. J., Reuter, M. A., Verhoef, E. V. 2000. A new paradigm for waste management. In: *Waste Management*, vol. 20(8), pages 633–638. [https://doi.org/10.1016/S0956-053X\(00\)00052-0](https://doi.org/10.1016/S0956-053X(00)00052-0).

pointed out how the relevant circumstances of the word ‘discard’ should be considered when defining the waste in general and in the special cases as well and to point out the situations when the waste is created regardless of the will of its holder. In conclusions, we try to summary the main categories of waste regarding the interpretation of the verb ‘discard’.

## 2. Scope of EU Waste legislation

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives (hereinafter as Waste Framework Directive or WFD) is one of the main EU legal regulations in the field of waste management and policy in the internal EU market. The scope of application does not really leave a lot of room for varied national implementation,<sup>27</sup> in spite of this fact, there are differences in how the member states manage their municipal waste.<sup>28</sup>

Article 2 of Waste Framework Directive defines its subject matter in two ways. Firstly, article 2(1) of the WFD excludes from the scope of the directive objects such as *gaseous effluents emitted into the atmosphere; land (in situ) including unexcavated contaminated soil and buildings permanently connected with land; uncontaminated soil; radioactive waste; decommissioned explosives; faecal matter, straw and other natural non-hazardous agricultural and forestry material (...)*. Secondly, article 2 (2) of the WFD excludes from its scope the waste to the extent that it is covered by other EU legislation. It seems that the Waste Framework Directive shall apply to special wastes only subsidiary (e.g. waste waters; animal by-products; carcasses of animals that have died other than by being slaughtered; waste resulting from prospecting, extraction, treatment and storage of mineral resources, etc.).

The concept of *other EU legislation* must be interpreted in the sense of the judgements of the ECJ. There are three important points. The first one, the ECJ provided the interpretation at the time when the Council Directive 75/442/EEC of 15 July 1975 on waste (hereinafter directive 1975) was in force. The directive 1975 (after its amendment by the Council Directive 91/156/EEC) excluded from its scope some types of waste *where they are already covered by other legislation*. According to the ECJ judgement C-252/05<sup>29</sup> the expression ‘other legislation’ in Article 2(1)(b) of Directive 75/442 (nowadays article 2 – 2 – a – of WFD) may also refer to national legislation. The present directive, Waste Framework Directive, added the word ‘Community’ in the expression ‘other legislation.’ We could conclude that according to the article 2 (2) of WFD including ‘other Community legislation’ (i.e. other EU legislation after December 1<sup>st</sup> 2009) and the quoted judgment of the ECJ, the expression may refer, first of all, EU legislation which can be accepted as the special legal regulation of some types of waste

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<sup>27</sup> Alaranta, J., Turunen, T. 2021. How to Reach a Safe Circular Economy? —Perspectives on Reconciling the Waste, Product and Chemicals Regulation. In: *Journal of Environmental Law*, vol. 33 (1), page 113 – 136. <https://doi.org/10.1093/jel/eqaa016>.

<sup>28</sup> Valenčíková, Fandel, 2023.

<sup>29</sup> Judgment of the Court of 10 May 2007 C-252/05 *the Queen on the application of Thames Water Utilities Ltd v South East London Division, Bromley Magistrates’ Court* (District Judge Carr), subpar. 32

or national legislation adopted on the base of EU legislation, i.e. national legislation adopted because of the transposition of a directive or because the EU legislation authorizes the Member States to adopt their own legal rules in special issues that are not directly regulated by the EU law.

The second one, the ECJ followed the interpretation on the example of waste waters which were excluded from the scope of the directive 1975 and are excluded from the scope of the Waste Framework Directive as well. However, the directive 1975 excluded the waste in liquid form from the expression of waste waters, and the WFD does not stipulate any exceptions from this expression. However, the judgement of C-629/19<sup>30</sup> does not reflect this changed. *Under Article 2(2)(a) of Directive 2008/98, waste water, with the exception of waste in liquid form, is excluded from the scope of that directive, provided, however, that waste water is already covered by 'other [EU] legislation'.*<sup>31</sup>

The third one, the interpretation of the expression 'other (EU) legislation' enable expressly to classify the particular types of waste named in that provision (article 2 – 2 – of WFD) as *waste within the meaning of the directive, while providing that waste may, in certain circumstances, fall outside the scope of the directive and, therefore, the general legal regime for waste which it establishes.*<sup>32</sup> In other words, the types of waste named in the article 2 (2) of WFD are generally regulated by Waste Framework Directive and only *in certain circumstances* are regulated by the special 'other legislation' and fall outside the scope of WFD. The expression '*in certain circumstances*' means that *the rules in question must not merely relate to a particular substance, but must contain precise provisions organising its management as waste within the meaning of Article 1(d) of the directive. Otherwise, the management of that waste would be organised neither on the basis of Directive 75/442 (nowadays WFD) nor on that of another directive nor on that of national legislation, which would be contrary both to the wording of Article 2(1)(b) of Directive 75/442 (nowadays article 2 – 2 – of WFD) and to the very objective of the Community (EU) legislation on waste.*<sup>33</sup> It means 'other EU legislation' must contain *precise provisions organising the management of waste and ensures a level of protection which is at least equivalent to that resulting from Directive 75/442 (nowadays WFD)*<sup>34</sup> and *ensure a level of protection of the environment equivalent to that guaranteed by Directive 75/442 (nowadays WFD).*<sup>35</sup>

<sup>30</sup> Judgment of the Court of 14 October 2020 C-629/19 *Suppi Austria Produktions-GmbH & Co. KG, Wasserverband 'Region Gratkorn-Gratwein' v. Landeshauptmann von Steiermark*.

<sup>31</sup> Ibid, subpar. 33.

<sup>32</sup> Judgment of the Court of 10 May 2007 C-252/05 *the Queen on the application of Thames Water Utilities Ltd. v. South East London Division, Bromley Magistrates' Court*, subpar. 26.

<sup>33</sup> Ibid, subpar. 33; Judgment of the Court of 11 September 2003 C-114/01 *Avesta Polarit Chrome Oy*, subpar. 52; Judgment of the Court of 29 October 2009 C-188/08 *Commission of the European Communities v Ireland*, subpar. 46.

<sup>34</sup> Judgment of the Court of 29 October 2009 C-188/08 *Commission of the European Communities v. Ireland*, subpar. 46; Judgment of the Court of 10 May 2007 C-252/05 *The Queen on the application of Thames Water Utilities Ltd v South East London Division, Bromley Magistrates' Court*, subpar. 34.

<sup>35</sup> Judgment of the Court of 10 May 2007 C-252/05 *The Queen on the application of Thames Water Utilities*

From the above-mentioned judgements, we can conclude that the concept of ‘other EU legislation’ covers all EU legal acts including the national legal regulations of the EU member states issued on the base of any EU regulation in the field of waste management when both legal regulations (the EU and the national ones as well) are able to ensure a level of environmental protection equivalent to the protection guaranteed by the FWD.

### 3. Definition of waste

In general, waste is perceived negatively as something to be discarded.<sup>36</sup> According to the article 3 of WFD *waste means any substance or object which the holder discards or intends or is required to discard*. Although the definition seems clear at first sight, ‘In practice, though, different interpretation issues have arisen, as a result of which a narrower or wider scope has been given to the notion on a case-by-case basis.’<sup>37</sup> The WFD has ‘possibly received more judicial consideration by the European and national courts than any other environmental provision of the Community’.<sup>38</sup>

The definition of waste was a slightly changed in comparison to the definition in directive 1975. According to the previous definition *waste means any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force*. The language versions such as French, Spanish or German did not change the wording of the key words of definition.<sup>39</sup> However, in the English version, the word ‘dispose of’ was replaced by the word ‘discard’, on which the meaning of definition depends.<sup>40</sup> The ECJ confirmed that the classification of waste is to be inferred primarily from the holder’s actions and the meaning of the term ‘discard’.<sup>41</sup> ‘It was assumed that the purpose behind the use of the expression “discard”

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*Ltd. v. South East London Division, Bromley Magistrates’ Court*, subpar. 38.

<sup>36</sup> Gharfalkar, M., Court, R., Campbell, C., Ali, Z., Hillier, G. 2015. Analysis of waste hierarchy in the European waste directive 2008/98/EC. In: *Waste Management*, vol. 39, pages 305–313. <https://doi.org/10.1016/j.wasman.2015.02.007>.

<sup>37</sup> Feltkamp, R., Hermans, T. 2023. The (Legal) Concept of Waste: An Obstacle for Exnovating Linear Economic Activities and the Transition to a Circular Economy (In the Brussels Capital Region)? In: *European Energy and Environmental Law Review*, vol. 32 (3), pages 114–135. <https://doi.org/10.54648/eelr2023008>.

<sup>38</sup> Pocklington, D. 2006. The Significance of the Proposed Changes to the Waste Framework Directive. In: *European Energy and Environmental Law Review*, vol. 15 (3), pages 75–87. <https://doi.org/10.54648/eelr2006008>.

<sup>39</sup> The words ‘discard’ or ‘dispose’ sounds in French ‘défaire’, in German ‘entledigen’ and in Spanish ‘se desprenden’.

<sup>40</sup> Cheyne, I. 2002. The Definition of Waste in EC Law. In: *Journal of Environmental Law*, vol. 14 (1), pages 61–73. <http://www.jstor.org/stable/44248349>.

<sup>41</sup> Judgment of the Court of 10 May 2007 C-252/05 *The Queen on the application of Thames Water Utilities Ltd v South East London Division, Bromley Magistrates’ Court*, subpar. 24; Judgment of the Court (Second Chamber) of 7 September 2004 C-1/03 *Criminal proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA*, subpar. 42; Judgment of the Court of 18 December 1997 C-129/96 *Inter-Environnement Wallonie ASBL v. Région Wallonne*, subpar. 26; Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveysystön kuntayhtymän hallitus*, subpar. 22.

instead of “disposal” by the EU Directive was to broaden its reach, and include the widest possible acts of abandonment of things – with or without interest in the final destination of the discarded things.<sup>42</sup> However, ‘The ordinary meaning of discarding makes it problematic to apply to reusable waste and, from a regulatory point of view, it may not be appropriate to extend waste regulation to recovery of such waste because it is less likely to be got rid of in a way which causes pollution.’<sup>43</sup> The ECJ in its judgments and EU Commission with its Guidance on the interpretation of key provisions of Directive 2008/98/EC on waste<sup>44</sup> try to interpret the expression ‘discard’ regarding the legal definition of waste in the WFD.

First of all, the ECJ took into account the interpretation of the verb ‘discard’ *in the light of all circumstances, regard being had to the aim of WFD and the need to ensure that its effectiveness is not undermined*.<sup>45</sup> It means that the interpretation of this verb has to follow the aims of the legal regulations otherwise the EU legislation would be redundant. Moreover, it has to follow not only secondary law but also the aims or particular provisions of the primary law should be taken into account. *The verb ‘to discard’ must be interpreted in the light not only of the aims of Directive 75/442 (nowadays WFD), that is, the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, but also of Article 174 (2) EC (nowadays article 191 – 2 – TFEU). The latter provides that ‘Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the [principle] that preventive action should be taken (...). The verb ‘to discard’ therefore cannot be interpreted restrictively.*<sup>46</sup> It follows that the verb ‘discard’ should be interpreted widely, and it includes not only disposal of waste (operations named in Annexe I of WFD) but also its recovery (operations named in Annexe II of WFD).<sup>47</sup> However, these

<sup>42</sup> Cheyne, I., Purdue, M. 1995. Fitting definition to purpose: the search for a satisfactory definition of waste. In: *Journal of Environmental Law*, vol. 7(2), pages 149–68. <https://doi.org/10.1093/jel/7.2.149>.

<sup>43</sup> Cheyne, I. 2002. The Definition of Waste in EC Law. In: *Journal of Environmental Law*, vol. 14 (1), pages 61–73. <http://www.jstor.org/stable/44248349>.

<sup>44</sup> European Commission. 2012. Guidance on the interpretation of key provisions of Directive 2008/98/EC on waste.

<sup>45</sup> Judgment of the Court (Fifth Chamber) of 15 June 2000 Joined cases C-418/97 and C-419/97 *ARCO Chemie Nederland Ltd v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (C-418/97) and Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v. Directeur van de dienst Milieu en Water van de provincie Gelderland (C-419/97)*, subpar. 88 and 97; Judgment of the Court (First Chamber), 12 December 2013 Joined Cases C-241/12 and C-242/12 *Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV*, subpar. 40; Judgment of the Court (Second Chamber) of 4 July 2019 C-624/17 *Criminal proceedings against Tronex BV*, subpar. 20.

<sup>46</sup> Judgment of the Court of 10 May 2007 C-252/05 *The Queen on the application of Thames Water Utilities Ltd v South East London Division, Bromley Magistrates’ Court* (District Judge Carr), subpar. 27; Judgment of the Court (Fifth Chamber) of 15 June 2000 Joined cases C-418/97 and C-419/97 *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (C-418/97) and Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v. Directeur van de dienst Milieu en Water van de provincie Gelderland (C-419/97)*, subpar. 36–40.

<sup>47</sup> Judgment of the Court of 18 December 1997 C-129/96 *Inter-Environnement Wallonie ASBL v. Région Wallonne*, subpar. 27; Judgment of the Court (First Chamber), 12 December 2013 Joined Cases C-241/12



lists of operations are not named exhaustively (Article 3 – 15 – and – 19 – of WFD). It means that also other operations are able to be considered as ‘recovery’ or ‘disposal’. On the other hand, any substances which undergo operations named at the one of these annexes is not waste per se. The ECJ stated that *that it does not necessarily follow from the fact that certain methods of disposing of or recovering waste are described in those annexes that any substance treated by one of those methods is to be regarded as waste*.<sup>48</sup> The ECJ explained it by the abstract term of some operations: *Although the descriptions of certain methods make express reference waste, others are formulated in more abstract terms and, accordingly, may be applied to raw materials which are not waste*.<sup>49</sup> From the above mentioned, it is clear that the aims of WFD and particular article TFEU should be taken into account. The most crucial term of the waste definition is ‘discard’ that should be interpreted widely. The recovery/disposal operations in annexes of WFD are not very helpful to determine if any substance is a waste. There is a question of what crucial criteria for determining whether any substance is waste should be used. According to the Commission and the ECJ has confirmed this meaning of *the classification of a substance or object as waste is (...), primarily to be inferred from the holder’s actions, which depend on whether or not he intends to discard the substances in question*.<sup>50</sup> The secondary law does not provide any criteria how to determine that the holder intend or not to discard any substance. However, the ECJ has provided some indicators in its judgements.

The circumstances that are not relevant for the concept of waste according to the ECJ judgements are as follows: capability of economic reutilization (*the concept of waste does not exclude substances and objects which are capable of economic reutilization*<sup>51</sup>); commercial value of potential waste and their collection for a commercial purpose (the concept of waste includes *all objects and substances discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or reuse*<sup>52</sup>); place of storage of a substance,

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and C-242/12 *Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV*; subpar. 39; Judgment of the Court (Second Chamber) of 4 July 2019 C-624/17 *Criminal proceedings against Tronex BV*, subpar. 19.

<sup>48</sup> Judgment of the Court (Fifth Chamber) of 15 June 2000 Joined cases C-418/97 and C-419/97 *ARCO Chemie Nederland Ltd v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-418/97) and *Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v. Directeur van de dienst Milieu en Water van de provincie Gelderland* (C-419/97), subpar. 49; Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, subpar. 27.

<sup>49</sup> Judgment of the Court (Fifth Chamber) of 15 June 2000 Joined cases C-418/97 and C-419/97 *ARCO Chemie Nederland Ltd v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-418/97) and *Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v. Directeur van de dienst Milieu en Water van de provincie Gelderland* (C-419/97), subpar. 50.

<sup>50</sup> Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, subpar. 22.

<sup>51</sup> Judgment of the Court (First Chamber) of 28 March 1990. Joined cases C-206/88 and C-207/88. *Criminal proceedings against G. Vessoso and G. Zanetti*, subpar. 9; Judgment of the Court (First Chamber), 12 December 2013 Joined Cases C-241/12 and C-242/12 *Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV*; subpar. 50.

<sup>52</sup> Judgment of the Court (Sixth Chamber) of 25 June 1997. Joined cases C-304/94, C-330/94, C-342/94

its composition or the fact, that the substance does not pose any real risk to human health or the environment;<sup>53</sup> the conditions under which the substances are kept and the length of time for which they are kept, because it per se does not show whether or not the holder intends to discard the substances.<sup>54</sup> Moreover, it is relevant if the holder ‘discard’ a substance intentional or accidental because WFD *would be made redundant in part* if substances which *cause contamination were not considered waste on the sole ground that they were spilled by accident*.<sup>55</sup>

The circumstances that are relevant for the concept of waste according to the ECH judgements are as follows:

a) the substance or object is a production residue; i.e. a product not in itself sought a subsequent use.<sup>56</sup> However, it is necessary to make differences between a production residue that could be a waste and by-product that together with the concept of end-of-waste introduces a distinction between waste and non-waste.<sup>57</sup> In spite of the fact that a production residue and by-product as well are not the primary aim of the production process, the undertakings try to eliminate the quantity of production residues<sup>58</sup> but they do not wish to ‘discard’ a by-product and *intends to exploit or market* (...).<sup>59</sup>

b) *the degree of likelihood that substance will be reused, without any further processing prior to its reuse*.<sup>60</sup> The degree of likelihood to reuse a substance is increasing when *there is also a financial advantage to the holder in so doing* (...). *In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to ‘discard’, but as a genuine product*.<sup>61</sup> The degree of likelihood

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and C-224/95. *Criminal proceedings against Euro Tombesi and Adino Tombesi* (C-304/94), *Roberto Santella* (C-330/94), *Giovanni Muzi and others* (C-342/94) and *Anselmo Savini* (C-224/95), subpar. 52.

<sup>53</sup> Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, subpar. 51.

<sup>54</sup> *Ibid*, subpar. 42 and 47.

<sup>55</sup> Judgment of the Court (Second Chamber) of 7 September 2004 C-1/03 *Criminal proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA*, subpar. 48; Judgment of the Court of 10 May 2007 C-252/05 *The Queen on the application of Thames Water Utilities Ltd v South East London Division, Bromley Magistrates’ Court*, subpar. 28.

<sup>56</sup> Judgment of the Court (Fifth Chamber) of 15 June 2000 Joined cases C-418/97 and C-419/97 *ARCO Chemie Nederland Ltd. v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-418/97) and *Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v. Directeur van de dienst Milieu en Water van de provincie Gelderland* (C-419/97), subpar. 84; Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, subpar. 32.

<sup>57</sup> European Commission. 2012. Guidance on the interpretation of key provisions of Directive 2008/98/EC on waste, p. 10; Judgment of the Court (Fifth Chamber) of 3 September 2020 Joined-Case C-21/19 to C-23/19 *Criminal proceedings against XN and Others*, subpar. 36–38.

<sup>58</sup> Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, subpar. 32.

<sup>59</sup> *Ibid*, subpar. 34.

<sup>60</sup> *Ibid*, subpar. 37; Judgment of the Court (Second Chamber) of 4 July 2019 C-624/17 *Criminal proceedings against Tronex BV*, subpar. 23; Judgment of the Court (Third Chamber) of 18 December 2007, C-263/05 *Commission of the European Communities v. Italian Republic*, subpar. 38.

<sup>61</sup> Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, subpar. 37; Judgment of the Court (Second Chamber) of 4 July

has to be very high equal to near certainty when the concept of waste should be interpreted widely in order to limit its inherent risks and pollution.<sup>62</sup> Therefore the reuse of a substance *is not a mere possibility but a certainty, without any further processing prior to reuse and its production is an integral part of the production process*<sup>63</sup> or *after undergoing prior processing without, however, requiring a recovery operation within the meaning of Annexe II B to that directive* (nowadays Annex II of WFD).<sup>64</sup> On the contrary, if the reuse is not certain and is only foreseeable in the longer term, with the result that a substance in question can only be regarded as production residue which its holder intends or is required to discard and thus falls within the concept of waste.<sup>65</sup>

c) the fact that the substance is a residue for which no use other than disposal can be envisaged or a residue whose composition is not suitable for the use made of it or where special precautions must be taken when it is used owing to the environmentally hazardous nature of its composition.<sup>66</sup>

d) the fact that the way of use is a common method of recovering waste and that substance is commonly regarded as waste;<sup>67</sup> however, the fact that a substance is the result of a recovery operation is only one of the factors which must be taken into consideration for the purpose of determining whether that substance is still waste.<sup>68</sup>

e) the substance falls within the concept of waste if the substance is not or is no longer of any use to its holder because those substances constitutes a burden which a holder will see to discard.<sup>69</sup>

f) we mentioned above the fact, that the concept of waste does not depend on the place of storage of a substance. However the mere fact that the substance *re-use requires long-term storage operations may constitute a burden to the holder and is also potentially the cause of precisely the environmental pollution which the directive seeks to reduce that re-use cannot be described as a certainty and is foreseeable only in the longer term, and accordingly the substance in question must, as a general rule, be regarded as waste*.<sup>70</sup>

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2019 C-624/17 *Criminal proceedings against Tronex BV*, subpar. 23.

<sup>62</sup> Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveysystyön kuntayhtymän hallitus*, subpar. 36.

<sup>63</sup> Ibid, subpar. 36.

<sup>64</sup> Judgment of the Court (Second Chamber) of 11 November 2004 C-457/02 *Criminal proceedings against Antonio Niselli*, subpar. 53.

<sup>65</sup> Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveysystyön kuntayhtymän hallitus*, subpar. 38.

<sup>66</sup> Judgment of the Court (Fifth Chamber) of 15 June 2000 Joined cases C-418/97 and C-419/97 *ARCO Chemie Nederland Ltd v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-418/97) and *Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v. Directeur van de dienst Milieu en Water van de provincie Gelderland* (C-419/97), subpar. 86 – 88.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Judgment of the Court (Second Chamber) of 4 July 2019 C-624/17 *Criminal proceedings against Tronex BV*, subpar. 22; Judgment of the Court (First Chamber), 12 December 2013 Joined Cases C-241/12 and C-242/12 *Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV*, subpar. 53.

<sup>70</sup> Judgment of the Court (Third Chamber) of 18 December 2007, C-263/05 *Commission of the European Communities v. Italian Republic*, subpar. 39; Judgment of the Court (Sixth Chamber) of 18 April 2002 C-

g) a substance falls within the concept of waste if the working order of the substance is not safeguarded from transport damage by means of adequate packing. *Without such packaging, it must be presumed, in so far as the holder accepts the risk of those substances being damaged during transport that he intends to discard them.*<sup>71</sup>

h) a substance falls within the concept of waste if the object *suffers defects that require repair, such that it cannot be used for its original purpose, that appliance constitutes a burden for its holder and must thus be regarded as waste, in so far as there is no certainty that the holder will actually have it repaired.*<sup>72</sup> Moreover, the way in which a holder treats a fault or defect may provide an indication as to whether there is an act, intention or obligation to discard the goods concerned. Thus, when he sells or transfers those goods to a third party without first having ascertained their working conditions, it must be held that those goods represent for the holder a burden which he discards, with the result that those goods must be classified as 'waste' within the meaning of Directive 2008/98.<sup>73</sup>

The WFD does not provide any single decisive criterion whether the holder intends to discard a substance or an object. The ECJ provided in its judgments some decisive criteria that should be considered when defining the concept of waste. However, in any case *whether a substance is in fact 'waste' within the meaning of the directive must be determined in the light of all the circumstances, the account being taken of the aim of the directive and the need to ensure that its effectiveness is not undermined.*<sup>74</sup> Therefore the concept of waste and the term 'discard' remains still very indefinite. *It must be noted that no single factor or indicator is conclusive. It is always necessary to consider all the circumstances. Hence, none of the criteria provided above paragraphs are intended to take precedence over real-life cases, since the circumstances of those cases may lead to other results.*<sup>75</sup> Therefore, we introduce some extractions from the cases to understand the above-mentioned criteria in real-life.

### 3.1. Sewage sludge

In the recent case, the ECJ reviewed if *a sewage sludge arising during the joint treatment of industrial or residential and municipal waste water in a sewage treatment plant which is incinerated in a waste incineration plant for the purposes of energy*

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9/00 *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, subpar. 38; Judgment of the Court (Fourth Chamber), 3 October 2013, C-113/12 *Donal Brady v. Environmental Protection Agency*, subpar. 54; Judgment of the Court (Third Chamber) of 18 December 2007, C-194/05 *Commission of the European Communities v. Italian Republic*, subpar. 40.

<sup>71</sup> Judgment of the Court (Second Chamber) of 4 July 2019 C-624/17 *Criminal proceedings against Tronex BV*, subpar. 41.

<sup>72</sup> *Ibid.*, subpar. 36.

<sup>73</sup> *Ibid.*, subpar. 39.

<sup>74</sup> Judgment of the Court (Third Chamber) of 18 December 2007, C-194/05 *Commission of the European Communities v. Italian Republic*, subpar. 41.

<sup>75</sup> European Commission. 2012. Guidance on the interpretation of key provisions of Directive 2008/98/EC on waste, p. 11.

*recovery by generating steam must be classified as waste.*<sup>76</sup>

First of all, there is no doubt that the industrial waste water joined together with the residential and municipal waste water is waste. There is clear that the holders of residential and municipal waste water discard or intend to discard of the waters. If that waters are joined with industrial waste waters without possibility to separate it again, that waters are classified as waste regardless the proportion of industrial and communal waste waters. However, the waste waters undergo the purification prior to the discharge into a water source and the results of this purification – sewage sludge – may contain a pathogen or a heavy metal which is a risk for the human health and environment as well. There is a question of the sewage sludge maintains its status of waste or could be considered as the end of waste when is used for the energetic purposes has undergone a recovery operation. *In a situation where incineration of sewage sludge consists in 'recovery' (...) operations, that sludge must still be classified as 'waste' when it is incinerated.*<sup>77</sup>

*A change of status (...) would thus presuppose that the treatment (...) makes it possible to obtain sewage sludge with a high level of protection of the environment and human health (...) which is, in particular, free from any dangerous substance (...) before the sewage sludge is incinerated. It must in particular be determined, (...) that the sewage sludge meets the statutory limit values for pollutants and that its incineration does not lead to overall adverse environmental or human health impacts. On the contrary assumption, it should be considered that that sewage sludge is still covered by the concept of 'waste' at the time of that incineration.*<sup>78</sup>

Waste recovery can end the waste status of a substance only if it does not have negative effects on the environment and human health. It follows from the above that the classification of sewage sludge as waste depends on the answers to three consecutive questions: (1) whether sewage sludge contains dangerous substances after the treatment of waste waters and, if so, (2) whether these meet the limit values for pollutants and, if so, (3) whether its incineration does not have an adverse effect on the environment and human health.

### 3.2. Slurry produced in a piggery

The ECJ discussed in more cases the waste concept in relations to the slurry. In case *Commission v. Spain*, the ECJ had decided the question if slurry and animal carcasses from a livestock farm is a waste. The ECJ considered animal carcasses as waste because carcasses cannot be reused for the purposes of human consumption and the holder of those carcasses is obliged to discard them.<sup>79</sup> However, the slurry does not

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<sup>76</sup> Judgment of the Court of 14 October 2020 C-629/19 *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband 'Region Gratkorn-Gratwein' v. Landeshauptmann von Steiermark*, subpar. 31.

<sup>77</sup> Judgment of the Court of 14 October 2020 C-629/19 *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband 'Region Gratkorn-Gratwein' v. Landeshauptmann von Steiermark*, subpar. 66.

<sup>78</sup> *Ibid*, subpar. 67 – 70.

<sup>79</sup> Judgment of the Court (Third Chamber) of 8 September 2005 C-121/03 *Commission of the European Communities v. Kingdom of Spain*, subpar. 63–64.

be wasting without other considerations.

*If the slurry is used as an agricultural fertiliser in the context of rules for spreading in accordance with good agricultural practice (...), the persons running those farms are not therefore seeking to discard it.*<sup>80</sup> However, there should be fulfilled also these conditions: (1) the slurry is used as soil fertiliser *spreading in accordance with good agricultural practice*; (2) *on clearly identified parcels* and (3) *its storage is limited to the needs of those spreading operations.*<sup>81</sup>

First condition means that if the slurry is used according to the good agricultural practices, the slurry is considered as by-product when other conditions mentioned below are met. However, if the good agricultural practices are interrupted, there is still not any proof that the slurry should be considered as waste.<sup>82</sup> Moreover, if the slurry producer delivers that by-product to the relevant third parties, in spite of this fact *that slurry may, in some circumstances, become waste after its delivery, in particular if it were to become apparent that it is ultimately discharged by those third parties into the environment in an uncontrolled manner, in conditions which enable it to be regarded as waste.*<sup>83</sup> It is very uncertain situation for slurry producer. At the time of the slurry delivery the slurry holder does not know how the third party will really apply slurry into the environment – in a controlled manner, that (s)he delivered slurry as a by-product – or in an uncontrolled manner, so (s)he delivered slurry as a waste because according to the ECJ judgement *the person who is in fact in possession of products immediately before they become waste must be regarded as having ‘produced’ that waste.*<sup>84</sup>

Second, the clearly identified parcels do not need to belong automatically to the producer of slurry as fertiliser, but it has to be certain to be used to meet the needs of economic operators other than the operator which produced it.<sup>85</sup> Identification of parcels is clearly *capable of showing that the quantities of slurry to be delivered are in principle actually intended to be used for the purpose of fertilising the plots of land of the farmers concerned.*<sup>86</sup>

The third condition is very close to the previous one. *If the producer of the slurry wishes to store it for a longer period than that necessary for its collection with a view to disposal, he must have firm commitments from operators to take delivery of the slurry for the purpose of using it as fertiliser on duly identified plots of land.*<sup>87</sup> Moreover, there are additional conditions for storage facilities: first, *the storage facilities which the producer of the slurry uses are designed so as to prevent any run-off of that substance or seepage into the soil, and that they provide sufficient capacity*

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<sup>80</sup> Ibid, subpar. 65.

<sup>81</sup> Ibid, subpar. 60.

<sup>82</sup> Ibid, subpar. 96.

<sup>83</sup> Judgment of the Court (Fourth Chamber), 3 October 2013, C-113/12 *Donal Brady v. Environmental Protection Agency*, subpar. 50.

<sup>84</sup> Ibid, subpar. 51.

<sup>85</sup> Judgment of the Court (Third Chamber) of 8 September 2005 C-121/03 *Commission of the European Communities v. Kingdom of Spain*, subpar. 61.

<sup>86</sup> Judgment of the Court (Fourth Chamber), 3 October 2013, C-113/12 *Donal Brady v. Environmental Protection Agency*, subpar. 52.

<sup>87</sup> Ibid, subpar. 53.

to store the slurry produced pending its actually handing over to the farmers concerned;<sup>88</sup> second, the actual storage of the slurry should be strictly limited to the needs of the spreading operations, which means, first, that the quantities stored must be limited in such a way that they are, in their entirety, indeed intended to be so reused and, second, that the period of storage must be limited in the light of the requirements resulting in this regard from the seasonal nature of the spreading operations, that is to say, it must not exceed what is required in order for the producer to be able to meet his existing contractual commitments to deliver slurry for spreading purposes during the spreading season in progress and the coming one.<sup>89</sup> It follows from the above that if the slurry producer is not able to sell all produced slurry as fertilizer, (s)he must have two different storage facilities for slurry, one for slurry as fertiliser and one for slurry as waste. The slurry delivered as fertiliser cannot be stored together with slurry to be disposed of as waste. In contrary, all slurry will be considered as waste.

The years later, the ECJ added the interpretation of conditions that should be considered when slurry should be defined as waste in the case *Brady v. Environmental Protection Agency*.<sup>90</sup> *Slurry produced in an intensive pig farm and stored pending delivery to farmers in order to be used by them as fertiliser on their land constitutes (...) a by-product when: (4) that producer intends to market the slurry on terms economically advantageous to himself in a subsequent process; (5) provided that such reuse is not a mere possibility but a certainty; (6) without any further processing prior to reuse and as part of the continuing process of production.*<sup>91</sup>

The fourth condition is met when *the reuse of the slurry by the third parties (...) is such as to confer upon him an advantage over and above merely being able to discard that product, since such a circumstance (...) increases the likelihood of actual reuse.*<sup>92</sup> In other words, if there is also a financial advantage to the holder in reusing the substance, the likelihood of reuse is high and the substance must no longer be regarded as a burden which its holder seeks to ‘discard’, but as a genuine product.<sup>93</sup>

The fifth condition is related to the reuse of the slurry that should be certain and not only hypothetical. *The relevant circumstances liable to require being taken into account by the national courts (...) include the circumstance that the substances concerned are the subject of actual commercial transactions and meet the buyers’ specifications. Thus, it may be pertinent, in this connection, to examine the conditions, in particular the financial conditions, under which the transactions between the producer and the purchasers of the slurry take place. The same applies to the burdens, in particular those linked to the storage of the substances concerned, which are brought about for the holder by the reuse of those substances, since such burdens must not prove excessive for him.*<sup>94</sup>

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<sup>88</sup> Ibid, subpar. 55.

<sup>89</sup> Ibid, subpar. 56.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid, subpar. 60.

<sup>92</sup> Ibid, subpar. 57.

<sup>93</sup> Judgment of the Court (Sixth Chamber) of 18 April 2002 C-9/00 *Palin Granit Oy and Vehmassalon kansanterveysystön kuntayhtymän hallitus*, subpar. 37.

<sup>94</sup> Judgment of the Court (Fourth Chamber), 3 October 2013, C-113/12 *Donal Brady v. Environmental*

The last condition is related to the reuse of the substance without further processing, mainly without processing named in the annexes of the WFD. However, not only these kinds of processing are relevant because like mentioned above the list of processing is not exhaustive.

The above-mentioned conditions are the main conditions *expressis verbis* declared also in the ECJ judgements that should be considered by the national court when deciding the substance is waste or non-waste. However, the key role can also play other relevant circumstances in particular cases. It is the role of national courts to define all circumstances and to pick up those that are the most relevant to decide whether the substance is waste or non-waste. However, the mentioned circumstances in the ECJ judgements are very helpful for national courts in deciding similar cases.

### 3.3. Fuels

The ECJ decided also several cases related to the fuels. *Heavy fuel oil sold as a combustible fuel, does not constitute waste (...), where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing.*<sup>95</sup> In this case, unlike sewage sludge, the ECJ no longer examines whether its incineration is safe for the environment and human health and whether it does not contain substances harmful to the environment, which is the basic aim of the WFD. So the question is whether it is necessary to investigate these questions only in the case of end-of-waste (a product received from the recovery of waste like sewage sludge from the treatment of waste waters) and production residues; however, it is not necessary to answer these question in the case of the main products that are the intended results of the production process, such as the production of heavy fuel oils by refining oil. The ECJ gave the answer in another case related to the petroleum coke *which was produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste.*<sup>96</sup> According to the ECJ opinion, the use of substance which must involve special measures to protect the environment are relevant only in the case of production residues; however they are irrelevant in the production of substance which is the result of a technical choice (e.g. petroleum coke is not necessarily produced during refinery operations; therefore it is not considered as a production residue).<sup>97</sup> If the substance is produced intentionally regardless in the course of producing other products is not considered as a production residue. In such cases the WFD is not applied on the substances regardless of their effect on the environment.

However, the question is more difficult when the heavy fuel oil that is

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Protection Agency, subpar. 59.

<sup>95</sup> Judgment of the Court (Grand Chamber) of 24 June 2008 C-188/07 *Commune de Mesquer v. Total France SA and Total International Ltd.*, subpar. 48.

<sup>96</sup> Order of the Court (Third Chamber) of 15 January 2004 C-235/02 *Criminal proceedings against Marco Antonio Saetti and Andrea Frediani*, subpar. 47.

<sup>97</sup> *Ibid.*, subpar. 45–46.



accidentally spilled into the sea following a shipwreck must be classified as waste within the meaning of WFD. The fact that WFD includes also category of waste as material spilled, lost or having undergone other mishap, does not automatically mean that heavy fuel oil spilled at sea and cause pollution of the territorial waters is considered as waste regardless of other circumstances. *In those circumstances, it must be examined whether such an accidental spillage of hydrocarbons is an act by which the holder discards them.*<sup>98</sup> The ECJ considered the fact that spilled oil does not constitute a product which can be reused without prior processing, which (...) would in fact be a significant financial burden,<sup>99</sup> and the exploiting or marketing of such oil is very uncertain or even hypothetical. *It follows that such hydrocarbons accidentally spilled at sea are to be regarded as substances which the holder did not intend to produce and which he 'discards', albeit involuntarily, while they are being transported, so that they must be classified as waste.*<sup>100</sup> The ECJ confirmed its opinion judged four years ago. In the case of the hydrocarbon leak, which was the result of defects in the service station's storage facilities, the ECJ judged *that the holder of hydrocarbons which are accidentally spilled and which contaminate soil and groundwater 'discards' those substances. If hydrocarbons which cause contamination are not considered to be waste on the ground that they were spilled by accident, their holder would be excluded from the obligations (...) in contradiction to the prohibition on the abandonment, dumping or uncontrolled disposal of waste. Finally, Directive 75/442 (nowadays, FWD) would be made redundant (...) were not considered waste on the sole ground that they were spilled by accident.*<sup>101</sup>

In additionally, there is a third question whether the fuel (diesel) accidentally mixed with other substances at the time of its loading into a tanker should be considered as waste, mainly after the fact that the purchaser returned it to the seller because he could not store it having regard to its environmental permit nor sell at the pump as diesel fuel as he intended. The ECJ judged that *a consignment of diesel accidentally mixed with another substance is not covered by the concept of 'waste', provided that the holder of that consignment does actually intend to place that consignment (...) back on the market (...).*<sup>102</sup> The ECJ investigated the intention of both contracting parties to discard the consignment.

The first question was whether the purchaser by returning the consignment does effectively 'discard' it. The key circumstance was that the purchaser returned the consignment to the seller, with a view to obtaining a refund, pursuant to the sale contract. By so acting, that client cannot be regarded as having intended (...) to discard it. In addition, the substance has a significant commercial value and therefore the risk that the holder will discard that consignment in a way likely to harm the environment is

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<sup>98</sup> Judgment of the Court (Grand Chamber) of 24 June 2008 C-188/07 *Commune de Mesquer v. Total France SA and Total International Ltd.*, subpar. 55.

<sup>99</sup> Ibid, subpar. 57 – 59.

<sup>100</sup> Ibid, subpar. 59.

<sup>101</sup> Judgment of the Court (Second Chamber) of 7 September 2004 C-1/03 *Criminal proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA*, subpar. 47–50.

<sup>102</sup> Judgment of the Court (First Chamber), 12 December 2013 Joined Cases C-241/12 and C-242/12 *Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV*, subpar. 54.

low.<sup>103</sup>

The second question was the intention of the seller whether he intended to ‘discard’ the consignment since its contamination was disclosed. The most relevant circumstance in favour that the substance is not waste was the fact that the seller *took back the consignment at issue with the intention of blending it and placing it back on the market is of decisive importance in the present case.*<sup>104</sup>

In contrary, the fact that the trade-in products analogous to the consignment is not regarded as a trade-in waste, or the fact that the commercial value of the consignment corresponds largely to that of a product or the fact that the consignment could be sold on the market without being processed, did not be decisive circumstances without actual intention of contracting parties. They can only tend to refuse the idea that the consignment is a waste.<sup>105</sup> The European Commission should provide a European standard for waste-derived fuels, which is essential for a proper functioning of European market.<sup>106</sup>

### 3.4. Soil as a waste or by-product

The ECJ considered soil contaminated by fuel as waste, *even if it has not been excavated.*<sup>107</sup> However, soil was considered as waste also when it has been excavated but not contaminated. There is a question if the excavated soil should be considered as a by-product or a waste. According to the ECJ, there is no general presumption that the excavated soil will bring to the holder more advantageous re-use than discard. Moreover, *the mere fact that the materials in question will be reused does not support the inference that they do not constitute ‘waste’ within the meaning of the directive.*<sup>108</sup> Therefore, the general exclusion of excavated soil from the term waste regardless of other circumstances, mainly the intention of its holder goes beyond what the directive stipulates and is contrary to EU law. On the other hand, the by-product is relatively strictly defined in the WFD as well as in the national regulations of the member states. There are four cumulative conditions that should be met when a substance should be considered as a by-product. When the status of a by-product of a substance is confirmed, the substance is excluded from the concept of waste. The excavated soil is considered as a by-product if all these conditions are fulfilled:

1. Further use of the substance is certain, i.e. the further use is not only possible but there is a guarantee that the substance will be used and will not stay in a storage facility. Moreover, the certain use of a substance could be guaranteed by the producer

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<sup>103</sup> Ibid, subpar. 45–46.

<sup>104</sup> Ibid, subpar. 52.

<sup>105</sup> Ibid, subpar. 49–51.

<sup>106</sup> Jouhara, H., Malinauskaite, J., Spencer, N. 2017. Waste Prevention and Technologies in the Context of the EU Waste Framework Directive: Lost in Translation? In: *European Energy and Environmental Law Review*, vol. 26 (3), pages 66–80. <https://doi.org/10.54648/eelr2017009>.

<sup>107</sup> Judgment of the Court (Second Chamber) of 7 September 2004 C-1/03 *Criminal proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA*, subpar. 61.

<sup>108</sup> Judgment of the Court (Third Chamber) of 18 December 2007, C-194/05 *Commission of the European Communities v. Italian Republic*, subpar. 49.

of that substance<sup>109</sup> or by a third party on the base of a contract with that producer, e.g. the excavated soil is used by farmers to improve the quality of agricultural land cultivated by them and the farmers *have made a binding commitment (...) to take delivery of the excavated materials (...) in order to use them for carrying out works to adapt and improve land and cultivation areas*, and moreover, *those materials and the quantities supplied did in fact serve to carry out those works and were strictly limited for those purposes*.<sup>110</sup> The excavated soil need not to be used by farmers immediately; however the storage of that soil must not exceed what is required in order to meet the obligations stipulated in the contract with farmers.<sup>111</sup>

2. It must be possible to use the substance directly without further processing other than normal industrial practice; e.g. the excavated soil did not require any processing or treatment before their further use other than its control quality that it is not contaminated and suitable to use for agricultural land quality improvement.<sup>112</sup> On the other hand, a treatment which is normal industrial practice, e.g. modification of size or shape by mechanical treatment, does not prevent a substance from being regarded as a by-product.<sup>113</sup>

3. The substance or object is produced as an integral part of a production process; regardless where such industrial treatment is carried out (in the facility of a substance producer or substance user or at the third party).<sup>114</sup> For example, *the excavated soil is the result of one of the first steps usually undertaken in a construction operation as an economic activity, the result of which is the transformation of land*.<sup>115</sup> Therefore, the excavated soil could be considered as the substance produced as an integral part of the production process and also by-product.

4. The further use of the substance must be lawful, i.e. it fulfils all relevant products, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts, e.g. *the use of excavated materials in the highest quality class, for the purpose of adapting and improving cultivation areas, makes it possible to comply with the waste hierarchy*<sup>116</sup> and *the use of excavated soil, in the form of building materials, in so far as such soil meets strict quality requirements, has a significant advantage for the environment because it contributes (...) to the reduction of waste, to the preservation of natural*

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<sup>109</sup> Judgment of the Court of 11 September 2003 C-114/01 *Avesta Polarit Chrome Oy*: Leftover rock from the operation of a mine must be classified as waste, unless the holder uses them lawfully for the necessary filling in of the galleries of that mine.

<sup>110</sup> Judgment of the Court of 17 November 2022 C-238/21 *Porr Bau GmbH v. Bezirkshauptmannschaft Graz-Umgebung*, subpar. 52.

<sup>111</sup> Judgment of the Court (Fourth Chamber), 3 October 2013, C-113/12 *Donal Brady v. Environmental Protection Agency*, subpar. 45.

<sup>112</sup> Judgment of the Court of 17 November 2022 C-238/21 *Porr Bau GmbH v. Bezirkshauptmannschaft Graz-Umgebung*, subpar. 54.

<sup>113</sup> European Commission. 2021. Guidance on Waste Definitions.

<sup>114</sup> *Ibid.*

<sup>115</sup> Judgment of the Court of 17 November 2022 C-238/21 *Porr Bau GmbH v. Bezirkshauptmannschaft Graz-Umgebung*, subpar. 55.

<sup>116</sup> *Ibid.*, subpar. 59.

*resources and to the development of a circular economy.*<sup>117</sup> In other words, a substance meets the technical specifications for further use or its use is not forbidden by law.<sup>118</sup> However, it is still important to use that substance according to the law or rules friendly to the environment.<sup>119</sup>

It follows from the above that if the soil is contaminated, it is considered as waste regardless it is excavated or not. Uncontaminated soil can be considered as waste or as by-product depending on whether these four above-mentioned conditions are met. All these four conditions have to be fulfilled cumulative. However, all these conditions are very general but clearer than the definition of waste taking into account usually the intention of the holder to discard a substance. However, if it is possible to define a by-product using several conditions, it would be possible to prepare such a definition also for waste. It would be useful when the ECJ with its judgements or the European law-maker prepared the conditions for the concept of waste, which would not only be based on a vague interpretation of the word ‘discard’, depending on circumstances which relevance is judged by national courts of the Member States. In addition, it is also appropriate to consider whether the definition should be closer to the definitions of waste from international documents, which exclude the reuse of a substance from the term waste. This case also confirms that considering a valuable natural resource – soil of the highest quality – as waste goes beyond the aim of the directive which is to protect the environment and human health.

### 3.5. Electrical and electronic appliances

The ECJ gives a special view of the concept of waste when it interpreted waste in relation to electronic appliances in case *Tronex*.<sup>120</sup> The question was whether electronic appliances during transport should be considered as waste or as products. The most of these appliances were in their original packaging; however, some of them were unpacked. Moreover, some of those appliances were returned by consumers under the product guarantee, some of them were returned by the retailer, wholesaler or importer due to their redundancy and some of them were defective. This fact causes that all the appliances cannot be considered as waste regardless of all relevant circumstances in the particular groups of appliances sorted by the reasons of their return and by the packing.

The ECJ judged that *electrical and electronic appliance (...), which were returned by the consumer or which, for various reasons, were sent back by the retailer to its supplier, is to be regarded as a shipment of waste, where that consignment contains appliances the good working conditions of which has not been previously ascertained or which are not adequately protected from transport damage.* However,

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<sup>117</sup> Ibid, subpar. 58.

<sup>118</sup> European Commission. 2021. Guidance on Waste Definitions.

<sup>119</sup> Judgment of the Court (Fourth Chamber), 3 October 2013, C-113/12 *Donal Brady v. Environmental Protection Agency*, subpar. 50: If the slurry is used by uncontrolled manners, it is not more by-product, but it becomes waste.

<sup>120</sup> Judgment of the Court (Second Chamber) of 4 July 2019 C-624/17 *Criminal proceedings against Tronex BV*.

*such goods which have become redundant in the seller's product range and which are in their original unopened packaging (...) must not, without indications to the contrary, be regarded as waste.*<sup>121</sup> Such indication could be a doubt as to the good working condition of those appliances.<sup>122</sup> Without these doubt it is usually considered that the unopened appliances are new products in working condition and such appliances can be marketed and therefore they do not represent a burden for their holder that he wants to discard.<sup>123</sup> On the other hand, the appliances in opened packing or without packing returned under the guarantee should be ascertained their working conditions and whether the appliances show defects, it is important to find out if they can still be sold without being repaired to be used for their original purpose (e.g. the defect consists in a colour or small scratch) and whether it is certain that they will be reused. In the case of positive answers, there is a low probability that the holder wants to discards of them as waste. However, if the *appliance suffers defects that require repair, such that it cannot be used for its original purpose, that appliance constitutes a burden for its holder and must thus be regarded as waste, in so far as there is no certainty that the holder will actually have it repaired.*<sup>124</sup> The level of certainty that the appliances will be repaired decreases when the holder of appliances sells or transfers those goods to a third party without first having ascertained their working conditions<sup>125</sup> and, moreover, the holder, who intends to ship appliances to a third party, should ensure that they are safeguarded from transport damage by adequate packaging.<sup>126</sup> In contrary, without having ascertained the working conditions of those appliances and without adequate packaging, it must be presumed that the holder intends to discard them.

This case also confirms that the only criterion as to whether electronic appliances are waste is the owner's intention what to do with them. If the products are in their original and unopened packaging, the ECJ considers them to be products rather than waste, if there are no circumstances that could confirm otherwise. On the contrary, products without packaging or products in their opened packing are rather waste, if the holder does not demonstrate otherwise, i.e. an adequate level of care for them, e.g. in the form of packaging protecting them against damage or testing their functionality.

#### 4. Conclusion

The existence of 'waste' must be determined in the light of all the circumstances, regarding the aim of WFD and ensuring that its effectiveness is not undermined. The concept of waste remains very vague and uncertain in spite of the interpretation of the ECJ in its many judgements as well as the Guidance issued by the European Commission. On the one hand, the ECJ judgments help to understand which circumstances are relevant for classifying a substance as waste. On the other hand, there

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<sup>121</sup> Ibid.

<sup>122</sup> Ibid, subpar. 33.

<sup>123</sup> Ibid, subpar. 32.

<sup>124</sup> Ibid, subpar. 36.

<sup>125</sup> Ibid, subpar. 39.

<sup>126</sup> Ibid, subpar. 41.

is an opinion that a purposive interpretative approach in response to evident deficiencies in the drafting of the Directive will not be sufficient in the light of the cost and complexity of waste regulation.<sup>127</sup>

It seems that we can distinguish three basic situations: the first, a substance or object is waste if the holder is obliged by law to get rid of it; the second, a substance or object is waste as a result of an accident or malfunction, the substance deteriorates, e.g. the fuel pollutes the coast or the water or the storage facility malfunctions and the substance begins to leak into the soil, regardless of the intention of the holder, whereby not only the leaking substance but also the component (e.g. water, soil) with which the leaking substance is mixed becomes waste; the third, a substance or object is waste if the holder wants to discard of this substance; i.e. the holder has a greater benefit when he does not own the substance (or he is willing to sell it for a symbolic price or give it someone for free) that is the benefit from the possession of this substance in his storage facilities or other premises. Otherwise, the substance could be classified as products, by-products or raw material needed in the production process. In other words, if the utility of the holder is higher without the possession of the substance than with it, then we can prefer the opinion that the substance is waste for him that he wants to discard regardless of the fact that for other subjects it would be a valuable substance or object. However, it is inappropriate to classify as 'waste' items which have value to another.<sup>128</sup>

The European legislator should prepare a new definition of the concept of waste, which will be based on objective criteria and which will be closer to the definitions of waste in international documents, from which material intended for reuse is excluded. Although the argument of a possible threat to the environment is very important, it is necessary to consider whether the concept of waste based on the circumstances of a specific case does not often lead to the same threat to the environment, e.g. if considering whether the top quality soil is waste.

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<sup>127</sup> Cheyne, I. 2002. The Definition of Waste in EC Law. In: *Journal of Environmental Law*, vol. 14 (1), pages 61–73. <http://www.jstor.org/stable/44248349>.

<sup>128</sup> Pocklington, D. 2006. The Significance of the Proposed Changes to the Waste Framework Directive. In: *European Energy and Environmental Law Review*, vol. 15 (3), pages 75–87. <https://doi.org/10.54648/eelr2006008>.

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