The Definition of Waste

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Introduction

1. I should start with an important caveat. It will come as no surprise to those reading this paper that it is difficult to provide a definitive answer on whether an object/substance will be treated as waste or not. The definition of waste has proved to be a complex and contentious issue, requiring consideration of both EU and UK law. The European Commission stated recently in publishing its unofficial communication on waste strategy that:

“The current definition of waste sets no clear boundaries for when a waste has been adequately treated and should be considered a product. This is problematic, as it creates legal uncertainty and administrative costs for businesses and competent authorities. It can lead to diverging views from Member State to Member State and even from region to region which creates problems for the internal market…”

2. The definitions in the relevant legislation (see below) are too broad to provide a definitive answer, so it becomes necessary to consider EU and UK caselaw. A number of decisions of the European Court of Justice have however successively failed to provide any real degree of certainty on the issue. The European Court has explicitly resisted laying down any definitive criteria. The most that can be said is that the cases show that there are a number of indicators which may assist, but that the decision remains one to be made by the competent authorities and

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the courts on a case by case basis. What is clear however is that the term ‘discard’ is central to the meaning of waste; it should be interpreted in the light of the aim of the Waste Directive and cannot be interpreted restrictively.

3. The UK Courts, whilst sometimes expressing frustration at the approach (Stanley Burnton J in Castle Cement v the Environment Agency described the guidance given by the ECJ to national courts as “less than pellucid” and as a “Delphic utterance [which] may positively mislead”) have broadly had no alternative but to follow the approach in the ECJ cases.

**The relevant legislation**

4. Directive 2006/12/EC (the Waste Framework Directive) defines waste as:

   “any substance or object in the categories set out in Annex 1 which the holder discards or intends or is required to discard”.

5. The definition lays down two criteria for a substance/object to be defined as waste

   i) the substance or object must be within one of the categories in Annex 1;
   ii) it must be discarded as provided for in Article 1(a).

6. The categories of waste set out in Annex 1 include:

   (a) Production or consumption residues
   (b) Off-specification products

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2 See Joined Cases C-418/97 and C-419/97 Arco Chemie Nederland Ltd et al v Minister van Volksgezondheid Ruimtelijke Ordening en Milieubeheer [2000 ECR I-4477] and more recently Case C-457/02 Niselli (second Chamber November 11 2004) which restates the orthodoxy developed in cases like Arco Chemie.
3 See Arco Chemie, paras 37 and 40.
4 [2001] Env LR 46 at paras 18 and 45
(c) Residues of industrial processes
(d) Products for which the holder has no further use
(e) Any materials, substances or products which are not contained in the above categories

7. These are extremely broad categories which, given the existence of the last category, allow practically anything that is, or will be, discarded to quantify as ‘waste’. The advantage of this approach is that it provides sufficient flexibility of definition to prevent all discarded substances or objects from causing harm to the environment. The disadvantage is that considerable uncertainty can arise about when waste regulation rules should apply.

8. In light of this the European Commission has set out a detailed list of wastes considered to fall within the Annex 1 categories. Here wastes are grouped according to the industrial processes that produce them. The aim of the catalogue is to provide a uniform list which can be used across the EC to ensure a common approach in waste regulation. However whilst listing by name provides regulatory clarity, it is inflexible as a regulatory technique because the list needs frequent updating to take account of industrial developments. Further, inclusion of a material in the list does not necessarily mean the material is ‘waste’ – it will only be a waste if, in addition, it satisfies the general definition of waste, i.e. ‘discarding’ by the holder. Unsurprisingly, the reference in the general definition to the term ‘discard’ has therefore assumed great importance.

9. Both disposal and recovery operations come within the concept of ‘discard’. Annex IIB\(^6\) lists a series of recovery operations “as they occur in practice” including:

\(^6\) As substituted by Commission Decision 96/350/EC of 24 May 1996.
• Recycling/reclamation of metals and metal compounds (R4)
• Recycling/reclamation of other inorganic materials (R5)
• Use of wastes obtained from any of the operations numbered R1 – R10 (R11).

10. Whilst the Directive makes no explicit link between the list of recovery operations and the definition of waste, the presence of the list indicates that waste can be ‘discarded’ not only by being subject to disposal operations but also to recovery operations.

11. Under UK law, the question of what is waste is – as would be expected – exactly the same question as under EC law. Section 75 of the Environmental Protection Act 1990 sets out a definition of “waste” and “controlled waste”. This definition was amended substantially by the Waste Management Licensing Regulations 1994, the main purpose of which was to implement the Waste Framework Directive into UK law.

12. The definition of waste in the Waste Management Licensing Regulations 1994 adopts verbatim the definition in the Framework Directive. Regulation 1(3) provides that waste means “Directive waste” and “Directive waste” is defined as meaning:

“any substance or object in the categories set out in Part II of Schedule 4 which the producer or the person in possession of it discards or intends to discard but with the exception of anything excluded from the scope of the Directive by Article 2 of the Directive. “Discard” has the same meaning as in the Directive...”

13. The 1994 Regulations also contain similar lists of waste recovery activities to those listed in Annex IIB of the Waste Framework Directive. The concept of discard is therefore also central to the UK definition of waste, as it is to the EC definition.

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7 SI 1994/1056. The definition will be amended further by Schedule 22, para 88 of the Environment Act 1995 when it comes into force, but will not be materially changed.
14. Annex 2 of Circular 11/94 issued by the Department of the Environment (as was) in 1994 attempted to provide guidance on the definition of waste (see below). However, the Circular pre-dates the important EC case law, and for that reason the guidance is not generally now relied upon.

The caselaw

15. Before embarking on an analysis of the sometimes obtuse caselaw on the definition of waste, it is useful to remember that in most cases it will be relatively clear whether something is waste or not. The case of ordinary disposal operations is relatively unproblematic. The difficulties arise with re-use, recovery and recycling – because in these contexts one person’s waste can be another person’s (or even the same person’s) raw material. Commentators have suggested that one of the key issues here is whether the definition of waste might be said to be too broad in situations where normal industrial processes involve more than one use of a particular substance without posing a threat to the environment.

16. Some of the questions before the European and our domestic courts have been as follows:

(a) The manageress of a laundry in Italy was prosecuted for storing sludge from dry-cleaning machines in her laundry on a temporary basis. Is the temporary storage of waste a ‘waste management activity’ within the meaning of EC legislation although it is not expressly mentioned in that legislation? Held YES

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8 Ilona Cheyne  The Definition of Waste in EC law JEL Vol 14 No 1 p61
(b) Is acid, discarded by one person, having been used to strip metal surfaces, but very useful to another person, a waste for which a waste management permit is necessary? **Held YES**

(c) Is left over rock from the extraction of ore, which is stored near the ore mine, a waste? Some of the rock will remain there permanently, a small amount will be used as raw material for aggregates, some will be landscaped and some will be used to fill in underground parts of the mine. **Held YES⁹**

(d) Is a substance resulting from a manufacturing process, which is then burned as a fuel for use in the cement industry without adverse environmental effects, to be regarded as a waste or a raw material? **Held WASTE¹⁰**

(e) Are powdered wood residues from the construction and demolition industry, which are treated and then used as a fuel to generate electricity, to be regarded as waste? **Held YES¹¹**

(f) Does the fact that the disposal or recovery of a substance which forms part of an industrial process (being carried out by the undertaking which produced the substance, at the place of production, as opposed to elsewhere by a specialist disposal or recovery company) remove it from the scope of the Waste Framework Directive? **Held NO**

(g) Does the concept of waste exclude objects that possess an economic value or are dealt with as part of a continuous commercial cycle? **Held NO¹²**

17. European caselaw has established that the term discard, which is of central importance to the definition of waste, must be interpreted in the light of the aim of the Directive which is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and

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⁹ Avesta Polarit Chrome Oy and Palin Granit
¹⁰ Arco Chemie
¹¹ Arco Chemie
¹² Vessoso & Zanetti
tipping of waste. The effect is that the concept of waste cannot be interpreted restrictively and that the concept of discard covers both wastes passing to disposal and to recovery. The intention of the holder is to be interpreted objectively, not according to his own specific intentions. The list of recovery operations in the Framework Directive provides no more than indicative practical examples of how waste might be discarded. A material can still be waste even if it has a use or economic value. Materials should only be regarded as products as opposed to waste if re-use is a certainty and can be done without any further processing or treatment.

18. By way of summary; if there is anything which is clear from Joined Cases C-418/97 and C-419/97 Arco and the other cases, it is that whether a substance is waste within the meaning of the Directive “... must be determined in the light of all the circumstances, regard being had to the aim of the Directive and the need to ensure that its effectiveness is not undermined.” This may be regarded as the “golden rule”. The other point of clarity is that the term ‘discard’ should be interpreted in the light of the aim of the Waste Directive and cannot be interpreted restrictively.

Problematic areas - by products and when a waste ceases to be a waste

“It is important to distinguish between the question and those European authorities which deal with the question, of when material becomes waste, as against the issue for me to decide which is when material, which has on any basis, already become waste, ceases to be waste. It is plain that in deciding

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14 See Arco Chemie at para 40.
15 Case C-129/96 Inter Environnement Wallonie ASBL v Region Wallonne [1997] ECR I-07411
16 Arco Chemie at para 49
17 Vessoso & Zanetti
18 Case C-9/00 Palin Granit Oy and Vekmassalon Kansanterveyston kuntayhtyma hallitus [2003] ECR I-08725
19 See Joined Cases C-418/97 and C-419/97 Arco Chemie Nederland Ltd et al v Minister van Volkhuisvesting Ruimtelijke Ordening en Milieubeheer [2000 ECR I-4477]
20 See Arco Chemie, paras 37 and 40.
whether what is produced as part of a process intended to manufacture some main product is a by-product, or a secondary product or, on the other hand, is waste, such questions as whether there has been intentional production, a certainty of use and an economic value for the material in question (see eg Palin Grant Oy … and Saetti v Frediani) are important. These concepts are however, in my judgment, of no or little value or relevance in considering the question as to whether product which was waste has gone through a sufficient recovery operation to be able to say it is no longer waste” (Mr Justice Burton in SRM and the Environment Agency and OSS Group Ltd and the Environment Agency 30.11.2006)

Problematic Area 1) the distinction between a waste and a by-product

19. The leading European decisions on the distinction between waste and by-products are; Case C-900/00 Palin Granit Oy21; Case C-114/01 AvestaPolarit Chrome Oy;22 Case C-235/02 Saetti and Frediani23 and, most recently, Case C-121/03 Commission v Spain24.

20. The more recent cases demonstrate that the ECJ is drawing back from highly restrictive criteria for distinguishing between a waste and a by-product. Instead the Court is looking at the technical and commercial realities of the operation in question.

21. Palin Granit is accepted as having laid down a two stage test for distinguishing between a waste and a by-product;

(a) Re-use should not be a mere possibility but a certainty;
(b) There must be no further processing required prior to re-use;

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21 [2002] 1 WLR 2644
22 Sixth Chamber, 11/9/03
23 Third Chamber, 15 January 2004
24 ECR 2005 I 07569
22. Prior to **Commission v Spain** there had been debate as to whether **Palin Granit** had introduced a third test for a by product namely that the reuse must be an integral part of the production process (see para 36 of the **Palin Granit** judgment). The Environment Agency has certainly sought to argue, that para 36 of the **Palin Granit** judgment creates a threefold test: (1) re-use is not a mere possibility but a certainty, (2) there must be no further processing required prior to reuse, and (3) the reuse must be as an integral part of the production process.

23. However in **Case C-121/03 Commission v Spain**, the ECJ rejected the third test as being relevant to the waste/byproduct distinction. The case involved a number of infractions by Spain relating to the management of animal effluent from pig farms including the spreading of slurry on agricultural land for use as a fertiliser. Directives on waste, nitrates, groundwater, urban waste water and EIA were all said to have been breached. All parties accepted that the effluent did not constitute a waste and was instead a by-product that the farm did not intend to discard if it was used on the same farm in accordance with good agricultural practice. However the European Commission sought to argue, as per an interpretation of **Palin Granit** as including a three stage test (see paras 15/16 above), that this analysis should not apply to effluent taken off the farms to meet the needs of other economic operators.

24. The Court expressly rejected the Commission’s argument;

“Contrary to the Commission’s submissions, it is not appropriate to limit that analysis to livestock effluent used as fertiliser on land forming part of the same agricultural holding as that which generated the effluent. As the Court has already held, it is possible for a substance not to be regarded as waste within the meaning of Directive 75/442 if it is certain to be used to meet the needs of economic operators other than that which produced it (see, to that effect Saetti and Frediani)”

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25 Paragraph 61.
28. The Court held that the slurry was not waste. It was used as an agricultural fertiliser in the context of national rules for spreading and in accordance with good agricultural practice. The farmers were not therefore seeking to discard it within the meaning of Directive 75/442. The Court expressly contrasted the case of livestock which died on the farm and could not lawfully be used for human consumption. In that case the farmer was obliged to discard them and they must be regarded as waste.

29. The approach of the Court in *Commission v Spain* follows that of the Court in *Saetti and Frediani* which also resisted any strictly mechanistic application of the tests in *Palin Granit* and looked at the technical and commercial reality of the process in question. The case concerned petroleum coke (petcoke) derived from the refining of crude fuel oil. The refinery was using it as fuel for its combined steam and electricity power station, with surplus energy being sold to other industries.

30. The Court noted that the elements of the test proposed in *Palin Granit* were “...not necessarily conclusive, and whether something is in fact waste must be determined in the light of all the circumstances, regard being had to the aim of the Directive and the need to ensure that its effectiveness is not undermined” (para 40).

31. The Court found that petcoke could not be regarded as a production residue (para 45):

   “...petroleum coke cannot be classified as a production residue ... as the production of coke is the result of a technical choice (since petroleum coke is not necessarily produced during refinery operations), specifically intended for use as fuel, whose production costs are probably lower than the cost of other fuels which could be used to generate the steam and electricity which meets the needs of the refinery. Even if ... the petroleum
coke at issue automatically results from a technique which at the same time generates other petroleum substances which are the main results sought by the refinery’s management, it is clear that, if it is certain that the coke production in its entirety will be used, mainly for the same purposes as the other substances, that petroleum coke is also a petroleum product, manufactured as such, and not a production residue. The file in the main proceedings sent to the Court appears to indicate that it is common ground that the petroleum coke is certain to be fully used as fuel in the production process and that the resulting surplus energy is sold.”

32. Accordingly the Court held that:

“Petroleum coke which is 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 within the meaning of Council Directive 75/442/EEC.”

**Problematic area 2) when a waste ceases to be a waste**

25. The Courts have found it difficult to decide whether and when a substance, having been a waste, can cease to be a waste and become a product again. As an example, relatively pure metals such as chromium which are for all practical purposes identical to unused materials, can be recovered from waste.

26. The joined cases C-418/97 and C-419/97 Arco Chemie Nederland 26 considered, amongst other issues, when a waste ceases to be waste. The cases concerned certain substances derived from chemical processes and waste wood, which were

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26 [2000] ECR I-4477 (full reference at footnote 2 above)
used as fuel, and whether they were to be regarded as primary raw materials or whether they were still to be classified as waste.

27. In his opinion, Advocate-General Alber identified, at para. 109 by way of a general summary rather than by reference to the specific questions referred, the following test for determining when a waste material ceases to be waste,

“If a waste material is recovered or reprocessed so that a substance is obtained that no longer poses a danger typical of waste and, when used in a normal manufacturing processing, does not pollute the environment any more than, but at most in the same way as, a raw material, that substance probably is no longer to be regarded as waste in the sense of being subject to control or authorisation for its further use. It is for the national court and the competent authorities to examine whether or not the substance in question constitutes a danger typical of waste – that is to say one which goes beyond the dangers posed by a comparable primary raw material – so that supervision in accordance with the Directive must continue to be regarded as necessary. Such supervision does not preclude any recycling and use of such substances as substitutes for primary raw materials specifically laid down as policy. The substance and the recovery operation are subject to to controls provided for in the Directive to avoid harm to human health and the environment. For that reason the shipment of such substances must also be supervised and, where necessary, freedom of movement must be restricted for as long as that danger typical of waste persists.”

28. A similar approach, which attempted to provide practical guidance on the issue, had been adopted earlier in the DoE’s guidance in Circular 11/94 27 and approved by Carnwath J in Mayer Parry Recycling Limited v. Environment Agency.28 In that case the Environment Agency accepted that scrap metal capable of being used as a feedstock in steel production without any further reprocessing was not waste, and Carnwath J agreed with that position. On the other hand, scrap metal which required further processing (sorting, fragmentizing, baling, etc) or was contaminated so as to require further decontamination, was still waste.

27 See para 2.47.
29. The ECJ, in its judgment in Arco Chemie however declined to follow the Advocate-General’s approach, at least as a conclusive test. It accepted at para. 93 that:

“A substance ceases to be waste only when it has undergone a complete recovery operation within the meaning of Annex II B to the Directive, that is to say when it can be processed in the same way as a raw material or, as in this case, when the material or energy potential of the waste has been used during burning.”

30. However, it also stated at para. 94:

“In that regard, it should first be noted that even where waste has undergone a complete recovery operation which has the consequence that the substance in question has acquired the same properties and characteristics as a raw material, that substance may nonetheless be regarded as waste if, in accordance with the definition in Article 1(a) of the directive, its holder discards or intends or is required to discard.”

The Court’s judgment envisages that the fact that the material is akin to a raw material is only one factor to be considered.29 The issue must be considered by reference to the issue of discarding, having regard to the broad aims of the Directive. Even if the material is akin to a raw material, it may still be waste if its holder then intends to discard it.

31. In the UK case of Castle Cement v the Environment Agency,30 the issue was similar to that in Arco Chemie - whether a liquid fuel produced mainly from waste solvents and liquids (known as Cemfuel), burnt in cement kilns as fuel, was still a waste. Stanley Burnton J said the following at para. 45 of his judgment:

“I confess to finding important parts of the judgment of the ECJ [in Arco Chemie] Delphic. However it is clear that the carrying out of a “complete” recovery

29 See para. 95.
30 [2001] Env LR 45
operation whatever that may be does not necessarily result in a substance ceasing to be waste. To this extent the judgment of Carnwath J in Mayer Parry No 1 must be regarded as superseded”

32. Castle Cement in that case had sought to argue that Advocate General Alber’s approach in Arco Chemie referred to above (i.e once a waste material has been recovered or reprocessed so it no longer poses the danger typical of waste, then it is probably no longer a waste) was the correct test. Stanley Burnton J stated that this test was inconsistent with the judgment of the ECJ. He agreed with the criticisms of the Environment Agency, that the test was uncertain: In particular what are “the dangers typical of waste” and how is the primary raw material to be used as the comparator is to be selected?31 He held that Cemfuel remained waste until it was burnt as fuel and its burning was a use of waste as a source of energy within the terms of the Directive.

33. In his judgment Burnton J drew a clear distinction between the recovery operation R1, use principally as a fuel (the recovery operation relevant to the issues raised in Arco and Castle Cement) and the other substantive operations applicable to waste (R2- R9) which includes the recovery operation relevant to the production of gypsum. He noted that R1 refers to an end use of waste whereas R2- R9 refer to operations carried out in order to enable waste to be used. He characterised the difference between R1 and the other recovery operations as follows;

“The difference between R1 and the other substantive waste material recovery operations reflects the wording of Article 3.2(b) of the Waste Framework Directive. R 1 reflects Article 3.2(b)(ii) whereas the other operations R2-R9 reflect Article 3.2(b)(i)”

31 Para 47 of the judgment
34. He also referred to Article 3.2(b)(i) of the Waste Framework Directive requires Member States to encourage the use of waste as a source of energy whereas Article 3.2(b)(ii) requires Member States to encourage the recovery of waste as a means of recycling, reuse or reclamation or any other process with a view to extracting secondary raw materials.

35. Burnton J’s judgment then reproduces the *Arco* analysis discussed above (paragraphs 31-34) namely the fact that the material is akin to a raw material is only one factor to be considered in deciding whether it has ceased to be a waste. The issue must also be considered by reference to the issue of discarding, having regard to the broad aims of the Directive. He relied on various factors to decide that Cemfuel was properly regarded as a waste until it was burnt as a fuel, these including its composition and its potential environmental impacts.

36. In *Attorney Generals Reference (No 5 of 2000)* 32 the Court of Appeal (Criminal division) endorsed the reasoning in *Castle Cement* and on this basis held that a condensate derived from animal rendering and spread on agricultural fields without any intervening recovery operation was capable of being waste33

37. As of 30 November 2006 however, a further domestic case has considered the issues in detail in the joined cases of *SRM Ltd -v- Environment Agency and OSS Group Ltd -v- the Environment Agency* [2006] EWHC 3023.

32 [2001] Env LR 129.
33 See also *Case C-444/00 Mayer Parry (No 2)*. This was a case primarily concerned with the definition of “recycling” in the Packaging Waste Directive 94/62/EC. The Court’s conclusion was that recycling only occurred when the secondary raw material was processed to produce ingots, coils or sheets of steel. However, it is clear that this issue was determined primarily on the specific definition of “recycling” and not on the definition of waste.33 The Court noted that the material produced by Mayer Parry contained impurities ranging from 3 per cent to 7 per cent such as paint, oil and chemicals, which remained to be removed when the material is used to produce steel. Accordingly, processing by Mayer Parry did not confer on the material “characteristics comparable to those of the material of which the metal packaging was composed.” (R (Mayer Parry Limited) v. Environment Agency [2003] CMLR 8; [2004] Env LR 106.)
38. The case concerned two judicial review applications brought against the Agency both of which raised the issue as to what circumstances does or can material which has become waste or derives from waste, cease to be waste if it is burn as fuel; and in particular whether it can or does cease to be waste when a prior process is carried out for the purpose of rendering it safe to be burnt as fuel or whether it only so ceases when it is burnt.

39. SRM ‘launders’ waste solvents. Some of the solvents are returned to customers. SRM wanted to use some of the laundered solvents as fuel to operate their own plant provided they meet a product specification and a fuel specification. This would preserve natural resources by using as a fuel a reconditioned material. OSS sell ‘recycled fuel oil’ (RFO) which is largely derived from waste, contaminated lubricating oils. The Agency’s position was that, bar one exception\(^{34}\), whether or not a product which was waste or derived from waste has ceased to be waste as a result of some successful processes, if it is to be burnt as fuel, it does not ordinarily ceases to be waste until it is burnt and the energy is recovered. SRM say they comply with the position in Arco that they have carried out a ‘complete recovery operation’ to produce a substance which is accepted as being equivalent to the naturally occurring raw material and that is the point at which the material ceases to be waste so the dangers typical of waste were eliminated\(^{35}\). OSS set out their proposal for a test for when waste ceases to be waste (see para 35 of the judgment)

40. The Agency argued that whilst it is an important part of the European waste regime that regeneration should be encouraged, its primary purpose is to ensure high standards in relation to all steps taken with regard to waste. The entire

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\(^{34}\) The exception relates to where the material was originally a fuel, then it can be recovered as a fuel by an appropriate process and ceases to be waste if it is chemically and physically identical to the original material and requires no further processing (the so called ‘oakley test’)

\(^{35}\) The facts in the OSS case were under dispute so OSS could only make arguments in support on general principles
structure of the relevant waste directives is inconsistent with any suggestion that product derived from waste can simply be safely burned. The requirements of the Directive cannot be avoided by an argument that the material is ex waste when it comes to be burnt. Caselaw shows the Court in Arco rejected a concept of a complete recovery operation prior to burning in cases where a waste derived fuel is burnt once it has acquired the same characteristics as a raw material (as suggested by the Advocate General). The Agency also highlighted the uncertainties of the Advocate General’s test and in the test put forward by OSS for when a waste ceases to be a waste.

41. The Judge accepted the Agency’s view of the caselaw and of the uncertainties in any test to define when a waste ceases to be a waste. OSS have however been given leave to appeal to the Court of Appeal.

42. Meanwhile Lord Reed in *Scottish Power Generation Limited (No. 2) v Scottish Environment Protection Agency* ([2005] CSOH 67) had, as Mr Justice Burton in OSS said, construed the ECJ judgment in Arco Chemie as adopting the Advocate General’s approach.

43. The petitioner had used certain waste derived fuels to produce electricity in a power station which it operated under an IPC authorisation made under Part I of the Environmental Protection Act 1990. Before commencing the burning of the waste derived fuel, the first respondent (SEPA) issued a variation notice in 1998 permitting the burning of waste-derived fuel, and a second variation in 2003 whereby it sought to apply the provisions of reg. 3(2) of the Waste Incineration (Scotland) Regulations 2003 which set more stringent controls over waste incineration plants and co-incineration plants as compared to the controls applied to the normal operation of a power station. The petitioner sought judicial review of the variation notice. At first instance, the petition was refused, with Lord Reed
finding that the waste-derived fuel was “waste” as defined in Art.1(a) of the Waste Framework Directive (75/442/EEC), or the PPC Regulations.

44. There is therefore a conflict between the approach of the highest Scottish Court in the Scottish power case and the High Court in the Castle Cement and SRM/OSS case.

**Other areas covered in recent cases/legislation**

**Contaminated Soil**

45. *Case C-1/03 Van de Walle and Texaco Belgium SA* involved the leak of fuel from storage tanks in a petrol station which contaminated the earth round the tanks. The issues referred to the ECJ were whether and in what circumstances contaminated soil amounted to waste under EC law and secondly whether Texaco was to be regarded as the producer of the waste in circumstances where it had produced the fuel and then sold it to a manager operating one of its petrol stations under an operating agreement.

46. The Court held that hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste. This is true for soil contaminated by hydrocarbons even if the soil has not been excavated. In the factual circumstances Texaco could only be considered to be the holder of the waste if the leak from the service stations storage facilities which gave rise to the waste can be attributed to the conduct of the undertaking.

47. In its reasoning the Court noted that the categories of waste included “materials spilled, lost or having undergone other mishap including any materials, equipment etc contaminated as a result of the mishap” (Q4). It went on to say that this merely illustrated that the materials could fall within the scope of ‘waste’. The
issue depended on whether the accidental spill of hydrocarbons is an act by which the holder ‘discards’ them. It noted that discard should not be interpreted restrictively but in light of the aim of the directive which is to protect health/the environment against harmful effects of waste. A production residue is a waste. Accidentally spilled hydrocarbons are not a product which can be reused without processing. The Court concluded therefore that the accidentally spilled hydrocarbons were substances which the holder did not intend to produce and which he ‘discards’ albeit involuntarily as the time of the production or distribution operations which relate to them. Discard includes accidental discarding. The soil which became contaminated by the hydrocarbons was also waste (as befits the Q4 category of waste which includes materials contaminated by any spill or mishap). Whether the soil has been excavated or not has no bearing on its status as waste.

48. As regards who was the holder of the waste: Article 1c) of the Framework Directive provides that the holder is the ‘producer of the waste or the natural or legal possession in possession of it’. The petrol station operator was clearly in possession of the waste and its producer. Whether Texaco was also the holder, depended on whether the problems with the fuel tanks were in any way attributable to its conduct under its contractual obligations.

**Agricultural Waste**

49. Some important changes have been made to the Waste Management Licensing Regulations by the Waste Management (England and Wales) Regulations 2006 (S.I. 2006/937), which came into force on May 15, 2006.

50. The most significant aspects relate to agricultural waste, which, having previously been excluded by section 75(7)(c) of the Environmental Protection Act 1990, is brought within the waste management licensing regime for the first time (following Commission v. U.K.(Case C-62/03; E.C.J.; December 16, 2004 where
the UK was found to have failed to fulfil its obligations under the Waste Framework Directive for not regulating waste from the activities of mines and quarries and the management of a number of types of waste from premises used for agriculture).

**Waste and sewage**

51. Another interesting area is the potential overlap between waste and liquid effluent/sewage.

52. In *R (on the application of Thames Water Utilities Ltd|) v Bromley Magistrates' Court* 36 the Administrative Court made a reference to the ECJ on the question of whether sewage escaping from the sewage network amounts to “directive waste” for the purposes of the Waste Framework Directive.

53. The Environment Agency has been pursuing the practice of prosecuting sewerage undertakers under the waste provisions of Part II of the EPA 90 in cases of overflowing sewers or escapes of sewage from works which do not result in water pollution. Rose LJ found that the district judge did not have jurisdiction to rule on a preliminary point of law in relation to which it was not necessary to find any facts 37 In order to resolve the question of law it was necessary for an authoritative decision to be made by the European Court of Justice. The questions asked are

(a) Whether sewage which escapes from a sewerage network maintained by a statutory sewerage undertaker amounts to directive waste

(b) If the answer to (1) is yes, whether the sewage is:

- is excluded from the scope of ‘directive waste’ under the WFD by virtue of article 2(1)(b)(iv) of the WFD, in

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36 [2005] EWHC 1231 (Admin) Case C-252/05
37 Sections 8A and 8B of the Magistrates Courts Act 1980 (inserted by Sched 3 of the Courts Act 2003) now expressly confer powers to make preliminary rulings
particular, by virtue of the UWWTD and/or the WIA 1991;
- or, comes within article 2(2) of the WFD and is excluded from the scope of ‘directive waste’ under the WFD, in particular, by virtue of the UWWTD.

54. However in the meantime, the domestic courts have considered the same question in a case involving a different factual context and a different undertaker.

55. In ‘United Utilities Water plc v Environment Agency’ Court of Appeal ([2006] EWCA Civ 633; May 19, 2006), considered that questions of whether sewage sludge was “waste” within the meaning of Article (a) of the Waste Framework Directive (75/442/EEC) and, if so, whether it was excluded from obligations under that directive by virtue of Article 2(b)(iv), and whether waste water treatment plants required permits under the Pollution Prevention and Control (England and Wales) Regulations 2000 (S.I. 2000/1973).

56. The claimant was a statutory water and sewerage undertaker within the meaning of the Water Industry Act 1991. It operated a significant number of waste water treatment plants, some of which incorporated sludge treatment facilities. Each of those plants received waste water, which consisted of domestic sewage, industrial trade effluent and rain water run off. Once treated two major products were produced: either treated waste water which could be discharged back into rivers or other receiving waters controlled under the Water Resources Act 1991; or sludge which was either disposed of by incineration or landfill or recovered for use on agricultural land.

57. The claimant brought proceedings for declarative relief that it was not required to secure from the defendant permits pursuant to the Pollution Prevention and Control (England and Wales) Regulations 2000, S.I 2000/1973, in respect of work
performed at six of its plants. Those plants had been chosen as test cases designed to determine the main issues of principle between the parties. The 2000 Regulations gave effect to Council Directive (EC) 96/61, which had a stated objective of providing an integrated approach to pollution control to prevent emissions into air, water or soil wherever possible.

58. At first instance, Nelson J found that there could be no doubt that sewage sludge was “waste” within the meaning of Article 1(a) of the Waste Framework Directive. Moreover, once it had been extracted from waste waters, sewage sludge was waste in liquid form, and therefore was not excluded under Article 2(b)(iv). It could not be accepted that sludge was either an integral part of waste water simply by being part of it or was a solid once it had become cake. Sludge was waste and aqueous. Once it had been extracted from waste waters it was more concentrated than such wastes and was therefore waste in liquid form.

**Current policy moves**

**European Commission Communication and Revised Framework Directive**

59. In December 2005, the European Commission published a Communication on a strategy on the prevention and recycling of waste (The waste strategy is one of the seven ‘thematic’ strategies required under the 6th Environment Action Programme (2002-2012)) along with a proposal for a revised framework directive on waste)\(^{38}\). The drivers behind the initiative include poor implementation of current waste legislation, the untapped potential for waste prevention and recycling and the lack of clarity of EU waste law. The strategy aims to help Europe become a recycling society that seeks to avoid waste and uses waste as a resource.

\(^{38}\) COM (2005) 666 final
60. As a first step, the Commission proposes revising the Waste Framework Directive (75/442/EEC) to set recycling standards and to include an obligation for Member States to develop national waste prevention programmes. This revision will also merge, streamline and clarify legislation, contributing to better regulation. The main elements of the proposed revision of the Waste Framework Directive are:

- Focusing waste policy on improving the way we use resources;
- Mandatory national waste prevention programmes, which take account of the variety of national, regional and local conditions, to be finalised three years after the entry into force of the new directive;
- Improving the recycling market by setting environmental standards that specify under which conditions certain recycled wastes are no longer considered waste; and
- Simplifying waste legislation by clarifying definitions, streamlining provisions and integrating the directives on hazardous waste (91/689/EEC) and on waste oils (75/439/EEC), the latter with a focus on collection rather than on regeneration that is no longer justified from an environmental point of view.

Further measures are programmed for the next five years to promote recycling and create a better regulatory environment for recycling activities.

61. One of the proposals is to simplify and clarify the current legal framework for waste. The Commission does not consider there is a need to substantively amend the definition of waste. It does however consider there is a need for more clarity on when a waste ceases to be a waste and becomes a new or secondary raw material.

“The current definition of waste sets no clear boundaries for when a waste has been adequately treated and should be considered a product. This is problematic as it creates legal uncertainty and administrative costs for businesses and competent authorities. It can lead to diverging views from Member State to Member State and even from region to region which creates problems for the internal market. On top of this, poor quality recycled material circulates on the market generating difficulties both for potential purchases and also for reputable sellers”
62. The Commission takes the view that the issue concerns a relatively small number of waste streams. Therefore, instead of a generic definition of when waste ceases to be waste, the approach proposed is to consider individual waste streams on a case by case basis. The conditions which a waste stream must meet before it may be considered for this approach are twofold;

(1) Reclassification as a secondary product or substance would not lead to overall negative environmental impacts
(2) A market exists for such a secondary product, material or substance

63. Environmental and quality criteria will be established which the waste must meet before it may be treated as a secondary product material or substance. The first waste streams to be considered will be compost, recycled aggregates and, subject to the outcome of an ongoing study on environmental impacts, the use of tallow as a fuel.

64. As regards by-products, the Commission intends to publish guidelines based on the jurisprudence of the European Court of Justice considering, on an industry sector basis, when by-products should or should not be considered as waste.

65. The Commission’s proposed approach is helpful to the extent that it is a more nuanced attempt to respond to the complexities of a legislative definition of waste than has been the case so far. It is based on an recognition that environmentally sustainable activities and the businesses involved with them are being hindered by current jurisprudence. To put it colloquially, things are moving in the right direction. Nonetheless the Commission’s proposals raise several significant concerns set out below.

39 An amendment to the Directive will allow the establishment of waste stream-based environmental criteria to determine when a waste ceases to be a waste. Article 11 of the proposed Directive makes provision for a procedure to clarify when a waste ceases to be waste, for selected waste streams.
(3) **Timetable** The proposed Directive is currently only a proposal. It is not yet law and may not become law in its current form. Progress though the European institutions may take some time. In the event that the Directive is adopted, the current timetable is that in 2006 the Commission will publish the guidelines on by-products. In 2010, the Commission will assess the effectiveness of the guidelines. The quality standards for determining when a material is to be declassified as a waste will not be produced until 2008 and then only for two materials, compost and recycled aggregates. Save for tallow, no other waste streams have currently been identified.

(4) **The use of the comitology procedure** the proposal entrusts the development of guidelines on byproducts/when a waste ceases to be a waste to a Commission committee with representatives from Member States. The use of this so called “comitology procedure” raises concerns about transparency and accountability as decisions are referred to a small unelected panel.

(5) **Legal status of the by-product guidelines/waste criteria** The legal status of the guidelines/criteria is not currently clear. It may be that they take the form of a Commission decision in which case they will be legally binding but this is not clear. It is not clear to what extent Member States will have to follow them or whether the ECJ caselaw will trump any inconsistencies. If industry follows them can it be reassured that it will be in legal compliance and safe from legal challenge?

**Domestic initiatives**

66. In keeping with the policy moves in Europe, the Environment Agency has started its own initiative on clarifying when a waste ceases to be waste. A protocol for aggregates produced from inert waste was published in 2005 (revised edition
September 2005). It is to be followed by the development of 10 new waste protocols.  

67. The Agency's press release in which it announced the development of the additional protocols, set out the purpose of the protocols in identical terms to the European Commission's Communication which are to:

(1) Define the point of full recovery from a waste back into a product or material that can be either reused by the business or industry or sold into other markets or
(2) Define when wastes are recovered to a state where the Environment Agency considers that their use is acceptable in accordance with their Low Risk regulatory principles or
(3) Confirm to the business community what legal obligations remain to control the reuse of the treated waste material

68. There is no indication as the timetable for the completion of the protocols.

69. The developments give rise to the same concerns about the legal status of the protocols and timetable as with the European Commission’s proposals. The difference is that concern about the protocols has an evidential basis in that a protocol on aggregates has already been published.

70. The aggregates protocol makes it clear that it will still be left to the Agency to make a decision on the individual circumstances of the case.

“When reaching a decision on when a waste ceases to be a waste, the Environment Agency requires its staff to take all the circumstances of each case,”

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40 A programme with the Environment Agency and WRAP (the Waste and Resources Action Programme) announced, on 9 May 2006,
based on current case law, into account. The Environment Agency considers that the protocol is suitable for use to decide how to regulate wastes and has circulated this QP to its staff and advised them to also take account of it in their decision making.”