ENVIRONMENTAL INFORMATION

T-189/14 (Deza v. ECHA): Permitting procedure under the REACH regulation

- The exceptions may be applied to some documents provided to ECHA but not necessarily all of them and not the complete version of them. ECHA has to consider possibility to make them public towards each individual document.
- There are no evident reasons that would suggest that providing information is in conflict with business of the company – this is something DEZA should prove.

Non-state subjects:

There is basically no international or EU law to oblige member states to provide general information.

Situation is different when it comes to the environmental information.

CJEU case law:

- C-279/12 (Fish Legal and Shirley, para. 52 – 55, 67 - 70), water management company, falls within the scope of Directive 2003/4

- C-204/09 (Flachglas Torgau GmbH) and C-515/11 (Deutsche Umwelthilfe) – state administrative in legislative position

- Environmental information: C-316/01, C-266/09, C-524/09 and recently C-673/13 P (Commission v. Stichting Greenpeace Nederland and PAN Europe) and C-442/14 (Bayer CropScience a Stichting De Bijenstichting).
ENVIRONMENTAL INFORMATION

ACCC case law:

"The National Atomic Company Kazatomprom is a legal person performing administrative functions under national law, including activities in relation to the environment, and performing public functions under the control of a public authority. The company is also fully owned by the State. Due to these characteristics, it falls under the definition of a "public authority", as set out in article 2, paragraphs 2 (b) and 2 (c)." (Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 3. 2005, para. 17).

"Establishment of a special company for construction of expressways does not in itself constitute a breach of obligations under the Convention, in the Committee’s view. In this regard, the Committee takes note of the fact that the company is established by the Act, is State-owned and would, therefore fall under the definition of the public authority in accordance with article 2, paragraphs 2 (b) and (c). In Committee’s view this in itself limits the scope of application of the commercial confidentiality exemption." (Hungary ACCC/C/2004/4; ECE/MP.PP/C.1/2005/2/Add.4, 14. 3. 2005, para. 10).

"The Committee considers that it is not conflicting with the Convention when national legislation delegates some functions related to maintenance and distribution of environmental information to private entities. Such private entities, depending on the particular arrangements adopted in the national law, should be treated for the purpose of access to information as falling under the definition of a “public authority”, in the meaning of article 2, paragraph 2 (b) or (c) of the Convention." (Belarus ACCC/C/2009/37; ECE/MP.PP/2011/11/Add.2, 12. 5. 2011, para.67).
• History & Development
• Legal regulation
• Main principles
• Recent case law of the CJEU
HISTORY & DEVELOPMENT

• The EIA emerged internationally after the 1972 Stockholm Conference and is now an established international and domestic legal technique for integrating environmental considerations into socio-economic development and decision-making processes.

• International organizations such as the World Bank and United Nations are moving to employ the EIA as a basic management tool. In 1999, around 200 systems for environmental impact assessment were introduced in countries, states and international organizations around the world.

• In 1985, the EIA Directive was adopted and later recast as DIRECTIVE 2011/92/EU. An important amendment was adopted in 2014 (Directive 2014/52/EU).

• Every year, roughly 16,000 EIAs are carried out in the member states of the European Union (EU) of which about 1% on average are transboundary EIAs.

• In 2001, DIRECTIVE 2001/42/EC (the SEA Directive) was adopted, introducing the strategic environmental impact assessment.
LEGAL REGULATION

Policies

Plans & Programmes
covered by SEA Directive

Projects covered by EIA Directive
MAIN PRINCIPLES: GENERAL OBJECTIVES OF EIA

What does the EIA Directive apply to?
• projects likely to have significant effects on the environment
  (by virtue, inter alia, of their nature, size and location)

What are these projects subject to?
• a requirement for development consent
• an assessment of their effects

When?
• before consent is given

EIA must identify, describe, assess likely direct and indirect environmental effects of activities on
  – human beings, fauna, flora, soil, water, air, climate, landscape, material assets, cultural heritage, the interaction between those factors
MAIN PRINCIPLES: GENERAL OBJECTIVES OF EIA
MAIN PRINCIPLES: GENERAL OBJECTIVES OF EIA

- Annex I projects
- Annex II projects

Mandatory EIA

Screening by Competent authorities to decide if EIA needed or not
MAIN PRINCIPLES: EXAMPLES

ANNEX I

• Long-distance **railway** lines
• **Motorways**, express roads, **roads** of four lanes or more (of at least 10Km)
• **Waste** disposal installations
  – for hazardous waste
  – for non hazardous waste (above 100 tonnes/day)
• **Waste water** treatment plants (above 150000 p.e.)
• [+ changes or extensions of Annex I projects meeting Annex I thresholds]
• ...

ANNEX II

• Construction of **railways** and **roads** not included in Annex I
• **Waste** disposal installations and **waste water** treatment plants not included in Annex I
• **Urban development projects**
• **Changes or extensions** of Annex I and II projects that may have adverse environmental effects
• [+ modifications not included in Annex I]
• ....
RECENT CASE LAW OF THE CJEU

C-645/15 (Bund Naturschutz in Bayern)

1. Point 7(c) of Annex I to Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment cannot be interpreted to the effect that it covers a road development project which, whilst it concerns, as in the case before the referring court, a stretch of road that is under 10 km in length, consists in the widening or development of an existing road with four or more lanes.

2. Point 7(b) of Annex I to Directive 2011/92 must be interpreted as meaning that ‘express roads’ for the purposes of that provision are roads whose technical characteristics are those set out in the definition in point II.3 of Annex II to the European Agreement on Main International Traffic Arteries (AGR), signed in Geneva on 15 November 1975, even if those roads do not form part of the network of main international traffic arteries or are located in urban areas.

3. The concept of ‘construction’ for the purposes of point 7(b) of Annex I to Directive 2011/92 must be interpreted as referring to the carrying-out of works not previously existing or to the physical alteration of existing installations. In order to determine whether such an alteration may be regarded as equivalent, because of its scale and the manner in which it is carried out, to such construction, the referring court must take account of all the characteristics of the work concerned and not only of its length or of the fact that its initial route is retained.
The meaning of the EIA Directive is not static
Affected by technical development
The EIA Directive has “a wide scope and a broad purpose” (Kraaijeveld).
Member States’ discretion is limited.
Consistent emphasis on the likely environmental effects of proposed projects.
Exemptions to be interpreted narrowly.
Uniform interpretation cannot be determined by one language.
MAIN PRINCIPLES: EIA - PROCEDURE

Screening

Scoping

Environmental information

Consultation on environmental information

Decision

Only for Annex II projects

Upon request of the developer

The “Report”

Public, Env. Authorities...

Takes account of env.inf and consultations
MAIN PRINCIPLES: SEA

What is a plan or a programme? (Article 2)

prepared and/or adopted by an authority at national, regional or local level AND;
required by legislative, regulatory or administrative provisions.
Definition includes:
co-financed by the EC, modifications.

Typically urban plans, waste management plans,...
MAIN PRINCIPLES: SEA

Article 3(2) - plans and programmes that always require environmental assessment:
(a) prepared for agriculture, forestry, fisheries, energy, industry, transport, waste/ water management, telecommunications, tourism, town & country planning or land use
   AND
   which set the framework for future development consent of projects listed in the EIA Directive.
(b) which, in view of the likely effect on sites, have been determined to require an assessment under Article 6 or 7 of the Habitats Directive.
(c) Article 3(9) - Exemptions:
   National defence, civil emergency, financial or budget plans/programmes
   Structural Funds Regulations (inc EAGGF) for current
MAIN PRINCIPLES: EIA - SEA

PLANNING

SEA report for the plan or programme

PERMITTING

EIA report for the development consent

- Project (building, activity)
- Land use
- Building
- Activity
INTERNATIONAL LAW?

International law – Customary law, Espoo convention (transboundary assessment)...
National law
BASIC PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

- Principle of sustainable development
- Principle of prevention
- Principle of precaution?
- Principle of shared but different duties

Not binding *per se*, but important for interpretation of customary and treaty law in particular cases.

BASIC PRINCIPLES OF GENERAL INTERNATIONAL LAW

- State sovereignty
- Shared resources
- Common heritage
- Cooperation
CUSTOMARY INTERNATIONAL LAW

• Particular – Law of the Sea
• General – binding unless confirmed?

ICJ:

• The states have obligation of **mutual respect and protection of the environment** (1974, *Nuclear Tests*) and **not to allow their territory to be used for activities violating rights of other states** (1949, *Corfu Channel*).

• There is also a **general obligation to ensure that any activity under the state's jurisdiction and control respects environment of other states** or area beyond control. (1996, *Advisory Opinion on use of Nuclear Weapons*).

• This obligation implies that the states **have to carry out the EIA** in case there is a risk of a negative impact on another state (2010, *Pulp Mills*). Such assessment does not have to be limited to only one phase and can be repeated during the course of time (1997, *Gabčíkovo – Nagymaros*).

- **obligations not to harm, to assess and to notify state concerned.**
CUSTOMARY INTERNATIONAL LAW

Vague concept – what exactly, when and how? Public participation?
CUSTOMARY INTERNATIONAL LAW
TREATY LAW – THE ESPOO CONVENTION (1991)
TREATY LAW – THE ESPOO CONVENTION

Article 1: Definitions
Article 2: General provisions
Article 3: Notification
Article 4: Preparation of the environmental impact assessment documentation
Article 5: Consultations on the basis of the environmental impact assessment documentation
Article 6: Final decision
Article 7: Post-project analysis
Article 8: Bilateral and multilateral cooperation
Article 9: Research programmes

Floor, not a ceiling

May be applicable as a chosen law

EU: Implemented – EIA SEA Directive (see Art.7)
Article 2
GENERAL PROVISIONS

1. The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.

2. Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

3. The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

4. The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.
5. Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in Appendix III.

6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

7. Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes.

8. The provisions of this Convention shall not affect the right of Parties to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security.
TREATY LAW – THE ESPOO CONVENTION

- *Floor, not a ceiling* approach
- May be applicable as a chosen law
- EU: Implemented – EIA SEA Directive
- Kyev Protocol - SEA
TREATY LAW – THE AARHUS CONVENTION
TREATY LAW – OTHER BILATERAL OR MULTILATERAL TREATIES

So as to facilitate practical application of transboundary EIAs, concrete agreements have been signed for instance, between Germany and the Netherlands, France, Switzerland and Poland or between Slovakia and Austria.
SUMMARY

- Customary law provides very vague obligations
- Espoo Convention = framework obligations towards other parties
- EU law = more detailed obligations towards other member states
- National law = mainly procedural aspects, but can go further, usually defines “affected states” as states whose territory may suffer significant environmental impacts due to a project.
CASE STUDY
CASE STUDY

As regards Annex I projects, electrical power lines were built in 2006. All the ground preparation work which could have effect on the environment took place before the accession of state X to the European Union. Consequently, these activities cannot constitute, from a temporal perspective, a failure to comply with EU law.

(C-141/14, Kaliakra – temporary effects)

As regards the gas pipeline, only 2 km of its length is located on territory of State X, the rest lies in State Y (10 km) and state Z (30 km). Therefore the project cannot be subsumed under Annex I list.

Articles 2(1) and 4(1) of the EIA Directive are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is transboundary in nature and less than 15 km of it is situated on the territory of that Member State.

(C-205/08, Umweltanwalt von Kärnten, para. 58)
For the projects listed in Annex II of the EIA Directive, State X had set thresholds in accordance to Article 4(2) and (3) of the EIA Directive to determine whether the projects shall be made subject to an assessment (for example only hotels with more than 500 beds and racing track of more than 200 ha). These projects do not exceed the thresholds and consequently had not been assessed. The 2 km part of the gas pipeline located in State X does also not exceed these thresholds (15 km).

**CASE STUDY**

For the projects listed in Annex II of the EIA Directive, State X had set thresholds in accordance to Article 4(2) and (3) of the EIA Directive to determine whether the projects shall be made subject to an assessment (for example only hotels with more than 500 beds and racing track of more than 200 ha). These projects do not exceed the thresholds and consequently had not been assessed. The 2 km part of the gas pipeline located in State X does also not exceed these thresholds (15 km).

**MSs have discretion about the methods they use to specify whether a project is subject to EIA. But this method must not undermine the Directive’s objective.**

*A decision that a project does not require EIA must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, compliant with the Directive.*

*(Italy C-87/02, Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80)*

Thresholds cannot exclude all projects of a certain type UNLESS, when viewed as a whole, they would not be likely to have significant environmental effects.

Small-scale projects can have significant effects on the environment.

**Cumulative effects of projects must be taken into account.**

*(Ireland, C-392/96)*
Use of biocides and manure is not listed as a project in Annex I and Annex II of the EIA Directive. On these grounds, it cannot be even considered project for purposes of the Habitats Directive.

**CASE STUDY**

Use of biocides and manure is not listed as a project in Annex I and Annex II of the EIA Directive. On these grounds, it cannot be even considered project for purposes of the Habitats Directive.

**Interaction between EIA and Habitats Directive**  
**What has to be assessed?**  
(see Art. 4 EIA, Art. 6/3 HD)

6. 3.  
Any plan or project not directly connected with or necessary to the management of the site but **likely to have a significant effect** thereon, either individually or in combination with other plans or projects, **shall be subject to appropriate assessment**...
CASE STUDY

Even if Article 6 of the Directive was applicable, the hotel complex was already authorised in 2006, before the State X joined the EU. The official authorities did not authorise the implementation of the campsite project in the ‘Heaven’ site. It was constructed illegally without any permission.

C-121/07: A Member State may not plead difficulties of implementation which emerge at the stage when a Community measure is put into effect, including difficulties relating to opposition on the part of certain individuals, to justify a failure to comply with obligations and time-limits laid down by Community law.
CASE STUDY

Are the authorizations (permits) for the gas pipe and the theme park required in State X, State Y, State Z or all of them?

Is the environmental impact assessment for the gas pipe and the theme park required in State X, State Y, State Z or all of them?
CASE STUDY

There are no special provisions for joint cross-border projects (e.g. roads, pipelines) in the directives or national EIA Acts. In practice, there are two options.

- The standard approach would be that each Party will carry out a licensing procedure including a transboundary EIA for that part of the project on its own side of the border. In each of these procedures the other Party will participate as affected Party.
- In the alternative Approach, the competent authorities of both countries agree to carry out a common EIA for the project as a whole. Later on, each of the two Parties will take due account of the outcome of this common EIA procedure in the final decision-making that is required for the licensing of that part of the project on its own side of the border. The ECJ provided that if transboundary projects were exempted from the application of the EIA Directive solely on the ground that the EIA Directive does not contain any express provisions in regard to them, this would seriously interfere with the objective of the EIA Directive.
CASE STUDY

• What are the obligations of State X towards other states and public concerned in these states?
• Are there any requirements as regards language of the information that should be provided?
• Are the ordinary citizens in Member State Y and State Z entitled to participate in the decision making process on this project in Member State X?
• Are the NGOs in Member State Y and State Z entitled to participate in the decision making process on this project in Member State X?
CASE STUDY

Assume that the competent authorities in Member State X grant permission for this development having totally ignored any effects on the environment in Member State Y and State Z. What remedies are available against Member State X?

**EIA Directive,**
- Complaint against State to Espoo Compliance committee but.. (MOX Plant)
- Directive obligations can be enforced in domestic courts
- Complaint to EU Commission

**Habitats Directive**
- Anyone in any State party or NGO can complain against another State party to Aarhus Compliance committee
- Directive obligations can be enforced in domestic courts
- Complaint to Commission
CASE STUDY

Assume that the competent authorities in Member State X grant permission for this development having totally ignored any effects on the environment in Member State Y and State Z. What remedies are available against Member State X?

*Delena Wells, C-201/02*

*If MSs fail to carry out EIA, they must take measures to remedy that failure. These might include the revocation or suspension of a consent, or compensation if an individual has suffered harm.*

*Also C-420/11, Leth, paragraphs 37-38*
CASE STUDY ON EUROPEAN WASTE MANAGEMENT
As a national judge, you are likely to encounter various issues concerning EU waste management law in your practice:

- Illegal transboundary shipment of waste,
- Illegal treatment, production or disposal,
- Breach of legal obligations,
- Permitting procedures and conditions of waste management activities,
- Protection of environment and human health.

Questions to answer:

- Liability,
- Legal regime of a specific material (waste/by-product),
- BAT
- Expert opinions (characteristics of the material, dangerous substances, …)

+ additional aspects (national law/EU law)
LEGAL BACKGROUND

• History & Development of the EU Waste Policy
• Legal regulation
• Main principles
• Main instruments
• Recent case law of the CJEU
The European environment policy has evolved significantly since the 1970s. In the 1970s and 1980s, a number of problems and scandals related to the handling of waste alerted policy-makers to the potential impact that poorly managed waste could have upon the environment and human health.

The Member States began taking national measures to control and manage waste, which then led to the Waste Framework Directive and the Hazardous Waste Directive, both adopted in 1975, and later to the Waste Shipment Regulation. These three pieces of legislation put in place the basis of the regulatory structure on waste. They define waste and other key concepts, ensure waste is handled without causing damage to the environment or human health, and impose controlled conditions for moving waste throughout the EU.

However, the first EU Directives did not specify the environmental emission parameters for the various waste management options that were considered to be acceptable: landfill, incineration and recycling. This proved to be the weak point in terms of environmental damage from waste, as was shown by a number of problems involving pollution from incinermators or landfills, and from certain recycling plants.

Most of these gaps were filled by the Landfill Directive, finally adopted in 2001, and by the Waste Incineration Directive of 2000 and its precursor legislation.
**Figure 1** Main legal instruments forming the EU waste acquis

- **Waste Framework Directive**
  - 2008/58
  - (includes municipal and construction demolition waste)

- **Waste Shipment Regulation**
  - 1013/2006

- **Industrial Emissions Directive**
  - (Waste Incineration)
  - 2010/75

- **Landfill Directive**
  - 1999/31

- **Streams**
  - Sewage sludge
  - 1986/278
  - Packaging
  - 1994/62
  - PCB/PCT
  - 1996/59
  - End-of-life vehicles
  - 2000/53
  - Batteries
  - 2006/66

- **Hazardous substances in electrical and electronic equipment**
  - 2011/65

- **Waste electrical and electronic equipment**
  - 2012/19

Source: European Commission (2013)
**HISTORY & DEVELOPMENT**

- **The environmental impacts of waste management and to a certain extent waste generation are increasingly under control.** The basic regulatory structure is in place, and its enforcement is improving.

- **The economics of waste have changed beyond recognition.** Waste streams that businesses would have had to pay to be taken away a decade ago, are now being sold for increasing amounts of money. Business innovation has transformed the technology available for the handling of waste. This means that although waste still has negative environmental and social impacts, it should no longer be seen as one of the most serious environmental issues when compared with climate change or biodiversity loss.

- Europe is facing a dual challenge – first, to stimulate the growth needed to provide jobs and well-being to all the citizens and – second, to ensure that the quality of this growth leads to a sustainable future.

- To move away from a **linear economic model** to a more circular economic model it is needed to change the patterns of take-make-dispose. The objective of a **Circular economy** is to maintain the value of resources in the economy for as long as possible.
HISTORY & DEVELOPMENT

Linear economy:
- Resources
  - Production
  - Consumption
  - Waste

Chain economy:
- Downcycling
- Production
- Consumption
- Upcycling
- Sustainable Production

Circular economy:
- From waste to resources
**HISTORY & DEVELOPMENT**

- **The Circular Economy Package** was adopted on 2 December 2015 and consisted of an **Action Plan** in the form of a Communication, an Annex with a list of over 50 measures that the Commission intends to adopt in the coming years and four legislative proposals on waste.

- The measures identified in the Action plan focuses of measures at EU level that high added value to bring about a circular economic model. Making the circular economy a reality will however require long-term involvement at all levels – the EU, a Member State, local, and from all stakeholders.

- The documents are all available here: [http://ec.europa.eu/environment/circulareconomy/](http://ec.europa.eu/environment/circulareconomy/)

- **March 2017**: key proposals to boost EU waste policy approved by the European Parliament
Who is supporting the Circular Economy?
Leaders and laggards: we asked member states where they stand

- **Recycling**
  - Do you support a 65% recycling target for Municipal Solid Waste, as asked by the European Commission?

- **Corporate responsibility**
  - Do you support minimum requirements for extended producer responsibility as binding at EU level, including full cost coverage and modulated fees?

- **Biowaste**
  - Do you support mandatory separate collection of biowaste and/or a biowaste recycling target?

- **Reuse**
  - Do you support specific targets for preparation for reuse of Municipal Solid Waste?

- **Waste prevention**
  - Do you support the European Commission in coming up with waste prevention targets?

- **Packaging**
  - Do you support a packaging reuse target of 10%?

**Country answer**
- Yes
- Yes, but...
- No

**Denmark**

- **Country answer**
  - No

- **Our assessment**
  - Denmark opposes a recycling target by 2030.

- **Waste generation**
  - 789 (kg/capita per year)

- **Recycling rate**
  - 46%

Data updated 11 May 2017
See a historical view

Related country data

http://archive.eeb.org/EUwaste_2/
POLICY > LEGAL REGULATION (EXAMPLES)

**Plastics** - A more ambitious target for the recycling of plastic packaging in the legislative proposal on waste.

**Food Waste** – Clarification of the EU legislation relating to waste, food and feed, and facilitation of food donation.

**Critical Raw Materials** - Reports on best practices and options for further action at the EU level. Incentives/requirements in the waste directives.

**Construction & Demolition** - Adequate waste management including reuse and recycling of construction material via the development of pre-demolition guidelines and voluntary recycling protocols.

**Municipal waste** - New landfill reduction target for municipal waste – by 2030 MS can only landfill maximum 10 % of its municipal waste. The ambition of the legislative proposals is not only in the proposed rate of recycling but also in the technical rules determining the definition of municipal waste and the rules how to measure recycling. Under existing rules, MS can choose between 4 different ways how to define the scope of municipal waste. The Commission is now proposing to use only one definition.
MAIN PRINCIPLES

PREVENTION AND PRECAUTION

• The quantity of waste, including through the re-use of products or the extension of the life span of products;
• Reduce, re-use, recycle, impacts of the generated waste on the environment and human health;
• The content of harmful substances in materials and products.

RECTIFICATION AT SOURCE (PROXIMITY)

• Art 16 WFD is one of the most important measures – it requires that MS establish an integrated network of waste management infrastructure which must enable disposal of waste in one of the nearest appropriate installations. For municipal waste – the network should provide installations close to source of production (where proximity is complied this may include regional cooperation).
• C-278/09 (Commission v Italy): If one region lacks sufficient infrastructure to manage its waste – it is legitimate to conclude that this will compromise the national network of waste management and that the network is no longer integrated and adequate or complies with the principle of self-sufficiency.

POLLUTER PAYS PRINCIPLE

• Art. 14 WFD – „In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders."
• Broad discretion by MS, but proportionality (C-172/08 – Pontina Ambiente, C-254/08, C-551/13 Setar)

WASTE HIERARCHY
C-335/16 (Čistoća):
Whether Article 14 and Article 15(1) of Directive 2000/98 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides, on the one hand, that waste management service users are to pay a fee calculated on the basis of the volume of the container provided for them, and not on the basis of the waste actually transported, and, on the other hand, that they are to pay an additional levy intended to finance investments necessary for the processing of the waste collected.

26 As EU law currently stands, there is no legislation adopted on the basis of Article 192 TFEU imposing a specific method upon the Member States for financing the cost of the disposal of urban waste, with the result that the cost may, in accordance with the choice of the Member State concerned, equally well be financed by means of a tax or of a fee or in any other manner. Accordingly, recourse to criteria of invoicing based on the volume of the container provided for users, calculated on the basis of, inter alia, the surface area of the property which they occupy and of its use, may provide a means of calculating the costs of disposing of that waste and allocating those costs among the various holders, in so far as this parameter is such as to have a direct impact on the amount of those costs (see, to that effect, judgment of 16 July 2009, Futura Immobiliare and Others, C-254/08, EU:C:2009:479, paragraphs 48 and 50).

28 The same applies to an additional levy intended to finance investments necessary for the processing of waste, including the recycling thereof.
RECENT CASE LAW OF THE CJEU

C-551/13 (SETAR) - Possibility for the waste producer to carry out the waste treatment independently

The request has been made in proceedings between Società Edilizia Turistica Alberghiera Residenziale (SETAR) SpA ('SETAR'), proprietor of a hotel complex in the locality of S'Oru e Mari (Italy) in the Comune di Quartu S. Elena, concerning SETAR's refusal to pay the municipal tax for the disposal of solid urban waste (tassa per lo smaltimento dei rifiuti solidi urbani; 'the TARSU').

Under Article 15 of that directive:
‘1. Member States shall take the necessary measures to ensure that any original waste producer or other holder carries out the treatment of waste himself or has the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector in accordance with Articles 4 and 13.

2. When the waste is transferred from the original producer or holder to one of the natural or legal persons referred to in paragraph 1 for preliminary treatment, the responsibility for carrying out a complete recovery or disposal operation shall not be discharged as a general rule.

Without prejudice to Regulation (EC) No 1013/2006 [of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1)], Member States may specify the conditions of responsibility and decide in which cases the original producer is to retain responsibility for the whole treatment chain or in which cases the responsibility of the producer and the holder can be shared or delegated among the actors of the treatment chain.

3. Member States may decide, in accordance with Article 8, that the responsibility for arranging waste management is to be borne partly or wholly by the producer of the product from which the waste came and that distributors of such product may share this responsibility.

On 30 November 2010, SETAR informed the Comune di Quartu S. Elena (Municipality of Quartu S. Elena; 'the Municipality') that, as from 1 January 2011, it would no longer pay the TARSU for management of the municipal waste disposal service, since, with effect from that date, it would be using a specialised firm for the disposal of the waste produced by its hotel complex, in accordance with Article 188 of Legislative Decree No 152/2006 and Article 15 of Directive 2008/98.
C-551/13 (SETAR) - Possibility for the waste producer to carry out the waste treatment independently

43 Thus, Article 15(1) of Directive 2008/98 allows Member States to choose between a number of options and the reference to Articles 4 and 13 of Directive 2008/98 cannot — contrary to the assertions made by SETAR — be construed as narrowing the discretion thereby conferred on Member States so as to compel them to recognise that an original waste producer or waste holder has the right to carry out the treatment of that waste independently and accordingly to be relieved of the obligation to contribute to the funding of the waste management system established by the public services.

44 In particular, Article 4(1) of Directive 2008/98, which establishes the waste hierarchy as it should be applied in waste prevention and management legislation and policy, does not support the inference that priority must be accorded to a system which permits waste producers to dispose of that waste independently. On the contrary, waste disposal is placed last in that order of precedence.

45 Moreover, the interpretation to the effect that Article 15(1) of Directive 2008/98 leaves a broad discretion to Member States and does not oblige them to permit the original waste producer or waste holder to dispose of that waste independently is the only interpretation that makes it possible to take useful account of the fact, referred to in recital 41 to the directive, that Member States maintain different approaches to the collection of waste and their waste collection systems differ substantially.

RECENT CASE LAW OF THE CJEU
MAIN PRINCIPLES

**Stages**

- **Prevention**
  - Using less material in design and manufacture.
  - Keeping products for longer; re-use.
  - Using less hazardous material.

- **Preparing for re-use**
  - Checking, cleaning, repairing, refurbishing, repair, whole items or spare parts.

- **Recycling**
  - Turning waste into a new substance or product.
  - Includes composting if it meets quality protocols.

- **Other recovery**
  - Including anaerobic digestion, incineration with energy recovery, gasification and pyrolysis which produce energy (fuels, heat and power) and materials from waste; some backfilling operations.

- **Disposal**
  - Landfill and incineration without energy recovery.
MAIN INSTRUMENTS

PROPER WASTE MANAGEMENT
• MS shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment
• enforcement: prohibit uncontrolled management of waste and penalties
• Waste management plans (WMP) containing Waste prevention programmes - obligation of the MS

WASTE INSTALLATIONS
• shall obtain a permit from the competent authority
• EIA, IPPC

LANDFILLING OF WASTE
• the worst waste management option
• landfill classes for hazardous – non-hazardous – inert waste
• proper treatment - permit is necessary and technical conditions (requirements)
• the following waste may not be deposit: liquid waste, tyres, waste with certain properties (e.g. explosive, flammable), infectious clinical waste
• closing and after-care
Definition of WASTE

"any substance or object which the holder discards or intends or is required to discard”

art. 3 (1) WFD

- subjective and objective elements
- restrictive interpretation is forbidden (high level of protection)
- it is necessary to consider all circumstances

BY-PRODUCTS

substance (object) is result from production process
but primary aim is not the production of the substance
conditions:
- the substance is produced as an integral part of a production process
- further use of the substance is certain
- the substance can be used directly without any further processing other than normal industrial practice
- further use is lawful
- i.e. the substance fulfils all relevant product, environmental and health protection requirements for the specific use
- will not lead to overall adverse environmental or human health impact
**Main Instruments**

**Definition of WASTE**

**C-252/05** This case followed flooding events in the United Kingdom. In response from the case brought by Thames Water the Court ruled that waste water that escapes from sewerage networks can be classified as waste under the Directive.

**C-457/02** This case clarified that the definition of waste should not be interpreted as excluding all production and consumption residues. Moreover, importantly the ruling set out that the definition of waste cannot be construed as covering exclusively substances or objects intended for, or subjected to, the disposal or recovery operations mentioned in Annexes II A and II B of the Directive, to that Directive or in the equivalent lists. As a consequence it was clarified that Annexes IIA and II B represent indicative lists rather than comprehensive lists.

**C-235/02** This case ruled on the issue of by-products versus waste. The Court set out that petroleum coke produced intentionally or in the course of producing 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.

**C-114/01** This case also ruled in the case of waste versus by-products. In this case the Court clarified the definition of waste stating that leftover rock and residual sand from ore dressing from mining activities must be classified as waste, unless they are to be used subsequently for the filling-in of galleries of that mine or where there is a definite prospect for their use for that purpose.
Definition of WASTE

C-9/00 This case concerns whether leftover stone from quarrying activities, which is later discarded. This case again focused on the difference between a waste product and by product of activity. The Court held that, having regard to the principle established in earlier cases that the concept of waste should be interpreted widely in order to limit its inherent risks, the classification of by-products should be confined to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process. Consequently, the leftover stone was classified as waste.

C-418/97 to C-419/97 In these cases the Court specifically examined if products discarded by some but are then, for example, used by others as a fuel source (e.g. wood chips) are considered to be waste. The Court ruled that the idea that material had been discarded should not necessarily be regarded as a basis for determining if a material is waste. It stated that each classification should be individually assessed.

C-129/96 This case examined what is considered a waste, when does it become a waste and how might this differ from a by-product. The Court ruled that a substance cannot be excluded from the definition of waste on the grounds that it directly or indirectly forms an integral part of an industrial production process.

224/95, C-304/94, C-342/94, C-224/95 This case deals with the fundamental question of when is a material waste and when does this material cease to be waste. The objects capable of economic reutilization even if the materials in question may be the subject of a transaction or quoted on public or private commercial lists. Moreover, the fact that a substance is classified as a re-usable residue without its characteristics or purpose being used or re-processed does not mean for the time being it is not considered waste in need of management.

C-206/88 and C-207/88 These cases again examined whether residue materials should not exclude substances and objects which are capable of economic reutilization. The concept does not presume that the holder disposing of a substance or an object intends to exclude all economic reutilization of the substance or object by others.
END-OF-WASTE CRITERIA
• waste has undergone a recovery and complies with specific criteria based on these conditions:
  • the substance is commonly used for specific purposes
  • a market or demand exists for such a substance
  • the substance fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products
  • the use of the substance will not lead to overall adverse environmental or human health impacts
  • Regulation (EU) No 333/2011 establishing criteria determining when certain types of scrap metal cease to be waste or No 1179/2012 (glass cullet)
  • MS may decide case by case

HAZARDOUS WASTE
• is mentioned in the List of waste (Commission Decision)
• displays one or more of the properties listed in Annex III of WFD
• ban on the mixing of hazardous waste with other waste or substances
• packaging and labelling requirements
• traceability from production to final destination
• transport: identification documents
• chronological record – has to be preserved for at least three years

MAIN INSTRUMENTS
MAIN INSTRUMENTS

SCOPE OF WFD - THESE TYPES OF WASTE ARE EXCLUDED:

- e.g. gaseous effluents emitted into the atmosphere
- land (in situ) including unexcavated contaminated soil and buildings permanently connected with land
- radioactive waste
- decommissioned explosives
- excluded to the extent that they are covered by other Community legislation
- waste waters
- animal by-product
- waste from extractive industries (Directive 2006/21/EC)
CASE STUDY/1
CASE STUDY/2
CASE STUDY/1

- Would you consider the excavated soil waste in this case?
- What are the obligations of Ludweiser regarding the excavated soil? Does the existence of contract between Ludweiser and ECOSOIL play any role as regards liability?
- What is the legal regime of the sorted material and pure soil? Is it possible to simply re-use it?
- In general, would you subsume the excavated soil storage for 8 months under preliminary storage of waste pending its collection, under the collection of waste or under the storage of waste pending treatment?

Additional questions:
- What if ECOSOIL was not authorised to handle the waste?
- What are the requirements on inspection as regards securing the evidence?
- Does the WFD set any requirements as regards sanctions?
- As a national judge in your country, are you entitled to lower the fine imposed on Ludweiser?
Guidance on the interpretation

of key provisions of

Directive 2008/98/EC on waste

There is a similar guidance on byproducts and end of life vehicles (ELVs).
Case C-9/00 (Palin Granit)

- A company in Finland operates a granite quarry.
- Storing of leftover stone and the possibility of recovering that stone by using it as gravel or filling material in constructing breakwaters and embankments
- No intention to produce the leftover stone
- Economic value
- Composition of the stone
- No danger to environment
- Degree of likelihood that the stone will be used

Absence of economic value is argument in favour waste

In Palin Granit, the ECJ considered that even if it was proven that the material in question does not pose any real risk to human health and environment; this was not a relevant criterion in order to consider that a material was not waste.

This is logical – inert industrial waste dumped in an inappropriate area may pose no risk to human health or to the environment. However, it undoubtedly constitutes a nuisance and should be covered by the scope of the waste definition.

If the excavated soil was sorted and directly used for (another) legal purpose, it could have been possible to assume that it was not discarded. However it was put in storage. Therefore, it should be assumed that it was discarded and became waste. The use of the sorted excavated soil could be considered recovery. In this regards it is decisive that such use of similar material is allowed (for example under the REACH regulation).
Deliberate x accidental

It is irrelevant whether materials, substances are deliberately or accidentally discarded (C-252/05 Thames Water Utilities, C-188/08 Cion v Ireland, C-188/07 Commune de Mesquer).

Economic value

Te concept of waste does not exclude substances or objects which are capable of economic reutilization (C-359/88 Zanetti and Others, C-241/12 and C-242/12 Shell)

Substances subject to waste recovery that forms part of an industrial proces may constitute waste (C-129/96 Inter-Environment Wallonie)
C-69/15 (Nutrivet): Transport of waste, sanctions

50 According to settled case-law, in the absence of harmonisation of EU legislation in the field of penalties applicable where conditions laid down by arrangements under that legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles, and, consequently, in accordance with the principle of proportionality (judgment of 9 February 2012 in Urbán, C-210/10, EU:C:2012:64, paragraph 23 and the case-law cited).

51 In that regard, it should be borne in mind that, in order to assess whether the penalty in question is consistent with the principle of proportionality, account must be taken inter alia of the nature and the degree of seriousness of the infringement which the penalty seeks to sanction and of the means of establishing the amount of the penalty (see, inter alia, judgment in Rodopi-M 91, C-259/12, EU:C:2013:414, paragraph 38 and the case-law cited). The Member States are thus required to comply with the principle of proportionality also as regards the assessment of the factors which may be taken into account in the fixing of a fine (judgment of 9 February 2012 in Urbán, C-210/10, EU:C:2012:64, paragraph 54).

52 However, it is ultimately for the national court, by taking into account all the factual and legal circumstances of the case before it, to assess whether the amount of the penalty does not go beyond what is necessary to attain the objectives pursued by the legislation in question. As regards the specific application of that principle of proportionality, it is for the national court to determine whether the national measures are compatible with EU law, the competence of the Court of Justice being limited to providing the national court with all the criteria for the interpretation of EU law which may enable it to make such a determination as to compatibility (see, to that effect, judgment of 29 July 2010 in Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski, C-188/09, EU:C:2010:454, paragraph 30 and the case-law cited).

Article 50(1) of Regulation No 1013/2006, as amended by Regulation No 255/2013, under which the penalties imposed by the Member States in the event of infringement of the provisions of that regulation must be proportionate, must be interpreted as meaning that a waste shipment for which the accompanying document referred to in Annex VII thereto contains incorrect or inconsistent information may, in principle, be penalised by a fine the amount of which is the same as the fine imposed for infringement of the obligation to complete that document. In the review of proportionality of such a penalty, the referring court must take particular account of the risks which may be caused by that infringement in the field of protection of the environment and human health.
C-487/14 (Total Waste Recycling)

Article 50(1) of Regulation No 1013/2006, as amended by Regulation (EC) No 669/2008, according to which the penalties applied by the Member States for infringement of the provisions of that regulation must be proportionate, must be interpreted as meaning that the imposition of a fine penalising the illegal shipment of waste, such as that referred to in Annex IV to that regulation, in the country of transit at a border crossing point which differs from that provided in the notification document which had been consented to by the competent authorities, of which the basic amount is the same as the fine imposed for a breach of the requirement to obtain consent and to give prior notification in writing, is to be considered to be proportionate only if the circumstances of the infringement make it possible to find that they involve equally serious infringements. It is for the national court to determine, by taking into account all the factual and legal circumstances of the case before it, and, in particular, the risks which may be created by that infringement in the field of the protection of the environment and human health, whether the amount of the penalty does not go beyond what is necessary to attain the objectives of ensuring a high level of protection of the environment and human health.

As regards the penalties imposed for infringement of the provisions of Regulation No 1013/2006, which aims to ensure a high level of protection of the environment and human health, the national court is required, in the context of the review of the proportionality of such penalty, to take particular account of the risks which may be caused by that infringement in the field of protection of the environment and human health.
CASE STUDY/2
**CASE STUDY/2**

**Question:**
Does the old van present waste? Which factors may play important role in this respect?
CASE STUDY/2
Disposal: Free or almost free
CASE STUDY/3
CASE STUDY/3

**Question:**
- *Does the yeast present waste? Which factors would be decisive for your conclusions?*

**Additional question:**
- *Replace the yeast with sludge from the water cleaning facility (or a sewage treatment plant) used for agricultural purposes. Does it share the same legal regime with the yeast?*
**CASE STUDY/3**

*Waste or by-product (non-waste)?*

*Only if all four conditions are met, a substance may be regarded as non-waste:*
- **Integral part of the production process**
- **Further use is certain**
- **Further use without further treatment/processing**
- **Further use is legal**

*Attention can be drawn to the Commission’s communication on the waste and by-products (COM(2007)0059 final) which provides more extensive guidance on the concept of by-product and the different considerations that the CJEU has provided as guidance. It should be noted that the notion of “animal by-product” (referred to in Art 2(2)(b) WFD) has not the same meaning as “by-product” in Art 5 WFD. Animal by-product is entire bodies or parts of animals or products of animal origin not intended for human consumption. “animal by-product” is excluded from the scope of the WFD if it is used for uses that are not considered waste operations. Management of animal byproducts is governed by Regulation 1069/2009.*
THANK YOU FOR YOUR ATTENTION!

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