

Editorial

WASTE MANAGEMENT WITHIN EUROPEAN UNION: MUST THE DISCOURSE CHANGE?

From a legal perspective, waste management is about dealing with the potential risks that waste poses for human health and the environment. Within the European Union (EU), waste is primarily governed by the Waste Framework Directive (2008/98/EC) (WFD) and associated legislation. In the advent of the circular economy, an additional purpose has come to the center of attention, namely that of utilizing waste as a valuable resource. This purpose is explicitly mentioned in the recital of the 2018 revision to the WFD where it is stated that “[i]mproving the efficiency of resource use and ensuring that waste is valued as a resource can contribute to reducing the Union’s dependence on the import of raw materials and facilitate the transition to more sustainable material management and to a circular economy model.” (Directive 2018/851, recital 2). While similar ideas were present in the 2008 WFD (2008/98/EC), the scope was limited to strengthening the economic value of waste (Directive 2008/98/EC preamble 8). It is thus clear that the policymakers of the European Union have incorporated the notion of a circular economy in their law-making process. However, the dichotomy of environmental protection and resource utilization is challenging to realize in practice.

The legal demarcation between waste and resource lies within the interpretation of the concept of waste. While the interpretation of what waste is within the EU is neither in its infancy nor definitive, a recent verdict from the Court of Justice of the European Union (CJEU), Case C-239/21 *Porr Bau*, showcases how a potential waste may, in an appropriate manner, substitute primary resources. The background for the dispute is an inquiry from a group of farmers to obtain excavated materials for soil adaption purposes from the construction company *Porr Bau*. At the time of the farmers inquiry the company was not in possession of such materials, which led *Porr Bau* to select an appropriate on-going construction project and extract the wanted materials. In short, this implies that materials which otherwise might not have been put to use is utilized for a beneficial purpose. Following this, *Porr Bau* requested primarily that the local authorities declare that the excavated material did not constitute waste, and secondly that it had ceased to be waste. The authorities, however, found that the excavated materials did constitute a waste, and also that it did not meet the requirements for end of waste, whereupon *Porr Bau* appealed the decision. The question is then how the authorities could reach the conclusion that the materials

constituted a waste when *Porr Bau* could clearly show that the materials were of the highest grade, and commercially retailed to the farmers for a beneficial purpose.

Waste is, according to EU law, something that its holder discards, intends to discard or must discard (Article 3(1) WFD). Based on the letter of the law, it should thus be fairly simple to determine whether an object constitutes a waste: has it been, or will it be, discarded? Or, as in this case, is *Porr Bau* discarding the excavated materials by selling it to the farmers? My first reaction was: surely not. But the interpretation of waste has generated a complex body of law, according to which, to this day, waste is not clearly defined. While the rulings of the Court partially and incrementally have clarified the meaning of waste, the idea of the circular economy implies new challenges. In *Porr Bau*, the Court clearly expressed that that re-use of excavated materials must not be hindered by formal criteria which have no bearing on environmental protection, as this would counteract the effectiveness of the WFD, and in turn breach EU law. And yet it was not due to formal criteria that the materials was seen as a waste, but the fact that it was considered discarded. No consideration was given to the quality of the material and that the use was not assumed to entail any adverse environmental impacts.

Thus, while the court clearly takes a stance in favor of both environmental protection and the circular economy as the classification of waste would imply that the excavated materials could not be used for a beneficial purpose the outcome of this case also highlights two problems:

First, the wide, and at the same time, ambiguous definition of waste results in considerable uncertainty because a correct assessment requires a combination of both objective and subjective criteria. What this in practices implies is that government authorities often adopt a better safe than sorry approach. While this approach is in line with the precautionary principle (i.e., in *dubio pro natura*), the flipside is that such a cautionary stance may in many cases constitute a detriment to the realization of waste as a secondary resource. In our case, for instance, *Porr Bau* were contacted by the farmers in early 2020 and the dispute was solved in late 2022. With such protracted processes, customers (in this case the farmers) are likely to obtain the desired materials elsewhere.

Second, while the Court directly refers to undermining circular economy as undermining the WFD, the case does not shed much light upon the dichotomy of environmen-

tal protection and resource use as the court only states that formal criteria, which are irrelevant for environmental protection, would undermine the circular economy. This of course begs the question of which parts of the waste legislation that could undermine the circular economy with the same argument, that is, where there are legal requirements that has no bearing on environmental protection, for example that a “market” is required for end of waste. Furthermore, it begs the question of if it is at all possible to make an assessment that favors resource utilization, or if waste as a resource will never outweigh environmental protection?

Environmental law, and by extension waste law, will always entail tradeoffs, and both the legislator and practitioners must find a balance between environmental protection and other interests. These tradeoffs have been illustrated in various ways in the last ten years, where the CJEU has produced rulings in waste law, covering the concept of waste, shipment of waste, final storage of waste through landfilling, and end of waste. Throughout the Court’s history, a common denominator of the rulings have been the maintenance of a high level of environmental protection. While this is both understandable and rational – as EU waste legislation is based upon article 192 TFEU – it has resulted in an extensive interpretation of the concept

of waste through a precautionary approach (Van Calster, 2015). The necessity of a wide interpretation of waste in order to uphold the environmental protection purpose of the waste regime is also repeatedly referred to by the Court.

To conclude, while the core of the concept of waste (discard) has remained unchanged for over thirty years, in light of the idea of the circular economy, it can be argued that the waste discourse has changed, or needs to change, in order for the new goals to be reached. It is time to reflect upon the consequences of the current regime. If waste, as the legislator points out, should be valued as a resource, it may be high time to narrow the definition of waste.

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