

Case C-629/19

Request for a preliminary ruling

Date lodged:

23 August 2019

Referring court:

Landesverwaltungsgericht Steiermark (Austria)

Date of the decision to refer:

14 August 2019

Appellant:

Sappi Austria Produktions-GmbH & Co KG
Wasserverband 'Region Gratkorn-Gratwein'

Defendant authority:

Landeshauptmann der Steiermark

[...]

**Landesverwaltungsgericht
Steiermark**
(Regional Administrative Court of Styria) [...]

Graz, 14 August 2019

To the
Court of Justice of the European Union
[...]

Request

for a

Preliminary Ruling

under Article 267 TFEU

Parties in the main proceedings [...]:

- a) Appellants:
- 1) Sappi Austria Produktions-GmbH & Co KG [...]
 - 2) Wasserverband 'Region Gratkorn-Gratwein' (water association for the Gratkorn-Gratwein region, 'the Gratkorn-Gratwein Wasserverband') [...]
- b) Defendant authority: Landeshauptmann von Steiermark (Governor of Styria) [...] **[Or. 2]**

In the proceedings concerning the appeal brought by Sappi Austria Produktions-GmbH & Co KG and the Gratkorn-Gratwein Wasserverband against the decision of the Governor of Styria of 2 November 2015 [...], the Regional Administrative Court of Styria [...] made the following

ORDER:

- I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:
1. **Is sewage sludge to be regarded as waste in light of the exclusion under Article 2(2)(a) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives in conjunction with Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment and/or the Sewage Sludge Directive, as amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008?**
 2. **If the first question is answered in the affirmative:**
Does Article 6(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives permit a substance to be classified as a by-product within the meaning of the concept of waste under EU law if, for process-related reasons, other substances which would otherwise have to be regarded as waste are added to that substance in a small proportion, if this has no effect on the composition of the substance as a whole and provides a significant benefit to the environment?
- II. The appeal proceedings shall [...] be continued once the Court of Justice of the European Union has given a ruling. **[Or. 3]**

Grounds

I.

Facts and procedure:

By the contested decision, the Governor of Styria determined, after an extensive preliminary investigation pursuant to Paragraph 6(6) Abfallwirtschaftsgesetz 2002 (Law on waste management 2002, 'the AWG 2002'), that modifications to boiler 11 of Sappi Austria Produktions-GmbH & Co KG, located on the site in [...] Gratkorn, [...] and the waste incineration plant owned by the Gratkorn-Gratwein Wasserverband, located on the same site, are subject to authorisation pursuant to Paragraph 37(1), (3) and (4) AWG 2002. This decision was based on the ground that, in the two plants, sewage sludge from the jointly operated waste water treatment plant of Sappi Austria Produktion GmbH & Co KG and the Gratkorn-Gratwein Wasserverband was co-incinerated in order to obtain steam for supplying energy to the paper and cellulose plant of Sappi on the same site.

In the decision, the defendant authority stated that although the majority of the sewage sludge used for incineration originated from a paper production process and that this proportion (approximately 97%) could be regarded as having by-product status within the meaning of Paragraph 2(3a) AWG 2002, this did not apply to the proportion of sewage sludge arising from municipal waste water treatment. Objectively speaking, this sewage sludge remained waste, especially given that it did not arise from a paper production process. Since, according to the case-law of the Supreme Administrative Court, there is no de minimis limit for the classification of a substance as waste, however, it was to be assumed that all the sewage sludge co-incinerated in the two plants described above was waste within the meaning of Paragraph 2(1) AWG 2002, and modifications to those plants were therefore subject to authorisation within the meaning of Paragraph 37(1), (3) and (4) AWG 2002.

The two parties [...] concerned brought an appeal against that decision before the Regional Administrative Court, in which they essentially argue that the sewage sludge referred to in the operative part of the decision was not waste pursuant to Paragraph 2(1) AWG 2002, as it arose in the context of an integrated paper and cellulose production process, which was planned as such from the beginning of the plant's design phase, and the sewage sludge was used to recover energy for the paper production, whereby all the installations were operated by Sappi at the [Or. 4] production site and it was only for organisational and legal reasons that they were owned by two different legal entities, which were also holders of the water permit for the waste water treatment plant and the industrial authorisation for boiler 11 and the waste incineration plant.

Referring to the case-law of the Court (Case C-114/01, *Avesta Polarit Chrome OY*, ECLI:EU:C:2003:448 and Case C-113/12, *Brady*, ECLI:EU:C:2013:627), it is stated that production residue and other substances fell outside the definition of

waste if they could either (in the case of internal waste) be used as part of the continuing process of production or could be used on the premises of any other economic operator, if that further use was ensured and such further use of the substance provided an economic benefit. In its decision of 23 January 2014 [...], the Supreme Administrative Court followed this case-law and stated that the use of production residue from a plant's own operations for energy production constituted 'certain further use', meaning that such production residue did not fall within the definition of waste. The municipal proportion of the sewage sludge, which amounted to 2% in purely arithmetical terms, did not in any way alter the properties of the substance and was also incapable of harming public interests in waste management within the meaning of Paragraph 1(3) AWG 2002, since a permissible further use of all the residuals that arose was ensured.

After conducting a preliminary investigation and public hearing, the adjudicating Regional Administrative Court initially allowed the appeal and, in a judgment of 19 December 2016 [...], found that modifications to boiler 11 of Sappi Austria Produktions-GmbH & Co KG[...] and the waste incineration plant owned by the Gratkorn-Gratwein Wasserverband, [...] are not subject to authorisation pursuant to Paragraph 37(1), (3) and (4) AWG 2002, BGBl (Federal Law Gazette) I 102/2002, as amended.

In a judgment of 27 February 2019 [...], the Supreme Administrative Court allowed the appeal on a point of law brought, *ex officio*, by the Federal Minister of Agriculture and Forestry, the Environment and Water Management [...] against the contested judgment of the Regional Administrative Court and annulled it on the ground of illegality. **[Or. 5]**

In the grounds, the Supreme Administrative Court states that:

In accordance with Article 5 of the Waste Framework Directive, paragraph 2(3a) AWG 2002 lays down the conditions under which a substance or object — which while resulting from a production process, is not the primary aim of that process — may be regarded as not being waste but as being a by-product. It is clear from the introductory wording of that provision that the substance or object must arise from a production process. The appellant on a point of law correctly states that the sewage sludge in question arises during the joint treatment of industrial and domestic/municipal waste water in the waste water treatment plant operated by the second respondent.

Waste water, and therefore also the industrial waste water of the first respondent, is not waste pursuant to point 1 of Paragraph 3(1) AWG 2002. In general, waste water is understood to refer to water, the properties of which have been altered by domestic, industrial or other uses. Within the meaning of the legislation pertaining to water, waste water is water that has been discarded by someone. It may be contaminated water (for instance kitchen waste water, domestic waste water, industrial waste water), but also slightly contaminated water or even uncontaminated water (e.g. rainwater). The Wasserrechtsgesetz 1959 (Act

regulating the law on water 1959, the 'WRG 1959') (in particular Paragraph 30 et seq.) lays down more detailed rules for the preservation and protection of waters (including groundwater). From the point at which the constituents have been filtered out of the waste water and are no longer present in it, it is no longer possible to refer to waste water constituents within the meaning of point 1 of Paragraph 3(1) AWG 2002. The exclusion pursuant to point 1 of Paragraph 3(1) AWG 2002 is no longer applicable to such substances [...]. Therefore, if sewage sludge arises as a waste water constituent from the treatment of waste water required pursuant to the WRG 1959, there is therefore no production residue from a production process, because that waste water treatment, whether it be in a sewage treatment plant on the premises of a company or in a municipal sewage treatment plant, cannot be regarded as being part of a production process. Rather, the waste water treatment is a treatment method used to ensure that wastewater is discharged into water bodies in accordance with the protection objectives of the WRG 1959. The fact that the sewage sludge arising from the waste water treatment is used for the production operations of the first respondent (and is therefore recovered and not disposed of) after mechanical dewatering by means of incineration in the aforementioned incineration plants does not provide any indication of whether the sewage sludge used in that way had previously arisen as a by-product in the context of a production process. A [Or. 6] fundamental condition for the existence of a by-product within the meaning of Paragraph 2(3a) AWG 2002 has therefore not been satisfied.

In the case of the sewage sludge that is the subject of these proceedings, the Administrative Court incorrectly assumed the existence of a by-product pursuant to the aforementioned provision and, on that basis, incorrectly found that Paragraph 37 AWG 2002 was not applicable to the incineration plants that are the subject of these proceedings.

The Regional Administrative Court of Styria, which is now once again competent in the second stage of the proceedings, now expresses doubts as to the interpretation of the concept of waste for the sewage sludge in question and as to whether its status as a by-product is lost because, for reasons of procedural efficiency, a small percentage of it consists of other substances from municipal waste water disposal that are added to it, substances for which a substitute would otherwise have to be found from elsewhere for process-related reasons — as a result of which the composition of the by-product is not altered — which is why this question of interpretation is referred, for the purpose of clarification, to the Court of Justice of the European Union, which has competence in such matters.

II.

The relevant legal position is as follows:

3. Provisions of EU law:

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives ('Waste Directive')

Recital 1

Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste establishes the legislative framework for the handling of waste in the Community. It defines key concepts such as waste, recovery and disposal and puts in place the essential requirements for the management of waste, notably an obligation for an establishment or undertaking carrying out waste management operations to have a permit or to be registered and an obligation for the Member States to draw up waste management plans. It also establishes major principles such as an obligation to handle waste in a way that does not have a negative impact on the environment or human health, [Or.7] an encouragement to apply the waste hierarchy and, in accordance with the polluter-pays principle, a requirement that the costs of disposing of waste must be borne by the holder of waste, by previous holders or by the producers of the product from which the waste came.

[...]

Recital 26

The polluter-pays principle is a guiding principle at European and international levels. The waste producer and the waste holder should manage the waste in a way that guarantees a high level of protection of the environment and human health.

Recital 27

The introduction of extended producer responsibility in this Directive is one of the means to support the design and production of goods which take into full account and facilitate the efficient use of resources during their whole life-cycle including their repair, re-use, disassembly and recycling without compromising the free circulation of goods on the internal market.

Recital 28

This Directive should help move the EU closer to a 'recycling society', seeking to avoid waste generation and to use waste as a resource. [...]

Recital29

Member States should support the use of recyclates, such as recovered paper, in line with the waste hierarchy and with the aim of a recycling society, and should not support the landfilling or incineration of such recyclates whenever possible.

Recital30

In order to implement the precautionary principle and the principle of preventive action enshrined in Article 174(2) of the Treaty, it is necessary to set general environmental objectives for the management of waste within the Community. By virtue of those principles, it is for the Community and the Member States to establish a framework to prevent, reduce and, in so far as is possible, eliminate from the outset the sources of pollution or nuisance by adopting measures whereby recognised risks are eliminated. [Or. 8]

Article 3

Definitions

For the purposes of this Directive, the following definitions shall apply:

1. *'waste' means any substance or object which the holder discards or intends or is required to discard;*

[...]

Article 4

Waste hierarchy

1. *The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:*

- (a) *prevention;*
- (b) *preparing for re-use;*
- (c) *recycling;*
- (d) *other recovery, e.g. energy recovery; and*
- (e) *disposal.*

[...]

Article 5

By-products

1. *A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste referred to in point (1) of Article 3 but as being a by-product only if the following conditions are met:*
 - (a) *further use of the substance or object is certain;*
 - (b) *the substance or object can be used directly without any further processing other than normal industrial practice;*
 - (c) *the substance or object is produced as an integral part of a production process; and [Or. 9]*
 - (d) *further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.*
2. *On the basis of the conditions laid down in paragraph 1, measures may be adopted to determine the criteria to be met for specific substances or objects to be regarded as a by-product and not as waste referred to in point (1) of Article 3. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 39(2).*

Article 6

End-of-waste status

1. *Certain specified waste shall cease to be waste within the meaning of point (1) of Article 3 when it has undergone a recovery, including recycling, operation and complies with specific criteria to be developed in accordance with the following conditions:*
 - (a) *the substance or object is commonly used for specific purposes;*
 - (b) *a market or demand exists for such a substance or object;*
 - (c) *the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and*
 - (d) *the use of the substance or object will not lead to overall adverse environmental or human health impacts.*

The criteria shall include limit values for pollutants where necessary and shall take into account any possible adverse environmental effects of the substance or object. [Or. 10]

2. [...]
3. [...]
4. *Where criteria have not been set at Community level under the procedure set out in paragraphs 1 and 2, Member States may decide case by case whether certain waste has ceased to be waste taking into account the applicable case-law. They shall notify the Commission of such decisions in accordance with Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services where so required by that Directive.*

Article 13

Protection of human health and the environment

Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular:

- (a) *without risk to water, air, soil, plants or animals;*
- (b) *without causing a nuisance through noise or odours; and*
- (c) *without adversely affecting the countryside or places of special interest.*

4. Provisions of national law:

Law on waste management 2002

Paragraph 1(1):

In accordance with the precautionary principle and the principle of sustainability, waste management shall be oriented in such a way that

1. *harmful or detrimental effects on humans, animals and plants, their livelihoods and their natural environment are avoided, or, otherwise, [Or. 11] effects detrimental to general human well-being are kept to a minimum;*
2. *emissions of atmospheric pollutants and climate-relevant gases are kept to a minimum;*
3. *resources (raw materials, water, energy, landscape, areas of land, landfill capacity) are preserved;*

4. *in the context of material recovery, the waste or the substances obtained from that waste do not pose a risk greater than that posed by comparable primary raw materials or products made from primary raw materials; and*
5. *only waste the deposit of which does not pose a threat to future generations is retained.*

Paragraph 1(3):

The collection, storage, transport and treatment as waste is in the public interest if, otherwise,

[...] [certain exhaustively listed protected interests (such as, for example, health, environment, public safety, landscape, etc.) would be endangered].

Paragraph 2(1):

(1) For the purposes of this Federal Law, waste means any movable property

1. *which the holder intends to discard or has discarded, or*
2. *whose collection, storage, transport and treatment as waste is necessary in order not to harm public interests (Paragraph 1(3)).*

Paragraph 2(3):

In any case, regulated collection, storage, transport and treatment within the meaning of this Federal Law is not necessary for reasons relating to the public interest (Paragraph 1(3)) if [Or. 11]

1. *according to prevailing opinion, an object is new, or*
2. *according to prevailing opinion, it is being used in the manner intended for it.*

[...] [special provision for agriculture]

Paragraph 2(3a):

A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste but as being a by-product only if the following conditions are met:

1. *further use of the substance or object is certain;*
2. *the substance or object can be used directly without any further processing other than normal industrial practice;*

3. *the substance or object is produced as an integral part of a production process; and*
4. *further use is permitted, in particular, the substance or object can be used safely for its intended useful purpose, no protected interests (cf. Paragraph 1(3)) are harmed by the use and all relevant legal provisions are complied with.*

Paragraph 6(6):

[...] [responsibility of the Governor to determine, inter alia, whether a plant or modification to that plant is subject to authorisation pursuant to Paragraph 37 AWG]

Abfallverbrennungsverordnung (Ordinance on waste incineration — AVV)

Paragraph 2(1):[Or. 13]

This Ordinance shall apply [...] to [...] [certain industrial plants]

[...],

in which solid or liquid waste is incinerated or co-incinerated.

Paragraph 2(1a):

[...] [exclusion of certain incineration plants that use special purification techniques]

Paragraph 2(1b):

[...]

Paragraph 2(2):

This Ordinance shall not apply to:

1. plants treating only the following wastes:

[...]

- c) *fibrous vegetable waste from virgin pulp production and from production of paper from pulp, if it is incinerated at the place of production and the heat generated is recovered;*

[...] [Or. 14]

III.

1. The Regional Administrative Court of Styria is prompted by doubts with respect to the compatibility with EU law of Paragraph 2 AWG 2002 to submit a request for a preliminary ruling to the Court of Justice of the European Union.
2. [...] [general statements regarding the admissibility of the request for a preliminary ruling]

The interpretation of Paragraph 2 AWG 2002 is material to the decision to be given, for the following reasons:

3. According to settled case-law of the Court of Justice, the concept of waste under EU law is a Community concept. The Member States do not have the possibility of creating, in addition to the concept of waste under EU law, a different, narrower national concept of waste. The Austrian concept of waste, provided for in Paragraph 2(3a) AWG 2002, must **[Or. 15]** be interpreted in conformity with the Directive. In cases where the national concept of waste differs from the concept of waste under EU law, the national concept of waste is superseded by that in Directive 2008/98/EC ('Waste Directive') (cf. CJEU, Case C-304/97, *Tombesi*, ECLI:EU:C:1999:152).
4. Pursuant to point (1) of Article 3 of the Waste Directive, 'waste' means any substance or object which the holder discards or intends or is required to discard. In this regard, the Court of Justice has always stated that the definition of waste must be interpreted widely in order to ensure a high level of protection with regard to the Union's objectives in the area of environmental policy (cf. CJEU, Case C-418/97, *ARCO Chemie*, ECLI:EU:C:2000:318; CJEU, Case C-9/00, *Palin Granit Oy*, ECLI:EU:C:2002:232; CJEU, Case C-235/02, *Saetti*, ECLI:EU:C:2004:26; CJEU, Case C-457/03, *Niselli*, ECLI:EU:C:2004:707; CJEU, Case C-252/05, *Thames Water Utilities*, ECLI:EU:C:2007).
5. The Court of Justice has emphasised on several occasions that the question of whether or not a material is waste must be assessed in the light of the individual circumstances, and that decision must be taken by the competent authority on a case-by-case basis (cf. CJEU, Case C-418/97, *ARCO Chemie*, ECLI:EU:C:2000:318; CJEU, Case C-9/00, *Palin Granit Oy*, ECLI:EU:C:2002:232; CJEU, Case C-235/02, *Saetti*, ECLI:EU:C:2004:26; CJEU, Case C-457/03, *Niselli*, ECLI:EU:C:2004:707; CJEU, Case C-252/05, *Thames Water Utilities*, ECLI:EU:C:2007). The sewage sludge created in the present case is obtained from the production of pulp as an integral part of the continuing process of production. As a result, the fibrous sewage sludge originates entirely from paper and pulp production and would not exist without it.

6. In accordance with Article 5 of the Waste Framework Directive, paragraph 2(3a) AWG 2002 lays down the conditions under which a substance or object — which while resulting from a production process, is not the primary aim of that process — may be regarded as not being waste but as being a by-product. The Administrative Court takes the view that the sewage sludge that is the subject matter of these proceedings meets the cumulative conditions laid down in that provision, at least in so far as it originates from the production process. In addition, the Regional Administrative Court takes the view that the addition of municipal waste water is not detrimental either, since, on the one hand, it does not alter the composition of the substance arising during production and, on the other hand, it would have to be replaced by something else.

7. The referring court also has doubts as to whether, even if sewage sludge were not to have the status of a by-product, sewage sludge itself constitutes 'waste' within the meaning of the definition of waste under EU law. **[Or. 16]**

According to the case-law of the Court of Justice, even if a material is to be regarded as production residue, it does not necessarily constitute waste. If such a material has characteristics that make it capable of economic reutilisation, this indicates that it should not be considered as waste. The Court of Justice has established three cumulative criteria for the classification of production residue as a by-product. If the further use of a material is a certainty and not a mere possibility, and if it can be used again without any further processing and as part of the continuing process of production, that material does not constitute waste (CJEU, Case C-9/00, *Palin Granit Oy*, ECLI:EU:C:2002:232).

8. Even on the basis of the narrow interpretation of the term 'production process' adopted by the Court of Justice (cf. CJEU, Case C-9/00, *Palin Granit Oy*, ECLI:EU:C:2002:232; CJEU, Case C-457/03, *Niselli*, ECLI:EU:C:2004:707; CJEU, Case C-121/03, *Commission v Spain*, ECLI:EU:C:2005:512), the referring court takes the view that these criteria have been met. Due to the fact that the sewage sludge is an integral part of the emission-neutral, seamlessly continuous incineration carried out to generate steam in the paper production process, the sewage sludge is permanently and immediately reused. In fact, the plant in the main proceedings is designed in such a way that the sewage sludge is fed from the sewage treatment plant into the steam generation system on conveyor belts, 24 hours a day, in a closed system.

9. In the event that the Court of Justice takes the view that sewage sludge is to be regarded as waste within the meaning of point (1) of Article 3 of Directive 2008/98/EC, the national court raises further doubts surrounding the request for a preliminary ruling. Even if sewage sludge were to be regarded as waste based on the facts of the dispute in the main proceedings,

it would have reached end-of-waste status before the internal incineration of the sewage sludge to generate steam.

10. Accordingly, the first subparagraph of Article 6(1) of Directive 2008/98 sets out the conditions to be met by the specific criteria which make it possible to determine which waste ceases to be waste when it has undergone a recovery, including recycling, operation. In this regard, the Court of Justice stated that the EU legislature specifically provided that Member States are entitled to adopt measures relating to end-of-waste status of a substance or object, without, however, specifying the nature of those measures (CJEU, Case C-60/18, *Tallinna Vesi AS*, ECLI:EU:C:2019:264, paragraph 23). In that regard, it must be noted [**Or. 17**] that these measures result in the end-of-waste status of waste and, therefore, in the end of the protection that the law governing waste guarantees as regards the environment and human health. Those measures must therefore comply with the requirements laid down in paragraph 1(a) to (d) of Article 6 and, in particular, take account of any possible adverse impact that the substance or object concerned may have on the environment and on human health.

The referring court does not fail to recognise that, in its case-law, the Court of Justice has stated that the Member State is also entitled to take the view that some waste cannot cease to be waste and to refrain from adopting legislation concerning waste status (CJEU, Case C-60/18, *Tallinna Vesi AS*, ECLI:EU:C:2019:264, paragraph 26). However, the Court of Justice takes the view that the Member State must ensure that such abstention does not amount to an obstacle to the attainment of the objectives set by Directive 2008/98, such as encouraging the application of the waste hierarchy, or encouraging the recovery of waste and the use of recovered material in order to preserve natural resources and to enable the development of a circular economy (CJEU, Case C-60/18, *Tallinna Vesi AS*, ECLI:EU:C:2019:264, paragraph 27). This does not appear to be the case for the referring court based on the facts of the dispute in the main proceedings, since the sewage sludge is conveyed by means of a closed, automated system within the plant, the sewage sludge is also used without interruption and this process does not present a risk to the environment or human health. In addition, this approach also pursues the objective of waste prevention and the substitution of fossil raw materials. This production process has given the referring court serious doubts as to the compatibility with EU law of the national authority's negative finding. [**Or. 18**]

IV.

1. There is an obligation incumbent on all authorities and courts in the Member States to interpret all law in conformity with the relevant directive in such a way as to ensure that the objective pursued by that directive is not undermined by the interpretation of national law (cf. CJEU, Case 14/83, *Von Colson and Kamann*, ECLI:EU:C:1984:153). However, since the correct application of EU law is not so

obvious as to leave no scope for any reasonable doubt and it is therefore not possible to interpret the national law in conformity with the directive at issue, the aforementioned questions are referred for the request for a preliminary ruling under Article 267 TFEU.

Landesverwaltungsgericht Steiermark

[...]

WORKING DOCUMENT