Sources of law

Closed Substance Cycle Waste Management Act (KrW-/AbfG, *Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträglichen Beseitigung von Abfällen - Kreislaufwirtschafts- und Abfallgesetz*) section 3 (2), section 21
Waste Framework Directive article 1 (b)
Environmental Liability Act UmwelthaftG (*Umwelthaftungsgesetz*) section 1

Headnote

A producer of waste within the meaning of section 3 (5) of the Closed Substance Cycle Waste Management Act (KrW-/AbfG, *Kreislaufwirtschafts- und Abfallgesetz)* is in principle anyone who, as the person exercising actual physical ownership over a thing, brought about the last cause that made the thing become waste. In exceptional cases, another person acting upstream may be defined as a producer of waste if, on account of special circumstances, this person's conduct is deemed upon assessment to constitute a major cause of the occurrence of waste.

Judgment of 15 October 2014 - BVerwG 7 C 1.13

Summary of the facts:

The claimant challenges a regulatory order of 11 August 2009 by means of which Arnsberg District Government ordered the claimant to remove extinguishing water that had occurred as a result of fighting a major fire that had started on its company premises.

The claimant operated a plant approved under immission control law for the physical-chemical treatment of hazardous waste in an industrial area in *I*. In the night of 21 to 22 July 2009, there was a major fire on the company premises which spread to neighbouring properties where it destroyed in particular a galvanisation plant. Only after two days did the fire brigade of the city of I. manage to extinguish the fire. The extinguishing water, which was contaminated with perfluorinated tensides (PFTs) from the added foam and from operational substances, was collected insofar as possible and the fire brigade had it put into interim storage outside the properties affected by the fire. According to an expert report by *I-C GmbH*, the fire was caused inter alia by a technical deficiency in an agitator which belonged to the claimant's distillation plant. Criminal proceedings, in the course of which further expert opinions were provided, have not yet been concluded.

In substantiation of the regulatory order, which was subsequently enforced through substitute execution, the defendant gave the following explanation: the extinguishing water that had been put into interim storage was waste to be removed, which could damage the environment on account of its contamination with PFTs and nickel. The claimant was the producer of this waste. While the extinguishing water had not occurred as a result of the claimant's own activity, the claimant had brought about the first cause for the fire brigade to act, since the fire had started from its plant. The claimant therefore had to accept responsibility for the activities of the fire brigade.

The Administrative Court allowed the action against the regulatory order. Upon the defendant's appeal on points of fact and law, the Higher Administrative

Court amended the Administrative Court's judgment and dismissed the action. The claimant's appeal on points of law was unsuccessful.

Reasons (abridged)

(…)

14 2. In its substance, the challenged judgment also stands up to the appeal on points of law. Without infringing legislation open to review, the court of appeal held that a claim could be made against the claimant for the removal of the contaminated extinguishing water by means of the challenged order, which was based on section 21 (1) in conjunction with section 11 of the Closed Substance Cycle Waste Management Act (KrW-/AbfG, *Kreislaufwirtschafts- und Abfallgesetz*). Although the claimant did not play a part in using the extinguishing water to fight the fire or subsequently to collect the water and put it into interim storage, it is the producer of waste within the meaning of section 3 (5) KrW-/AbfG that was applicable at the relevant date of assessment of the issue of the order.

15 a) Under the first alternative of section 3 (5) KrW-/AbfG, the only one that comes into question here, a producer of waste is any natural person or legal entity through whose actions waste has occurred. The court of appeal understands this to mean the person who, upon assessment, was the decisive cause of the occurrence of the waste. The exercise of control over the waste occurrence process is to be of major significance for the attribution of liability. The Court held that in the case of waste caused by damage or other exceptional events, the respective sphere of risk also has to be taken into account in the causal chain, however. This implies that even a person who did not bring about the last cause of the occurrence of waste and who did not have actual physical ownership of the thing that has become waste may be a producer of waste. This understanding is in accordance with the statutory provision. However, the requisite case-related evaluation has to take into account that only under specific circumstances is the process of the occurrence of waste to be attributed not to the person who had actual physical ownership of a thing at the time it became waste and who, through his conduct, brought about the last cause of the occurrence of waste, but another person acting in advance of the occurrence of waste as a producer of waste.

16 aa) According to the wording of section 3 (5) first clause KrW-/AbfG, the only factor determining whether a person is a producer of waste is that it is “through (their) actions (that) waste has occurred”. Thus, the relevant factor is not a particular relationship between a person and a thing, but a person’s conduct that has a particular result on the thing. The wording of the provision makes clear that not every conduct causing waste to occur is sufficient. What is required is an action that leads to the occurrence of waste, i.e. that is of major significance for the thing or the substance to become waste (in this sense regarding a producer of waste under Art. 1 (b) of Council Directive 75/442/EEC of 15 July 1975 on waste, OJ L 194 p. 47, as amended by Council Directive 91/156/EEC of 18 March 1991, OJ L 078 p. 32, - Waste Framework Directive - opinion of Advocate General Kokott of 29 January 2004 - C-1/03 [ECLI:EU:C:2004:67], Van de Walle - para. 52). Typically, this will involve an activity by the thing’s direct possessor. That is by no means necessarily the case, however. Another person may also affect a thing, resulting in it becoming waste, for example, through a damaging activity. Whether a person’s causal contribution to the occurrence of waste is so substantial that the waste occurred on account of his action cannot be specifically answered on the basis of the wording of the provision. The wording makes clear, however, that there must be decisive elements making the occurrence of waste attributable to a person, which naturally can only be determined on the basis of an assessment of the circumstances of the individual case. In this sense, it is possible - by analogy with the terminology used in regulatory law regarding a person or entity whose actions cause an interference (with something) - to speak of the requirement of direct causation, whereby directness is typically but not necessarily to be equated with the respective last cause (cf. BVerwG, decision of 12 April 2006 - 7 B 30.06 - juris para. 4).

17 bb) Systematic considerations point in the same direction. To be taken into account in this respect are firstly the normative context of the KrW-/AbfG in which the legal definition of section 3 (5) KrW-/AbfG is embedded, and secondly the connection with the Waste Framework Directive.

18 (1) The Closed Substance Cycle Waste Management Act contains separate definitions of waste producer and waste holder. It thus makes clear that the term producer of waste is not merely a subset of the term waste holder or previous holder. The terminological distinction in section 3 (3), section 24 (2) and section 44 (1) first sentence KrW-/AbfG also supports this view. The separate definitions of waste producer and waste holder make clear the tendency not to define too narrowly the circle of those subject to disposal obligations with a view to ruling out responsibility gaps. This tendency is emphasised by a comparison with the previous legal situation. Under section 3 (1) and (4) of the Waste Disposal Act (AbfG, *Abfallbeseitigungsgesetz*), only the (current) holder was responsible for waste disposal with the result that a person who had brought about the major causes for the occurrence of waste who had subsequently given up possession was not subject to any responsibility under waste law and had to be forced into the category of a waste holder only on the basis of regulatory law of the federal states (cf. BVerwG, judgment of 18 October 1991- 7 C 2.91 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 89 138 <141> (…); decision of 5 November 2012 - 7 B 25.12 - juris para. 12).

19 (2) From a systematic point of view, the reference to the Waste Framework Directive is of particular significance. The definition of the term “producer of waste” in section 3 (5) KrW-/AbfG is identical with the one in art. 1 (b) of the Waste Framework Directive (in the same spirit as the European Union’s follow-up provision in article 3 (5) of Directive 2008/98/EC of 19 November 2008, OJ L 312 p. 3). This is an argument in favour of understanding the respective terms as being equivalent with regard to their content. This conclusion is confirmed by the legislative material. According to the report by the Committee on the Environment, Nature Conservation and Nuclear Safety (*Ausschuss für Umwelt, Naturschutz und Reaktorsicherheit*) (Bundestag printed paper (BT-Drs., *Bundestagsdrucksache*) 12/7284 p. 13) the legislator intended to base its legal definitions of the terms producer and holder of waste in section 3 (5) and (6) KrW-/AbfG on the Waste Framework Directive’s definitions of producer and holder. In view of this, the case-law of the Court of Justice of the European Union concerning the term waste producer within the meaning of the Waste

Framework Directive is significant for interpreting the term producer within the meaning of section 3 (5) KrW-/AbfG. The judgments of 7 September 2004 - C-1/03 [ECLI:EU:C:2004:490], Van de Walle; and of 24 June 2008 - C-188/07 [ECLI:EU:C:2008:359], Commune de Mesquer - are of relevance. While in both decisions the concepts of waste producer and waste holder are interpreted in connection with the obligation to bear the costs under art. 15 of the Waste Framework Directive, they are equally authoritative for understanding these terms in connection with the statutory waste disposal obligation in view of the standardised definition of terms in article 1 of the Waste Framework Directive. They support the interpretive result that a producer of waste may also be a person who did not bring about the last cause of the occurrence of waste and was not in possession of the substance that became waste at the time of the occurrence of the waste.

20 In the Van de Walle case, the Court decided that a petroleum undertaking that supplies a service station may be regarded as the producer (art. 1 (b) of the Waste Framework Directive) of the soil contaminated with fuels in the course of the operation of the petrol station and thus as the holder of that waste within the meaning of article 1 (c) of the Waste Framework Directive if the leak of fuel, for example from storage facilities in poor condition, “can be attributed to a disregard of contractual obligations by the petroleum undertaking … or to any actions which could render that undertaking liable“ (para. 60). The Court does not base its arguments on criteria such as actual physical ownership of the petroleum or on the aspect of what conduct constituted the last cause of the occurrence of the damage, but on liability attribution criteria based on an intrinsic link between an upstream cause and the occurrence of the waste. This is in line with the appeal judgment and supports the view represented in that judgment that the decisive criterion is who, from the point of view of liability considerations, was responsible for the major cause of the occurrence of waste.

21 The judgment of the Court of Justice of the European Union in the Commune de Mesquer case continues this jurisprudence (cf. also the related opinion of Advocate General Kokott of 13 March 2008, - C-188/07 [ECLI:EU:C:2008:174], Commune de Mesquer - para. 111 ff.). In its judgment, the Court first of all ex-

plains that the owner of the ship carrying heavy fuel oil from which some of them spilled by accident at sea may be regarded as having produced that waste because he was in possession of the oil immediately before they became waste (oil mixed with sediments and water) (para. 74). To this extent, the judgment is based on the typical constellation that the producer of waste had actual physical ownership of a thing immediately before it became waste and - in transporting it - carried out the last cause of the occurrence of waste to be regarded as human activity. However, to supplement this, the Court then underlines that the waste could also have occurred as a result of the conduct of the heavy fuel oil seller and charterer if he contributed to the pollution hazard, specifically by failing to take measures to prevent a spill (e.g. careful selection of the transport ship). Thus, the Court also defines a person who merely performed an upstream cause as a producer of waste liable to disposal within the meaning of article 1 (b) of the Waste Framework Directive.

22 In summary of this analysis of the jurisprudence, the following statement may be made: European Union law assumes as a general rule that the producer is the person who has physical ownership of a thing that has become waste at the time the waste occurs. However, upstream conduct of other persons may, due to liability considerations relating to spheres of risk or misconduct, also be the basis for regarding a person as a waste producer.

23 cc) This understanding of the definition of ‘producer’ also corresponds to the intent and purpose of the provision. Regulatory law is dominated by the principle of effective hazard prevention. On account of the regulatory law character of waste legislation, this principle also applies to this legal area. The interpretation of the term producer is therefore to be based on the objective of effective waste disposal. On the one hand, that is an argument in favour of not interpreting it too narrowly. On the other hand, boundlessly widening the meaning of the term, which would call into question the manageability and accountability of the provisions determining disposal obligations, should be avoided.

24 As well as the principle of effectiveness, the polluter pays principle is significant for an interpretation based on the legislative purpose, which is explicitly speci-

fied in the legislative material as grounds for the obligation of the producer of waste (cf. report by the Committee on the Environment, Nature Conservation and Nuclear Safety, BT-Drs. 12/7284 p. 2). According to this report, the responsibility for waste disposal lies not with the public but with the persons significantly responsible for its occurrence.

25 In order to retain contours to the term “producer of waste” under the principle of effective hazard prevention, it must be upheld that in principle, the producer of waste is a person who, having actual physical ownership of a thing, brought about the last cause for the thing to become waste. However, with regard to the polluter pays principle, an exception is required when, upon assessment, upstream conduct constitutes a major cause of the occurrence of waste due to specific circumstances. This corresponds to the view recognised in general regulatory law that a person who brought about an upstream cause may exceptionally be responsible if this person’s activity forms a natural unit with the conduct of another person who brought about the last cause and objectively prompted this conduct (cf. BVerwG, decision of 12 April 2006 - 7 B 30.06 - juris para. 4 with further references).

26 b) On this basis, the claimant was rightly held liable as the producer of waste through the challenged order. Upon assessment, the claimant is to be considered responsible for the occurrence of waste in the course of the use of the extinguishing water.

27 The operation of the distillation plant is an upstream link in the causal chain that led to the occurrence of the collected contaminated extinguishing water. The claimant caused the fire and the resulting firefighting operation, which in turn was the last cause of the occurrence of the waste. Only the fire brigade had a dominant influence on the operation and on the type and extent of the extinguishing agents used. In this situation, special circumstances are required to substantiate the existence of decisive elements making the occurrence of the waste attributable to the claimant’s conduct. The existence of such circumstances is to be affirmed.

28 The plant operations constituted a potentially hazardous activity. Organic solvents, comprising waste, including hazardous waste, were treated at the plant, as the court of appeal explained in more detail. Fire and explosion hazards could result from operational disruptions. This is underlined by the actual course of events that led to the realisation of these hazards and to serious personal injuries and damage to property. A potentially hazardous activity may be assumed all the more since, according to the findings of the court of appeal, the distillation plant's agitator was defective. Furthermore, the plant's hazardous potential is expressed in the fact that the plant was subject to strict liability under section 1 of the Environmental Liability Act (UmweltHG, *Umwelthaftungsgesetz*) in conjunction with annex I no. 53 of that provision.

29 If the hazards of the operation of such a plant with particular risk potential are realised, the operator has a responsibility under administrative principles for incidents on account of its hazardous activity. It lacks effective means to fulfil this responsibility, however, with the result that only public emergency forces in the form of the fire brigade can act to effectively prevent hazards. This creates a special connection between the private cause of the hazard and public hazard prevention through extinguishing work, which justifies seeing the two as a natural unit. The claimant is therefore to be held responsible for the occurrence of extinguishing water with the result that it is to be regarded as the producer of waste.

30 Incidentally, this assessment that in its extinguishing operation the fire brigade not only performs a public task, but at the same time ‘steps into the breach’ for a private plant operator to perform a task for which that operator is actually responsible, is also the basis for section 41 (2) first sentence no. 2 of the Fire Protection and Assistance Act (FSHG*, Gesetz über den Feuerschutz und die Hilfeleistung*), which is linked to liability for hazards under section 1 UmweltHG and the basis for claims by the fire brigade against the plant operator. Most of the federal states foresee comparable provisions, linked to strict liability offences or tasks with a particular risk potential, in their fire protection laws. They may thus be understood as manifestations of a cross-state principle which also supports the attribution of the extinguishing operation and the associated occurrence of waste to the claimant’s operational activities.

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