

## Dealing with Construction and Demolition Waste Abroad: Lessons for Hong Kong (Part II)

**In the second instalment of a two-part article Dr Arthur McInnis and David Hall-Jones of Denton Wilde Sapte finish their look at how construction and demolition (C&D) waste is dealt with in other leading jurisdictions and set out their conclusions for how Hong Kong might address the issue.**

### The OECD Definition Of Waste

The OECD has addressed and continues to address important issues concerning waste reduction at the international level. The OECD has acknowledged the difficulties involved in distinguishing between waste and non-waste, most recently in their report, *The Final Guidance Document for Distinguishing Waste from Non-Waste*, (Waste Management Policy Group. OECD 2 July 1998). The OECD Report examined various definitions of waste in paragraph 38 and considered when waste ceased to be “waste”.

The key point seems to be that waste ceases being waste when it goes through an adequate “recovery process” and then becomes a “recovered material.” That is:

waste ceases to be waste when a recovery, or another comparable, process eliminates or sufficiently diminishes the threat posed to the environment by the original material (waste) and yields a material of sufficient beneficial use.

The OECD Report elaborates on these definitions, based on specific concepts and standards developed by the OECD, including the criteria that the recovered material meets all relevant health and environmental requirements.

### European Union Framework for Waste Management

The European Union (EU) policy on waste management stems from Directive 75/442/EEC, which entered into force in 1977 (and was later amended by Directive 91/156/EEC). This EU Directive provides a definition of waste which has been expanded by the adoption of the European Waste Catalogue (EWC) by Commission Decision 94/3/EC.

“Waste” is defined in Article 1(a) of Directive 75/442 EEC as:

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

The EWC is a harmonised, non-exhaustive list of wastes, which applies to all wastes, irrespective of whether they are destined for disposal or recovery operations: 93/3/EC Commission Decision of 20 December 1993 established a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on Waste.

The introductory note to the Annex “Index of Waste” provides that “the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances. The entry is only relevant when the definition of waste has been satisfied”.

The purpose of the EWC is to provide a reference nomenclature providing a common terminology throughout the community with the purpose of improving the efficiency of waste management activities. There is no specific definition of construction and demolition materials in the EU framework. They are slotted under category 17 00 000 as “construction and demolition waste ... which includes road construction”.

The majority of EU members have either incorporated the EU definition and categories of waste directly into their domestic legislation or have adopted similar definitions.

### Judicial Consideration of The Definition Of ‘Waste’

The EU definitions of waste have been tested in several court cases. Two of the more important cases may be noted. The first case worth referring to is *Criminal Proceedings Against Tombesi and Others (Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95)* [1998] Env LR 59.

Briefly, in the case four defendants were charged with a variety of waste management offences under Italian law. One of the issues which the European Court of Justice was

asked to address was:

Does the EEC legislation provide for the exclusion from the definition of waste and the relevant rules relating to the protection of health [and] of the environment of substances and objects which are capable of economic reutilisation?

The Court held at para 47:

As regards the interpretation of the Community Legislation on waste, it must be borne in mind that, according to settled case law, the concept of waste within the meaning of Article 1 of Directive 75/442, in its original version, and Article 1 of Directive 78/319 was not to be understood as excluding substances and objects which were capable of economic reutilisation. National legislation which defines waste as excluding substances and objects which are capable of economic reutilisation is not compatible with Directive 75/442, in its original version, and Directive 78/319 (Case C-359/88 Zanetti and Others [1990] ECR I-1509, paras 12 and 13, and case C-422/92 Commission v. Germany [1995] ECR I-1097, para.22).

The second case to be noted is *Inter-Environment Wallonie A.S.B.L. v. Region Wallonie C-129/96* [1998] Env LR 623. In the case, Inter-Environmental Wallonie sought to have the Belgian Conseil d'État annul relevant parts of the Walloon Executive Regulation on toxic and hazardous waste which exempted from the permit system required under Directive 75/442: "the operations of setting up and running of an installation intended specifically for the collection, pretreatment, disposal or recovery of toxic or dangerous waste which is not an integral part of an industrial production process and which processes waste originating from third parties" (Article 5 of the Regulation).

The issue was whether national legislation could exclude a substance from the definition of waste merely because it directly or indirectly formed an integral part of an industrial production process. ([1998] Env LR 623 at para.25)

The European Court of Justice first noted that the definition of waste turned on the concept of "discard" and that discard includes both disposal and recovery of a substance or object.

With reference to Annex I of Directive 75/442 and Annexes IIA, IIB the Court demonstrated at para. 27-28 that:

the concept of waste does not in principle exclude any kind of residue, industrial byproduct or other substance arising from the production processes.

The Court went on to point out at para. 29 that the Directive 75/442 applied not only to:

disposal and recovery of waste by specialist undertakings, but also to disposal and recovery of waste by the under taking which produced them, at the place of production.

As was stated in the Tombesi case, there is no exception for substances and objects capable of economic reutilisation.

### Conclusions

It can be seen from the above discussion that the concept and definition of waste varies widely from jurisdiction to jurisdiction. In Canada, British Columbia, has one particular view which differs from the federal view in that country. If other Canadian provinces' definitions had been set out here it would have been seen that further variation also existed among the other Canadian provinces. While Canada thus adopts fairly broad notions of waste, their meanings are then limited by further subclassifications and attenuated by specific industry initiatives, viz Industry Product Stewardship and Extended Producer Responsibility. These kinds of initiatives may be too ambitious to introduce at the moment to Hong Kong. By comparison, the EU is promoting an inclusive notion of waste. It would seem though that the EU approach has given rise to a number of problems in its application, which can be seen in the cases discussed above and which limit it as a model for Hong Kong. Therefore the OECD framework for distinguishing waste from non-waste seems to be the most compelling and is the one that may be well-suited for Hong Kong; in particular, if cross-frontier exports of C&D material are being contemplated.

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