

OPINION OF ADVOCATE GENERAL
KOKOTT

delivered on 11 September 2008¹

I — Introduction

1. The present case concerns the interpretation of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste² ('the waste incineration directive'). It relates to a plant at which waste is processed into a combustible gas which, after being subsequently purified, is co-incinerated at a coal-fired power plant. It is necessary to clarify the extent to which the waste incineration directive is applicable to that operation.

'The aim of this Directive is to prevent or to limit as far as practicable negative effects on the environment, in particular pollution by emissions into air, soil, surface water and groundwater, and the resulting risks to human health, from the incineration and co-incineration of waste.

This aim shall be met by means of stringent operational conditions and technical requirements, through setting emission limit values for waste incineration and co-incineration plants within the Community and also through meeting the requirements of Directive 75/442/EEC.'³

II — Legal framework

A — The waste incineration directive

2. Article 1 of the waste incineration directive defines its objectives:

3. Under Article 2(1) the directive covers incineration and co-incineration plants.

¹ — Original language: German.

² — OJ 2000 L 332, p. 91.

³ — *My addition*: Directive 75/442 ('the waste framework directive') was consolidated and replaced by Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

4. Waste, incineration plants and co-incineration plants are defined in Article 3(1), (4) and (5):

This definition covers the site and the entire incineration plant including all incineration lines, waste reception, storage, on-site pretreatment facilities, waste-fuel and air-supply systems, boiler, facilities for the treatment of exhaust gases, on-site facilities for treatment or storage of residues and waste water, stack, devices and systems for controlling incineration operations, recording and monitoring incineration conditions;

‘For the purposes of this Directive:

1. “waste” means any solid or liquid waste as defined in Article 1(a) of Directive 75/442/EEC;

5. “co-incineration plant” means any stationary or mobile plant whose main purpose is the generation of energy or production of material products and

...

— which uses wastes as a regular or additional fuel; or

4. “incineration plant” means any stationary or mobile technical unit and equipment dedicated to the thermal treatment of wastes with or without recovery of the combustion heat generated. This includes the incineration by oxidation of waste as well as other thermal treatment processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated.

— in which waste is thermally treated for the purpose of disposal.

If co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the thermal treatment of waste, the plant shall be regarded as an incineration plant within the meaning of point 4.

that the emission limit values set out in Annex V are not exceeded in the exhaust gas.

This definition covers the site and the entire plant including all co-incineration lines, waste reception, storage, on-site pretreatment facilities, waste-, fuel- and air-supply systems, boiler, facilities for the treatment of exhaust gases, on-site facilities for treatment or storage of residues and waste water, stack, devices and systems for controlling incineration operations, recording and monitoring incineration conditions.'

2. Co-incineration plants shall be designed, equipped, built and operated in such a way that the emission limit values determined according to or set out in Annex II are not exceeded in the exhaust gas.

...'

5. Article 7(1) and (2), first subparagraph, governs air emission limit values:

6. The waste incineration directive provides for two kinds of limit values in the case of co-incineration. One limit value refers to the proportion of waste in the incineration operation, whilst another refers to the proportion of conventional fuels. Both limit values are combined together, using the 'mixing rule', into a single limit value for the pollutant in question.

'1. Incineration plants shall be designed, equipped, built and operated in such a way

B — Comparison of requirements for co-incineration plants and for large combustion plants

SO₂/Nm³, i.e. between 42.5% and 50% of the limit values for large combustion plants. New large combustion plants, on the other hand, are subject to equally stringent or more stringent values than co-incineration plants, namely 200 mg SO₂/Nm³.

7. Emissions of certain pollutants from coal-fired power plants are governed by Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.⁴

8. Comparing the limit values applied under the mixing rule for conventional solid fuels, which are used together with waste in co-incineration plants, with the requirements for large combustion plants under Article 4 in conjunction with Annexes III, VI and VII of Directive 2001/80, the following differences become apparent.

9. For SO₂, existing large combustion plants may emit, depending on their size, between 2 000 mg SO₂/Nm³ and 400 mg SO₂/Nm³, whilst co-incineration plants may emit only between 850 mg SO₂/Nm³ and 200 mg

10. Existing large combustion plants may emit, depending on their size, 600 mg/Nm³ or 500 mg/Nm³ of NO_x until 2016, whilst for co-incineration plants that figure is, depending on size, no more than 400 mg/Nm³, 300 mg/Nm³ or 200 mg/Nm³. After 2016 the largest of these large combustion plants must comply with the same value as comparable co-incineration plants, whilst smaller plants are treated more strictly. New plants, on the other hand, are subject to the same requirements as co-incineration plants, and for plants between 100 and 300 MWth the more stringent limit value for larger plants even applies.

11. Lastly, co-incineration plants — like new large combustion plants — may, depending on their size, emit between 50 mg/Nm³ and 30 mg/Nm³ of dust. Existing large combustion plants, on the other hand, may emit considerably more dust, at between 50 mg/Nm³ and 100 mg/Nm³. Depending on size, the limit values for co-incineration plants are therefore between 30% and 50% of the values for large combustion plants.

⁴ — OJ 2001 L 309, p. 1.

12. However, the limit values applicable to existing plants under Directive 2001/80 can be more generous still if the plant comes under an emission reduction plan in accordance with Article 4(6) of that directive.

ities listed in Annex I are carried out, and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution.’

*C — Provisions of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control*⁵

14. Article 3 of Directive 96/61 lays down the basic obligations of operators of installations. In the present case particular reference should be made to the application of best available techniques:

13. Lastly, some of the provisions of Directive 96/61 are of interest. Article 2(3) defines ‘installation’:

‘Member States shall take the necessary measures to provide that the competent authorities ensure that installations are operated in such a way that:

‘For the purposes of this Directive:

(a) all the appropriate preventive measures are taken against pollution, in particular through application of the best available techniques.’

...

3. “installation” shall mean a stationary technical unit where one or more activ-

15. Under Article 5(1) of Directive 96/61, these requirements apply from 30 October 2007 to existing installations.⁶

5 — OJ 1996 L 257, p. 26, codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8).

6 — See the Report of the Commission on the implementation of Directive 96/61/EC concerning integrated pollution prevention and control of 3 November 2005, COM(2005) 540 final, p. 4.

III — Facts of the case and questions referred for a preliminary ruling

16. The dispute concerns the licensing of a modification to a plant. An existing gas plant is to be expanded to include a plant for purifying the gas produced. The applicant is Lahti Energia Oy ('Lahti Energia'). It is an energy company owned by the municipality of Lahti. Its sector of activity includes the operation of electricity, heating and natural gas plants and other energy management activities, and the production of and trade in associated products.

17. Lahti Energia operates Kymijärvi power plant and the gas plant on the same site. The power plant produces heating and electricity with more than 70% efficiency. It uses primarily coal as fuel, with around 5% natural gas and 15% gas produced by the gas plant.

18. The gas plant produces gas by means of 'circulating fluidised bed gasification'. In this process a combustible gas is obtained from solid waste through oxidation at around 850

to 900 °C. Around 30% waste wood from the wood-processing industry is used, around 10% felled timber, around 30% reclaimed fuels from sorted urban waste and around 30% old tyres and plastic waste.

19. The producer gas contains in particular particles, heavy metals and chlorine. Lahti Energia therefore plans to expand the existing gas plant to include a plant for purifying the gas. To that end the producer gas is cooled to 350 degrees and filtered. As a result, 99.9% of the particles are extracted from the gas, i.e. 96% to 99% of the heavy metals and 95% of the chlorine. It thus contains fewer impurities than the coal used.

20. The purified producer gas is composed mainly of the combustible fractions hydrogen, carbon monoxide and methane and the non-combustible fractions water, carbon dioxide and nitrogen.

21. Following purification the producer gas is conveyed for incineration in the main boiler of the power plant together with coal. Less chlorine, heavy metals, dioxins and furans

are released compared with incineration of unfiltered producer gas, but also with most conventional fuels.

22. On 4 December 2002 Lahti Energia applied for a permit for the planned modifications to the gas plant. In connection with the permit issued on 19 March 2004, the Environmental Permit Authority (*Ympäristölupa-virasto*) stated that the recycled-fuel gas plant and the power plant burning the gas together constituted a co-incineration plant within the meaning of the waste incineration directive. Therefore, in the decision on the permit it laid down limit values in accordance with that directive and the Finnish transposing legislation.

23. Lahti Energia brought an action against that decision. On 11 July 2006 the court of first instance dismissed the action. The appeal is now pending before the Korkein hallinto-oikeus (Supreme Administrative Court) (Finland), which has referred the following questions to the Court of Justice for a preliminary ruling:

1. Is Article 3(1) of [the waste incineration directive] to be interpreted as meaning that the directive does not apply to the combustion of gaseous waste?
2. Is a gas plant where gas is generated from waste by means of pyrolysis to be regarded as an incineration plant within the meaning of Article 3(4) of [the waste incineration directive] even if it has no incineration line?
3. Is combustion in the boiler of a power plant of gas which is generated in the gas plant and purified after the gasification process to be regarded as an operation within the meaning of Article 3 of [the waste incineration directive]? Does it have any bearing that the purified gas replaces the use of fossil fuels and that the emissions per unit of energy generated by the power plant would be lower when using purified gas generated from waste than when using other fuels? Is it of any relevance to the interpretation of the scope of [the waste incineration directive], first, whether the gas plant and the power plant form one plant having regard to the technical production aspects and the distance between them or, second, whether the purified gas generated at the gas plant is portable and may be used elsewhere, for example for energy production, as a fuel or for another purpose?
4. Under what conditions may the purified gas generated in the gas plant be regarded as a product, so that the rules on waste no longer apply to it?

24. Lahti Energia, the Häme Regional Environment Centre (*Hämeen ympäristökeskus*), Salpausselkä Friends of Nature Association (*Salpausselän luonnonystävät ry*), the Italian Republic, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland and the Commission of the European Communities took part in the written procedure. Lahti Energia, Friends of Nature, Finland and the Commission also participated at the hearing on 10 July 2008.

27. In the case of co-incineration plants, the waste incineration directive provides for two kinds of limit values. One limit value refers to the proportion of waste in the incineration operation, whilst another refers to the proportion of conventional fuels. Both limit values are combined together, using the ‘mixing rule’, into a single limit value for the pollutant in question.

IV — Legal assessment

25. The *Korkein hallinto-oikeus* must decide whether the limit values for a co-incineration plant under the waste incineration directive apply to the Kymijärvi coal-fired power plant or the more generous limit values for existing plants under Directive 2001/80 on large combustion plants.

28. The purified gas produced from the waste does not really make any significant contribution to polluting emissions. Consequently, only the limit values for the incineration of conventional fuels are relevant in the present case. In this respect, the same emission limit values apply in principle to new plants under both directives. This is shown in particular by Annex II, point II.2.1. of the waste incineration directive, under which its values are to be adapted to the more stringent values under the directive on large combustion plants.

A — Preliminary remark

26. The different limit values follow from the transitional rules of the waste incineration directive and Directive 2001/80 on large combustion plants.

29. Under Article 20(1) of the waste incineration directive, these requirements for new plants apply as from 28 December 2005 to *all* incineration plants and co-incineration plants, including existing plants. The operational conditions for those plants therefore had to be adapted by that date at the latest.

30. On the other hand, the directive on large combustion plants provides for different limit values for existing and new plants. The limit values for *existing* large combustion plants are less stringent than the limit values under the waste incineration directive.⁷

plant under the waste incineration directive or whether they are separate plants, with the result that the power plant at least would no longer be covered by the directive. With the different questions referred for a preliminary ruling, the referring court seeks to ascertain appropriate criteria for deciding that question.

31. If the power plant were treated as an existing large combustion plant, it could, according to the available information, comply with the limit values. However, it would find it difficult to respect the limit values for a co-incineration plant. This would not be because of the proportion of producer gas in the incineration operation, but the proportion of coal. Co-incineration of gas generally *reduces* polluting emissions, as it contains relatively few impurities which cause polluting emissions. On the other hand, the use of coal apparently increases polluting emissions to such an extent that the limit values for a co-incineration plant can no longer be guaranteed.

33. Hereinafter I will begin by examining the first and fourth questions, which relate to the producer gas obtained through gasification, and then the second and third questions, which concern the two plants.

B — The first question — Incineration of gaseous waste

32. The referring court therefore stresses that if the more stringent limit values were applied the use of producer gas would become unattractive, even though emissions would be reduced and other fuels would be replaced. The question therefore essentially arises whether the power plant together with the gas plant is to be treated as a co-incineration

34. With the first question, the referring court seeks to ascertain whether the incineration of gaseous waste falls outside the scope of the waste incineration directive. The court appears to take the view that the combustion in the power plant of the gas produced in the gas plant is not waste incineration within the meaning of the directive.

⁷ — For details see above, paragraph 8 et seq.

35. The referring court links this question to Article 3(1) of the waste incineration directive, where the notion of ‘waste’ is defined. However, that definition is only indirectly relevant as far as the scope of the directive is concerned. As Friends of Nature state, it does not apply to certain waste, but, under Article 2(1), to incineration and co-incineration plants.

36. The two kinds of plant are defined in Article 3(4) and (5) of the waste incineration directive. The distinctive factor is the way waste is handled, namely its thermal treatment or its use as a fuel. In this connection the definition of waste under Article 3(1) is relevant. Only where waste is handled in the relevant way within the meaning of that definition can a plant exist for the purposes of the directive.

37. Article 3(1) of the waste incineration defines as waste any solid or liquid waste as defined in Article 1(a) of the waste framework directive.⁸ As Austria and the Commission in

particular argue, the directive does not therefore cover any plants which incinerate or thermally treat no solid or liquid waste, but only gaseous waste.

38. Contrary to the view taken by Lahti Energia, Italy and Finland, however, this does not mean that the waste incineration directive does not apply to the incineration of gaseous substances. As the Environment Centre, Friends of Nature, the Netherlands, Austria and the Commission argue, the directive is also aimed at the incineration of gaseous substances which are produced from waste.

39. This can be seen in particular from the fact that Article 3(4) of the waste incineration directive cites pyrolysis and gasification as examples of thermal treatment, in so far as the substances resulting from the treatment are subsequently incinerated. If the products of thermal treatment no longer fell within the scope of the waste incineration directive, the actual incineration of the substances would no longer be covered. The bulk of the directive, namely the provisions on incineration,⁹ would thus be redundant in the case of gasification with subsequent incineration.

⁸ — According to that definition, waste means any substance or object which the holder discards or intends or is required to discard (see, most recently, Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 37 et seq.). The situation has not changed as a result of codification in Directive 2006/12.

⁹ — See point 63 below.

40. With regard to the present case, it follows that the power plant on its own cannot be a plant within the meaning of the waste incineration directive, as no waste within the meaning of that directive is incinerated or thermally treated in the power plant. However, it cannot be ruled out that the incineration of the producer gas requires the power plant together with the gas plant to be treated as a co-incineration plant within the meaning of the directive. This will be examined in the context of the third question.

41. The answer to the first question must therefore be that the waste incineration directive does not cover plants which incinerate or thermally treat only gaseous waste.

C — The fourth question — Loss of classification as waste

42. With the fourth question, which is to be examined before the second and third questions, the referring court is seeking to ascertain under what conditions the purified gas generated at the gas plant may be regarded as a product, so that the rules on waste no longer apply to it.

43. The referring court cites as an example fuel obtained from biological waste. If that substance were waste, vehicles using it would have to be treated as co-incineration plants within the meaning of the waste incineration directive.

44. The producer gas in the present case is produced from waste. It does not necessarily cease to be waste as a result of conversion into gas. Gaseous substances can also be waste within the meaning of the waste framework directive. Article 2(1)(a) of the waste framework directive excludes only gaseous effluents emitted into the atmosphere. If, as is the case here, gaseous substances are not emitted into the atmosphere, they may therefore be regarded as waste in principle.

45. However, gaseous substances cannot be waste within the meaning of the waste incineration directive.¹⁰ It could be inferred from this that within the scope of that directive gaseous substances cannot in principle be regarded as waste.

46. The waste framework directive is in principle open to such a limitation of the

¹⁰ — See above, point 37.

definition of waste, since Article 2(2) thereof provides that specific rules for particular instances, or supplementary rules, on the management of particular categories of waste may be laid down by means of individual directives. Such an individual directive may be considered to be *lex specialis* vis-à-vis the waste framework directive, so that its provisions prevail over those of the waste framework directive in situations which it specifically seeks to regulate.¹¹

47. However, the definition of waste under the waste incineration directive does not seek to lay down an exception to the general notion of waste. It merely defines waste whose incineration or thermal treatment characterises incineration or co-incineration plants. Furthermore, the waste incineration directive continues to apply in principle if waste is converted to the gaseous phase by means of thermal treatment.¹² The waste incineration directive does not therefore rule out the possibility of gaseous waste within the meaning of the waste framework directive being generated in such plants.

48. However, thermal treatment in conjunction with subsequent purification could have

converted the producer gas into a substance which has ceased to be waste.

49. Neither the waste incineration directive nor the waste framework directive contains express rules or — as Friends of Nature and the Environment Centre stress — quality standards governing when a substance ceases to be classified as waste. However, the Court has already recognised that after recycling has been concluded within the meaning of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste¹³ waste is no longer to be classified as waste, but as a product.¹⁴

50. In the *Niselli* judgment the Court generalised the findings on Directive 94/62 on packaging waste. Accordingly, steel waste ceases to be classified as waste if it has been recycled by being reprocessed into steel products. Those products must be so similar to other steel products made from primary raw materials that they can hardly be distinguished.¹⁵

11 — Case C-252/05 *Thames Water Utilities* [2007] ECR I-3883, paragraph 39.

12 — See above, point 38.

13 — OJ 1994 L 365, p. 10.

14 — Case C-444/00 *Mayer Parry Recycling* [2003] ECR I-6163, paragraph 61 et seq.

15 — Case C-457/02 *Niselli* [2004] ECR I-10853, paragraph 52.

51. This legal concept is not restricted to steel waste, but may be applied to other forms of waste. In the present case, however, a substance could not cease to be classified as waste if it were necessary in any case for the waste to be recycled into substances from which it was originally produced. The waste processed in the present case cannot really be considered to have been produced from a substance similar to the producer gas.

52. The Court required such recycling in particular in *Mayer Parry Recycling*. For the recycling under Directive 94/62 on packaging waste examined in that case, waste must be transformed into its original state and possess characteristics comparable to those of the original material.¹⁶

53. However, the question whether a substance ceases to be waste does not depend on the waste having been recycled. Recycling is just one possible form of waste recovery. Rather, the relevant factor is whether waste is processed to such an extent that it can hardly be distinguished from primary raw materials or other products.

54. This is consistent with the case-law on the distinction between by-products and production residues. The Court stresses that there is no reason to hold that goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products are covered by the law on waste.¹⁷

55. As far as the present case is concerned, it follows that the purified producer gas is the product of the proposed processing. It must therefore be examined whether it is sufficiently similar to primary raw materials or other products for it no longer to be regarded as waste.

56. As with otherwise ascertaining whether a substance is waste, the question whether a substance ceases to be waste must be determined in the light of all the circumstances.¹⁸ It is relevant, for example, whether there is a

17 — See the judgments in Case C-9/00 *Palin Granit and Vehmasselon Kansanterveystyön Kuntayhtymän hallitus* [2002] ECR I-3533, paragraph 35, and Case C-188/07 *Commune de Mesquer* (cited in footnote 8, paragraph 43), and the order in Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005, paragraph 35.

18 — With regard to the distinction between by-products and production residues, see Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraphs 73 and 88; Case C-176/05 *KVZ retec* [2007] ECR I-1721, paragraph 63; Case C-194/05 *Commission v Italy* [2007] ECR I-11661, paragraph 41; Case C-195/05 *Commission v Italy* [2007] ECR I-11699, paragraph 42; and Case C-263/05 *Commission v Italy* [2007] ECR I-11745, paragraph 40.

16 — Cited in footnote 14, paragraph 67 et seq.

market for the processed product and whether the power plant could obtain on the market a fuel possessing comparable characteristics which is not regarded as waste. However, marketability alone is not sufficient, because even substances and objects with a commercial value can be waste.¹⁹ Instead, the important factor is whether the processed waste possesses characteristics comparable to the corresponding primary raw material or the corresponding product, in particular as regards environmental risks.

57. There is good reason to assume that, prior to filtering, the producer gas is not yet sufficiently similar, on account of impurities, to other products or primary raw materials, whilst the purified producer gas is possibly comparable to natural gas and similar gaseous fuels. Ultimately it is for the referring court to examine this point.

58. The answer to the fourth question must therefore be that the purified gas generated at the gas plant may be regarded as a product, so that the rules on waste no longer apply to it, if it is sufficiently similar to primary raw materials or other products.

D — *The second question — No incineration line*

59. With the second question, the referring court would like to find out whether a gas plant where gas is generated from waste by means of pyrolysis is to be regarded as an incineration plant within the meaning of Article 3(4) of the waste incineration directive even if it has no incineration line. In the present case, it would be more reasonable, at first sight, to assume the existence of a co-incineration plant which is possibly operated with an incineration line in the form of the power plant. However, because it is for the national court to clarify the facts, the Court of Justice should not have any doubts at first sight as to the relevance of the question.

60. Under Article 3(4) of the waste incineration directive, waste is thermally treated in incineration plants. The notion of thermal treatment expressly includes processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated.

61. At first sight, these requirements are met in the main proceedings. As is stressed by the

¹⁹ — Case C-9/00 *Palin Granit and Vehmassalon Kansanterveysystön Kuntayhtymän hallitus* (cited in footnote 17, paragraph 29) and Case C-176/05 *KVZ retec* (cited in footnote 18, paragraph 61).

Austrian Government, the gas plant produces from solid waste a combustible gas which is subsequently incinerated in the power plant. The Netherlands Government takes a similar position, arguing that an incineration plant does not have to have all the elements referred to in Article 3(4)(2) of the waste incineration directive. In particular it does not have to have an incineration line.

and the rules on heat recovery under Article 4(2)(b) and Article 6(6).

62. However, the other parties take the view that an incineration plant requires an incineration line. In particular, the Commission stresses that incineration is in any case a condition for the application of the waste incineration directive and it must therefore take place in the plant.

64. Consequently, incineration boilers are in principle the relevant characteristics of an incineration or a co-incineration plant on the basis of which several plants can be distinguished from one another.²⁰

65. However, the need for incineration does not mean that this must be carried out within the plant. The present case illustrates that waste can be thermally treated with a view to incineration even without a dedicated incineration line.

63. The referring court, the Environment Centre and the Finnish Government rightly point out that many provisions of the waste incineration directive can be applied only to an incineration operation. This concerns in particular the rules laid down in Article 6 on operating conditions for the plant, the measurement requirements under Article 11

66. Furthermore, under Article 1 of the waste incineration directive, the directive is not restricted to preventing or limiting pollution by emissions into air. Instead, it also covers other negative effects on the environment, such as pollution into soil and water.

20 — See my Opinion in Case C-251/07 *Gävle Kraftvärme* [2008] ECR I-7047, point 19 et seq.

67. These further aims are served by certain provisions of the waste incineration directive, which are applicable whether or not there is an incineration line. These are specifically the rules on the waste used in Article 4(2)(a), (4)(a) and (5), and Article 5 on the rules on minimisation and disposal of residues in Article 4(2)(c) and (d) and Article 9, and possibly also the rules on water discharges under Article 8, if applicable.

68. Furthermore, Article 6(4) of the waste incineration directive shows that the Community legislature also covered atypical plants. Under that provision, different operating conditions may be laid down, provided the requirements of the directive are still met. That provision allows the specific environmental risks of plants without a dedicated incineration line to be countered.

69. Whilst it cannot be ruled out that the general rules of waste law would produce similar results, the special rules of the waste incineration directive have the specific purpose, in accordance with the second paragraph of Article 1, of fleshing out the general requirements laid down in the waste framework directive for the situation of one of the plants covered. That objective can be attained even if the plants covered do not have an incineration line.

70. Because the waste incineration directive can therefore be reasonably applied, within certain limits, to plants without a dedicated incineration line, such plants should not be excluded from its scope in contravention of the express wording of the definition of incineration plant under Article 3(4).

71. It should also be pointed out that a plant for the thermal treatment of waste can also be a co-incineration plant within the meaning of Article 3(5) of the waste incineration directive. This is conditional on its main purpose being the generation of energy or production of material products.²¹ Unlike the definition of incineration plant in Article 3(4), thermal treatment in Article 3(5) is not expressly linked to the requirement that the substances resulting from the treatment be subsequently incinerated.

72. Lahti Energia objects that the process used in the gas plant, pyrolysis, is not expressly referred to in Article 3(5) of the waste incineration directive as a process of a co-incineration plant. However, thermal

21 — See my Opinion in Case C-251/07 *Gävle Kraftvärme* (cited in footnote 20, point 34).

treatment is mentioned alongside incineration²² and in Article 3(4) in the definition of incineration plant pyrolysis is given as an example of thermal treatment. There is no reason to construe the notion of thermal treatment in the case of a co-incineration plant any differently from in the case of an incineration plant. Consequently, a plant where waste is thermally treated by means of pyrolysis can be a co-incineration plant.

73. In examining the third question it will be considered in greater detail which of the two kinds of plant is relevant in the present case and whether it is possible to consider both parts of the plant together.

74. The answer to the second question must therefore be that a gas plant where gas is generated from waste by means of pyrolysis may be regarded as an incineration plant within the meaning of Article 3(4) of the waste incineration directive even if it has no incineration line.

E — *The third question — Consideration of the power plant and gas plant together?*

75. The third question goes to the heart of the matter. It must be clarified whether and under what conditions combustion, in the boiler of a power plant, of producer gas which is generated in a gas plant and purified after the gasification process is to be regarded as an operation within the meaning of Article 3 of the waste incineration directive.

76. As the main purpose of the incineration of the purified producer gas is the generation of energy, it is possible that the power plant should be classified as a co-incineration plant under Article 3(5) of the waste incineration directive. A co-incineration plant is a plant whose main purpose is the generation of energy or production of material products and which uses wastes as a regular or additional fuel, or in which waste is thermally treated for the purpose of disposal.

77. If the power plant is viewed in isolation, waste is neither used as fuel nor thermally treated there. The producer gas, as a gaseous substance, is not waste within the meaning of the waste incineration directive.

22 — Thermal treatment was not part of the definition of co-incineration plant in the original Commission proposal, COM(1998) 558, OJ 1998 C 372, p. 11, but was added during the legislative process; see the tenth proposal for amendment from the first reading by Parliament, OJ 1999 C 219, p. 249, and Common Position (EC) No 7/2000 of 25 November 1999 adopted by the Council, OJ 2000 C 25, p. 17.

78. However, such waste is treated in the gas plant. The incineration of the producer gas therefore takes place only in a co-incineration plant where the power plant and the gas plant are to be regarded as a single plant for the co-incineration of waste.

79. As the referring court explains, the waste incineration directive does not give a general definition of the notion of plant, but there is such a definition in Article 2(3) of Directive 96/61. Accordingly, a plant is a stationary technical unit where one or more activities listed in Annex I to Directive 96/61 are carried out, and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution.

80. Whilst this definition does not apply expressly for the purposes of the waste incineration directive, it would appear reasonable to apply it by analogy in order to ensure that the law governing the licensing of plants is coherent. At present the waste incineration directive does not contain any indication to suggest that its definition of plant should be understood any differently from the definition of plant under Directive 96/61. Rather, both directives form part of a coherent overall system. In particular, recitals 12, 13 and 26 and Article 4(2), (4), (7) and (8), Article 12(1) and

(2), Article 14 and Article 15 of the waste incineration directive refer to Directive 96/61. It must be assumed that in principle the directives adopt a uniform definition of plant.

81. Furthermore, the Commission has proposed that in future Directive 96/61 be combined in a single text with the directives on waste incineration and large combustion plants and with other directives.²³ If the Community legislature follows that proposal, the uniform definition of plant under Directive 96/61 could undoubtedly also apply in future to co-incineration plants.

82. However, the application of the definition of plant in the waste incineration directive cannot depend on whether activities listed in Annex I to Directive 96/61 are carried out, but activities covered by the waste incineration directive must be involved.

83. It must therefore be examined whether the power plant and the gas plant form a

23 — See Article 2(3) of the Proposal for a Directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control), COM(2007) 844 final.

stationary technical unit where waste is incinerated or thermally treated, and other directly associated activities are carried out which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution.

84. The heart of the plant is thus the gas plant, where waste is thermally treated, whilst the incineration of the producer gas in the power plant could be a directly associated activity which has a technical connection with gasification and could have an effect on emissions and pollution.

85. In interpreting the characteristics of the direct association and the technical connection, it must be borne in mind that the application of environmental requirements may not be circumvented by connected projects being split into different subprojects and considered in isolation.²⁴ This is stressed in particular by the Environment Centre, Friends of Nature, the Austrian Government and the Commission.

24 — See Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraph 76, and Case C-227/01 *Commission v Spain* [2004] ECR I-8253, paragraph 53, on Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175, p. 40.

86. In the present case, the existence of a direct association and a technical connection is suggested by the fact that the gas plant was constructed with a view to using the producer gas in the power plant and is intended to continue to be operated in that way. This impression is confirmed by the schematic description of both parts of the business submitted by Lahti Energia. There is nothing to suggest that the producer gas is supplied for another use.

87. Furthermore, the waste incineration directive creates an association between the thermal treatment of waste and the incineration of the producer gas. Whilst the definition of thermal treatment in an incineration plant includes the requirement of subsequent incineration of the product, it is clear from the overall context of the directive that the model of the plants covered incorporates an incineration operation. This is shown in particular by the limit values for emissions of pollutants into the air.

88. The aspects highlighted by the referring court relating to the replacement of fossil fuels and the reduction of emissions are of no direct relevance for the application of the waste incineration directive. These effects are to be welcomed, although — as Austria observes — the replacement of fossil fuels is a characteristic of a co-incineration plant.²⁵

25 — See my Opinion in Case C-251/07 *Gävle Kraftvärme* (cited in footnote 20, point 38).

89. Nor does the relatively small proportion of producer gas in the fuels used in the power plant preclude a direct association and a technical connection. The waste incineration directive applies irrespective of the proportion of waste in the co-incineration operation. In practice it even appears that waste generally forms only a small proportion of the fuels used.²⁶

90. The Italian Government disputes a direct association between the two parts of the business, however, arguing that the association is not based on technical necessity, but solely on the intention to combine the two plants.

91. The association between the two parts of the business is not technically necessary in particular if the purified producer gas is no longer to be regarded as waste, but as a product. In that case it could easily be replaced by a comparable product, such as natural gas. At the same time, the producer gas could also be used for another purpose, for example in the event of seasonally low energy demand in the power plant.

92. If the producer gas is not waste, it would no longer be compatible with the principle of equal treatment or non-discrimination to make the power plant subject to the requirements for a co-incineration plant. That principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.²⁷

93. Since, where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the general principles of Community law,²⁸ a direct association and a technical connection within the meaning of the definition of plants would have to be rejected in the case of the incineration of producer gas where that gas is no longer to be regarded as waste. That is also the conclusion reached by the Finnish, Italian and Netherlands Governments.

94. If, on the other hand, the producer gas is still waste, its co-incineration is sufficiently distinguished from the combustion of conventional fuels to justify the application of the waste incineration directive.

26 — See the Reference Document on Best Available Techniques for Large Combustion Plants, July 2006, p. 489 et seq. (http://ec.europa.eu/comm/environment/ipcc/brefs/lcp_bref_0706.pdf). The Commission produced that document in collaboration with experts from the Member States on the basis of Directive 96/61.

27 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57; and Case C-227/04 P *Lindorfer v Council* [2007] ECR I-6767, paragraph 63.

28 — Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87; Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 105; Case C-457/05 *Schutzverband der Spirituosen-Industrie* [2007] ECR I-8075, paragraph 22; Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 68; and Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, paragraph 174.

95. At first sight the Community legislature appears to have introduced a discrepancy in so far as it laid down different limit values for existing plants for the generation of energy depending on whether or not they (also) use waste. It is irrelevant, as far as negative effects on the environment are concerned, whether emissions of pollutants are produced from waste or from conventional fuels. This discrepancy could be an obstacle to the substitution of primary raw materials by waste, which is desirable in principle, and — in the present case — result in higher total emissions of pollutants.

96. However, the legislature can enjoy a margin of discretion in laying down differential rules.²⁹ The scope of that discretion depends in particular on the objective pursued by it in making the distinction. In the case of complex political decisions it is generally broad.³⁰

97. The present case concerns complex environmental rules. Therefore, review by the Court must necessarily be limited to the question whether the legislature committed a

manifest error of appraisal with regard to the implementation of those objectives.³¹

98. In this regard, at the hearing the Commission pointed out that the limit values under the directive on large combustion plants and under the waste incineration directive are only minimum requirements. As is clear from the 13th recital in the preamble to the waste incineration directive and the eighth recital in the preamble to the directive on large combustion plants, more stringent requirements may follow in particular from Directive 96/61.

99. Article 3(a) of Directive 96/61 requires the plants covered to apply the best available techniques and to respect the relevant limit values. According to the Commission, the relevant limit values applicable to the plant at issue would be more stringent than those under the waste incineration directive. This shows that in laying down the different limit values for old plants under the directives on waste incineration and large combustion plants, the legislature did not have to agree to lay down definitive requirements for the respective plants.

29 — See Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraphs 35 and 49, and *Lindorfer* (cited in footnote 27, paragraph 78). See also the Opinion of Advocate General Pöiares Maduro in Case C-524/06 *Huber* pending before the Court, point 29, and Case C-127/07 *Arcelor* pending before the Court, point 30 et seq.

30 — See, for example, Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 61, and Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 63, on the objectives pursued in the field of employment.

31 — With regard to the criteria for the application of Article 174 EC, see Case C-284/95 *Hi-Tech* [1998] ECR I-4301, paragraph 37, and Case C-86/03 *Greece v Commission* [2005] ECR I-10979, paragraph 88, each on the Community legislature.

100. Furthermore, at the hearing the Commission stated, in reply to a question, that the more stringent limit values for older plants under the waste incineration directive are intended to ensure that waste is recovered only in plants where the best available techniques under Directive 96/61 are applied.

deposited.³⁴ Waste incineration is one of the most widespread treatment methods.³⁵ If it became less attractive for plant operators on account of stringent limit values, the corresponding additional costs would ultimately be borne by the producers of the waste. This would be consistent with the polluter-pays principle.³⁶

101. In addition, the arguments put forward by Friends of Nature in particular show that the use of waste as fuel is not to be welcomed unreservedly. The lower the requirements with regard to waste incineration and waste co-incineration, the less attractive the alternatives. This is detrimental above all to waste prevention and recycling. These alternatives may be more advantageous to the environment. Therefore, under Article 3 of the waste framework directive and recital 8 in the preamble to the waste incineration directive, waste prevention takes priority at least over recovery through incineration.³²

103. Consequently, in laying down limit values for existing plants under the waste incineration directive different factors had to be taken into consideration and weighed against one another. In the light of those considerations, the difference in treatment between existing co-incineration plants and existing large combustion plants is not manifestly unjustified.

102. Lastly, Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste³³ requires waste to be treated before it is

104. The answer to the third question must therefore be that combustion, in the boiler of a power plant associated with a gas plant, of gas which is generated in the gas plant and purified after the gasification process is to be regarded as an operation within the meaning of Article 3 of the waste incineration directive if the gas is waste at the time of combustion.

32 — Parliament now proposes incorporating a waste hierarchy into the revised version of the waste framework directive being discussed at present under which waste prevention, recovery and material recovery are to be favoured over reuse of waste for energy purposes (Article 4 of the consolidated draft annexed to the opinion of 17 June 2008, TA/2008/282).

33 — OJ 1999 L 182, p. 1.

34 — Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753.

35 — See Report from the Commission to the Council and the European Parliament on the national strategies for the reduction of biodegradable waste going to landfills pursuant to Article 5(1) of Directive 1999/31/EC on the landfill of waste of 30 March 2005, COM(2005) 105 final.

36 — See my Opinion in Case C-188/07 *Commune de Mesquer*, point 120 et seq.

F — *Summary*

purification the gas is sufficiently similar to raw materials or other products.

105. The answers to the different questions show that the waste incineration directive is applicable in principle where a combustible gas which is intended for incineration is obtained from waste by means of gasification. The directive covers the gas plant at least. The combustion of the gas is also covered if the plant in question is directly associated with the gas plant or there is a technical connection. Such a direct connection can be taken to exist at least where there is an association, if the gas is to be regarded as waste at the time of combustion. However, doubts arise if after

106. Further questions may arise in this connection in future. One example is combustion of producer gas, which is to be regarded as waste, in plants which are not associated with the gas plant, for example where the gas is transported in tanks. It is also doubtful how gasification would be treated if the gas is not intended for combustion, but for generating other products, for example in order to produce plastic. However, there is no need to give a ruling on these questions in the present case.

V — **Conclusion**

107. I therefore propose that the Court answer the questions referred for a preliminary ruling as follows:

- (1) Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste does not cover plants which incinerate or thermally treat only gaseous waste.

- (2) A gas plant where gas is generated from waste by means of pyrolysis may be regarded as an incineration plant within the meaning of Article 3(4) of Directive 2000/76/EC even if it has no incineration line.
- (3) Combustion, in the boiler of a power plant associated with a gas plant, of gas which is generated in the gas plant and purified after the gasification process is to be regarded as an operation within the meaning of Article 3 of Directive 2007/76/EC if the gas is waste at the time of combustion.
- (4) The purified gas generated in the gas plant may be regarded as a product, so that the rules on waste no longer apply to it, if it is sufficiently similar to primary raw materials or other products.