

JUDGMENT OF THE COURT (Second Chamber)

4 December 2008 (*)

(Directive 2000/76/EC Incineration of waste Purification and combustion Crude gas produced from waste Definition of waste Incineration plant Co-incineration plant)

In Case C-317/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Korkein hallinto-oikeus (Finland), made by decision of 6 July 2007, received at the Court on 10 July 2007, in the proceedings brought by

Lahti Energia Oy,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk, L. Bay Larsen and C. Toader (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 July 2008,

after considering the observations submitted on behalf of:

Lahti Energia Oy, by T. Rinne, asianajaja, and M. Kivelä and H. Takala, director and engineer respectively,

Hämeen ympäristökeskus, by P. Mäkinen and E. Mecklin, acting as Agents,

Salpausselän luonnonystävät ry, by M. Vikberg and S. Niemelä, asianajaja,

the Finnish Government, by J. Heliskoski, acting as Agent,

the Italian Government, by I. M. Braguglia, acting as Agent, and G. Fiengo, avvocato dello Stato,

the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,

the Austrian Government, by E. Riedl, acting as Agent,

the Commission of the European Communities, by I. Koskinen and J.B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2008,
gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 3 of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (OJ 2000 L 332, p. 91).
- 2.
3. The reference was made in the course of proceedings between Lahti Energia Oy ('Lahti Energi'), an undertaking owned by the municipality of Lahti, and Itä-Suomen ympäristölupavirasto (East Finland Environmental Permit Authority, 'ympäristölupavirasto') concerning whether a complex comprising a gas plant and a power plant is subject to the requirements of Directive 2000/76.
4. **Legal context***Directive 2000/76*
5. Recitals 5 and 27 in the preamble to Directive 2000/76 are worded as follows:
6. '(5) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, there is a need to take action at the level of the Community. The precautionary principle provides the basis for further measures. This Directive confines itself to minimum requirements for incineration and co-incineration plants....(27) The co-incineration of waste in plants not primarily intended to incinerate waste should not be allowed to cause higher emissions of polluting substances in that part of the exhaust gas volume resulting from such co'incineration than those permitted for dedicated incineration plants and should therefore be subject to appropriate limitations.'
7. Under Article 3 of Directive 2000/76:
8. 'For the purposes of this Directive:1. 'waste' means any solid or liquid waste as defined in Article 1(a) of [Council

Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39)];...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. This definition covers the site and the entire incineration plant including all incineration lines, waste reception, storage, on site pre-treatment 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;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 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. This definition covers the site and the entire plant including all co-incineration lines, waste reception, storage, on site pre-treatment 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;...12 'permit' means a written decision (or several such decisions) delivered by the competent authority granting authorisation to operate a plant, subject to certain conditions which guarantee that

the plant complies with all the requirements of this Directive. A permit may cover one or more plants or parts of a plant on the same site operated by the same operator;13. 'residue' means any liquid or solid material (including bottom ash and slag, fly ash and boiler dust, solid reaction products from gas treatment, sewage sludge from the treatment of waste waters, spent catalysts and spent activated carbon) defined as waste in Article 1(a) of Directive 75/442/EEC, which is generated by the incineration or co-incineration process, the exhaust gas or waste water treatment or other processes within the incineration or co-incineration plant.'

9. Article 7 of Directive 2000/76, entitled 'Air emission limit values' provides:
10. '1. Incineration plants shall be designed, equipped, built and operated in such a way that the emission limit values set out in Annex V are not exceeded in the exhaust gas.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....'*Directive 2006/12/EC*
11. Under Article 1 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9) which, in order to clarify matters, codifies Directive 75/442, 'waste' is to mean 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.
12. **The dispute in the main proceedings and the questions referred for a preliminary ruling**
13. Lahti Energia applied to the ympäristölupavirasto for an environmental permit with respect to the activities of its gas and power plants. That permit concerns a complex with two separate plants on the same site: a plant producing gas from waste and a power plant whose steam boiler burns the purified gas which is produced in the gas

plant.

14.

15. The ympäristölupavirasto issued a provisional environmental permit to Lahti Energia and laid down the conditions pursuant to which that permit was granted. The ympäristölupavirasto thus took the view that the gas plant which produces gas and the power plant burning the gas together constitute a co-incineration plant within the meaning of Directive 2000/76.

16.

17. Lahti Energia brought an appeal against that decision before the Vaasan hallinto-oikeus (Administrative Court, Vaasa) seeking a declaration that the combustion in a main boiler of gas purified and refined in a separate gas production plant was not to be regarded as co-incineration of waste within the meaning of Directive 2000/76.

18.

19. The Vaasan hallinto-oikeus dismissed the appeal. It held in particular that attainment of the objectives of Directive 2000/76 might be prejudiced if its scope were interpreted so restrictively that its requirements were not applied to the combustion of pre-treated waste. However, the court held that, as a separate operation, the gas plant was not to be regarded as an incineration plant within the meaning of Directive 2000/76, because gasification is a thermal treatment and that, to be regarded as an incineration plant, a plant must have a line specifically for incineration.

20.

21. Nevertheless, the Vaasan hallinto-oikeus held that the gas and power plants together constituted a co-incineration plant within the meaning of Directive 2000/76.

22.

23. Lahti Energia therefore brought an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

24. '(1) Is Article 3(1) of Directive 2000/76/EC 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 Directive 2000/76/EC 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 Directive 2000/76/EC? 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 Directive 2000/76/EC, 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?"**The questions referred for a preliminary ruling***The first question*

25. By its first question, the referring court wishes to know whether the definition of 'waste' in Article 3(1) of Directive 2000/76 also covers gaseous substances.
- 26.
27. In the context of the case in the main proceedings, that question must be understood as relating to whether the gas resulting from the pyrolysis, carried out in a gas plant, of solid waste of various kinds may be regarded as 'waste' within the meaning of Directive 200/76 so that that gaseous substance, used subsequently as a fuel in a power plant alongside other fuels, could therefore be considered

to be either a substance which '[is] subsequently incinerated' within the meaning of the first subparagraph of Article 3(4) of that directive, or waste used as 'additional fuel' or 'thermally treated for the purpose of disposal' within the meaning of the first subparagraph of Article 3(5) thereof.

28.

29. In that connection, as Lahti Energia, the Finnish and Italian Governments and the Commission of the European Communities have pointed out, it is evident that the clear wording of Article 3(1) of Directive 2000/76 defines 'waste' in the context of that directive as any 'solid' or 'liquid' waste as defined in Article 1(a) of Directive 75/442.

30.

31. A literal interpretation of that provision is sufficient for a finding that only waste in solid or liquid form is covered by Directive 2000/76, and there is therefore no need to examine in addition whether the definition of 'waste' in Directive 75/442 itself covers waste in gaseous form.

32.

33. Therefore, the answer to the first question must be that the definition of 'waste' in Article 3(1) of Directive 2000/76 does not cover gaseous substances.

34. *The second question*

35. By its second question, the referring court asks the Court of Justice whether the existence of an incineration line is a necessary condition of the classification of a unit, such as a plant producing gas from waste, as an 'incineration plant' within the meaning of Article 3(4) of Directive 2000/76.

36.

37. In accordance with the first subparagraph of Article 3(4) of Directive 2000/76, the definition of incineration plant covers any technical unit and equipment dedicated to the thermal treatment of wastes, which includes the incineration by oxidation of waste as well as other thermal

treatment processes such as, in particular, pyrolysis or gasification.

38.

39. In that connection, as is clear from a comparison of the various language versions of Article 3(4) of Directive 2000/76, and as Lahti Energia, Hämeen ympäristökeskus, the Finnish Government and the Commission have submitted, a unit in which waste is thermally treated will be classified as an 'incineration plant' only if the substances resulting from the use of that thermal treatment process are subsequently incinerated.

40.

41. As the Netherlands Government rightly observed, the list of technical elements in the second subparagraph of Article 3(4) of Directive 2000/76 cannot be regarded as either an exhaustive list of the elements which may constitute an incineration plant or as a list of the elements which are necessary to constitute such a plant. Therefore, the presence of an incineration line is not a necessary condition for the purposes of the classification of a unit as an 'incineration plant'.

42.

43. In those circumstances, the answer to the second question must be that the definition of 'incineration plant' in Article 3(4) of Directive 2000/76 relates to any technical unit and equipment in which waste is thermally treated, on condition that the substances resulting from the use of the thermal treatment process are subsequently incinerated and that, in that connection, the presence of an incineration line is not a necessary condition for the purposes of such classification.

44. *The third question*

45. By its third question, the referring court asks essentially how to classify, in the light of Article 3 of Directive 2000/76, a power-generating complex in which a gas plant, sited next to a power plant, provides the latter with

purified gas which is obtained by the gasification of waste and used in the power plant as a fuel alongside fossil fuels. The referring court asks in particular about the relevance, for the purposes of classifying that complex, first, of the fact that the use of the purified gas by the power plant produces lower emissions as compared with the use of fossil fuels and, second, the fact that the functions of the two units making up that complex overlap to a certain extent in that the gas plant is intended partially to cover the fuel requirements of the power plant but, at the same time, the gas produced in the gas plant might be sold off site.

46.

47. As a preliminary point, it must be stated that, for the purposes of applying Directive 2000/76, where a co-generation plant comprises a number of boilers, each boiler and its associated equipment are to be regarded as constituting a separate plant (Case C-251/07 *Gävle Kraftvärme* [2008] ECR I-0000, paragraph 33).

48.

49. Therefore, in the same way, with respect to two units such as those at issue in the main proceedings, a separate examination of the gas plant and the power plant should in principle be carried out for the purposes of applying Directive 2000/76.

50.

51. In accordance with the first subparagraph of Article 3(5) of Directive 2000/76, a plant whose main purpose is the generation of energy or production of material products, which either uses wastes as a regular or additional fuel or in which waste is thermally treated for the purpose of its disposal, is to be regarded as a co-incineration plant (see *Gävle Kraftvärme*, paragraph 35).

52.

53. The second subparagraph of Article 3(5) states that, 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 is to be regarded as an incineration plant within the meaning of Article 3(4) (*Gävle Kraftvärme*, paragraph 36).

54.

55. Accordingly, it is clear from the wording of those provisions that a co-incineration plant constitutes a particular form of incineration plant and that it is on the basis of the main purpose of a plant that the assessment of whether it is an incineration plant or a co-incineration plant is to be made (*Gävle Kraftvärme*, paragraph 37).

56. The classification of the gas plant

57. In the case in the main proceedings, and subject to the findings of fact which are the prerogative of the referring court, it is apparent that in the gas plant waste is thermally treated but the resulting substances are not incinerated there. The substances resulting from the thermal treatment, in this case crude gas, are filtered with the aid of a purifier which produces purified gas free from undesirable solid particles and therefore suitable for use as fuel.

58.

59. Thus, in so far as the substances resulting from the thermal treatment of the waste are not incinerated at the gas plant, the operation and characteristics of such a plant do not permit it to be classified, as such, as an 'incineration plant' within the meaning of Article 3(4) of Directive 2000/76.

60.

61. However, it is apparent that the main purpose of the gas plant is the production of a fuel, in this case a purified gas, and that within the plant waste is thermally treated for the purpose of disposal.

62.

63. In that connection, while it is admittedly true, as stated in paragraph 28 of this judgment, that a co-incineration plant constitutes a particular form of incineration plant, the fact remains that the two types of plant have definitions which are particular to them. Thus, as the Advocate General

stated in point 71 of her Opinion, although the condition relating to the thermal treatment of waste may be required in both cases, the wording of Article 3(5) of Directive 2000/76 does not, by contrast, as regards classification as a co-incineration plant, require that the resulting substances be subsequently incinerated.

64.

65. It follows that, in accordance with the findings in paragraph 26 of this judgment, a gas plant such as that at issue in the main proceedings satisfies the conditions necessary for its classification as a co-incineration plant within the meaning of Article 3(5) of Directive 2000/76.

66.

67. As regards purified gas resulting from the thermal treatment of waste, the Austrian Government submits that it could be considered that the purified gas thus produced by the gas plant corresponds to a substance which results from the thermal treatment of waste in that plant and that, in so far as the gas is then burnt in the power plant, the gas plant may be regarded as an incineration plant within the meaning of Article 3(4) of Directive 2000/76.

68.

69. In that connection, first, as it appears from the information given by the referring court, the gas concerned, by reason in particular of its filtration in the purifier, has properties similar to a fossil fuel and thereby constitutes a gas suitable for use as a fuel for the production of energy both in the power plant for which the production of the gas plant is intended and in other power plants.

70.

71. In those circumstances, there is no question of a substance resulting from the thermal treatment of waste in the gas plant which is incinerated in the power plant in order to complete a simple process of waste disposal. As the Finnish and Italian Governments have submitted, when the process is completed within the gas plant a product having the characteristics of a fuel is generated from waste.

- 72.
73. Second, where, in a plant whose main purpose is to produce material products, in this case, gas products, waste is thermally treated in order to dispose of it, such a plant must be classified as a co-incineration plant in accordance with the scheme of Article 3(4) and (5) of Directive 2000/76 which makes the classification of a unit as an incineration or co-incineration plant dependent on its main purpose (see, to that effect, *Gävle Kraftvärme*, paragraph 40).
74. The classification of the power plant
75. As regards the activities of the power plant at issue in the main proceedings, it is apparent that its purpose is the production of energy through combustion of primary materials such as coal and, partly, of purified gas as produced by the gas plant. Therefore, it must be stated that the main purpose of such a plant is not the incineration of substances resulting from the thermal treatment of waste undertaken in the gas plant.
- 76.
77. Furthermore, it cannot be argued that the combustion of the purified gas in the power plant together with fossil fuels constitutes thermal treatment of 'waste' within the meaning of Directive 2000/76 which would enable the power plant to be classified as an incineration plant.
- 78.
79. As stated in paragraph 17 of this judgment, the directive does not in any way include gaseous substances in the category 'waste'. Therefore, it cannot be held that the combustion in the power plant of purified gas produced by the gas plant constitutes thermal treatment of waste.
- 80.
81. It follows that, in circumstances such as those at issue in the main proceedings, where the purpose of the gas plant is to obtain products in gaseous form by thermally treating waste, which is sufficient for it to be classified as a co-

incineration plant within the meaning of Article 3(5) of Directive 2000/76, the power plant which uses purified gas obtained by co-incinerating waste in the gas plant, as a replacement for fossil fuels principally used in its energy production, does not fall within the scope of that directive.

82.

83. In that connection, for the purposes of classifying a unit as an incineration or co-incineration plant, there is no need to take account of which classification would enable the level of emissions most favourable to the environment to be achieved. That issue falls within the competence of the Community legislature, which has defined the conditions necessary for the legal classifications of plants and the level of emissions acceptable both for incineration and co-incineration plants and for large combustion plants. Accordingly, only the requirements set out in Article 3(4) and (5) of Directive 2000/76 are relevant for the national court dealing with such a question.

84.

85. In light of the foregoing, the answer to the third question must be that, in circumstances such as those at issue in the main proceedings:

86. a gas plant whose objective is to obtain products in gaseous form, in this case purified gas, by thermally treating waste must be classified as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76; a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, a purified gas obtained by the co-incineration of waste in a gas plant does not fall within the scope of that directive. *The fourth question*

87. By its fourth question, the referring court asks as from which chemical state waste may be considered to become 'products'.

88.

89. The referring court formulated such a question on the

premiss that the gaseous substances obtained by the thermal treatment of waste in a gas plant such as that at issue in the main proceedings are themselves 'waste' within the meaning of Article 3(1) of Directive 2000/76.

90.

91. In that connection, in the answer to the first question it was stated that the definition of 'waste' in that provision does not cover gaseous substances.

92.

93. In those circumstances there is no need to answer the fourth question.

94. **Costs**

95. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

96. On those grounds, the Court (Second Chamber) hereby rules:
1. The definition of 'waste' in Article 3(1) of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste does not cover gaseous substances.
2. The definition of 'incineration plant' in Article 3(4) of Directive 2000/76 relates to any technical unit and equipment in which waste is thermally treated, on condition that the substances resulting from the use of the thermal treatment process are subsequently incinerated and that, in that connection, the presence of an incineration line is not a necessary condition for the purposes of such classification.
3. In circumstances such as those at issue in the main proceedings: a gas plant whose objective is to obtain products in gaseous form, in this case purified gas, by thermally treating waste must be classified as a 'co-incineration plant' within the meaning of Article 3(5) of Directive

2000/76; a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, a purified gas obtained by the co-incineration of waste in a gas plant does not fall within the scope of that directive.[\[Signatures\]](#)*

Language of the case: Finnish.