

JUDGMENT OF THE COURT (Eighth Chamber)

25 February 2010 (*)

(Directive 2000/76/EC Incineration of waste Incineration plant
Co'incineration plant Complex comprising a gas plant and a
power plant Incineration in the power plant of non-purified gas
produced from the thermal treatment of waste in the gas plant)

In Case C-209/09,

REFERENCE for a preliminary ruling under Article 234 EC, by
the Korkein hallinto-oikeus (Finland), made by decision of 8
June 2009, received at the Court on 10 June 2009, in the
proceedings brought by

Lahti Energia Oy,

THE COURT (Eighth Chamber),

composed of C. Toader (Rapporteur), President of the Chamber,
C.W.A. Timmermans and K. Schiemann, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

Lahti Energia Oy, by J. Savelainen, Director-General,

Salpausselän luonnonystävät ry, by M. Vikberg, Director,

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

the Belgian Government, by T. Materne and L. Van den Broeck,
acting as Agents,

the German Government, by M. Lumma and B. Klein, acting as
Agents,

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

the Commission of the European Communities, by I. Koskinen
and A. Marghelis, acting as Agents,

having decided, after hearing the Advocate General, to proceed
to judgment without an Opinion,

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 Energia'), 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 the said Directive:
 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 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;

(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 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;...

(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 main proceedings and the reference for a preliminary ruling in Case C-317/07**
13. Lahti Energia applied to the ympäristölupavirasto for an environmental permit with respect to the activities of its gas and power plants. That application concerned a complex with two separate plants on the same site: a plant producing gas from waste and a power plant whose steam boiler was to burn the gas which was produced, and previously purified, 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 constituted 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) (Finland) 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. The court also 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) (Finland), 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?

25. That reference for a preliminary ruling gave rise to the judgment in Case C-317/07 *Lahti Energia* [2008] ECR I-9051, in which the Court ruled:
26. '1. The definition of 'waste' in Article 3(1) of Directive 2000/76 ... 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. **Developments in the main proceedings and the questions referred in the present case**

27. Following the judgment in *Lahti Energia*, the Korkein hallinto-oikeus called upon the parties to the main proceedings to submit their observations.
- 28.
29. At that point, Lahti Energia let it be known that, despite what it had said in its application for an environmental permit and in its appeals to the Vaasan hallinto-oikeus and to the court making the reference, it was no longer implementing the planned process of gas purification from the thermal treatment of waste in its gas plant. However, the applicant in the main proceedings argued that it could be deduced from the judgment in *Lahti Energia* that the combustion of a gaseous substance in a power plant cannot constitute the incineration of waste within the meaning of Directive 2000/76. In its view, such a power plant can be regarded as a co-incineration plant only if it uses for the most part synthesis gas obtained from waste. However, Lahti Energia's power plant uses such gas only as an additional fuel, that is to say, in a residual manner, with the result that the power plant does not come within the scope of Directive 2000/76.
- 30.
31. It was in those circumstances that the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
32. '1. Is combustion as an additional fuel in the boiler of a power plant of gas generated in a gas plant to be regarded as an operation within the meaning of Article 3 of Directive 2000/76/EC, if the gas conducted for combustion

is not purified after the gasification process?2. If the reply to the first question is basically in the negative, does the quality of the waste for incineration, or the particle content of the gas conducted for incineration, or the content of other impurities in it, have any bearing on the matter when making an assessment?"**The questions referred***First question*

33. By its first question, the national court seeks to ascertain whether Directive 2000/76 applies to a power plant which uses as an additional fuel, in addition to fossil fuels used for the most part in its production activities, a gas obtained from the thermal treatment of waste in a plant where the gas was not purified.
- 34.
35. In that regard, as was correctly pointed out by the national court, the Finnish, Belgian and German Governments and the Commission of the European Communities, the answer to the third question in *Lahti Energia*, which excluded the activity of the power plant from the scope of Directive 2000/76, was related to the fact that the gas used in that power plant, although produced from waste, was to be purified in the gas plant as part of the process of co-incinerating that waste.
- 36.
37. As the Court stated in paragraph 29 of that judgment, the substances resulting from the thermal treatment of waste in the gas plant, in this case crude gas, were to be filtered with the aid of a purifier, which would produce purified gas free from undesirable solid particles and therefore suitable for use as fuel.
- 38.
39. As is apparent from paragraphs 35, 36 and 41 of that judgment, the Court held that, in such a situation, as the gas produced in the gas plant would, by reason in particular of its filtration in the purifier, have properties similar to a fossil fuel, the activity of the power plant

could not fall within the scope of Directive 2000/76 merely because of the use of an additional fuel derived from waste.

40.

41. On completion of the process within the gas plant, the purified gas used in the power plant was deemed to be a 'product' within the meaning of Article 3(5) of Directive 2000/76.

42.

43. As Advocate General Kokott had remarked in points 91 and 93 of her Opinion in *Lahti Energia*, the burning in a power plant of a genuine 'product', even if it is obtained from waste, militated against recognising a technical and functional link between the gas plant and the power plant.

44.

45. However, the situation is different where, as has become the case in the main proceedings, the gas obtained from thermal treatment of waste in the gas plant is no longer purified within that plant but is transported as it is to the power plant to serve as an additional fuel in the latter plant.

46.

47. In such a situation, if the activity of the gas plant alone is considered, the process now being envisaged is not a simple process of waste disposal by thermal treatment which, if the substances obtained from it were subsequently incinerated, would allow such a plant to be regarded as an 'incineration plant' within the meaning of Article 3(4) of Directive 2000/76 (see, to that effect, *Lahti Energia*, paragraph 20).

48.

49. Nor can the plant in question be regarded on its own as a co-incineration plant, that is to say, in accordance with the first subparagraph of Article 3(5) of Directive 2000/76, as 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 (see Case C-251/07 *Gävle Kraftvärme* [2008] ECR I-7047, paragraph 35, and *Lahti Energia*, paragraph 26).

50.

51. In a situation such as the one now at issue in the main proceedings, contrary to what was stated in paragraph 36 of *Lahti Energia*, the process of thermal treatment of the waste, commenced in the gas plant, is no longer completed within that plant, since the gas is transported from the gas plant to the power plant where it is used to generate power, although it does not yet possess properties similar to a fossil fuel, particularly with regard to purity.

52.

53. It is true that the activities of two distinct plants must be the subject of a separate examination for the purposes of applying Directive 2000/76 (see, to that effect, *Lahti Energia*, paragraphs 24 and 25).

54.

55. However, in the situation which now exists in the main proceedings, the inevitable conclusion is that the gas plant and the power plant can in fact be regarded as a single entity whose objective is no longer to obtain a product but to generate power. In that entity, all the waste together is thermally treated, for the purpose of disposal, in a two-stage process, one stage taking place in the gas plant and consisting in thermal treatment of the waste, and the other taking place in the power plant and consisting in the burning of gaseous substances produced by the thermal treatment carried out in the gas plant.

56.

57. In such a situation, as Advocate General Kokott envisaged in her Opinion in *Lahti Energia*, when the process of generating energy or producing a product is realised and terminated only when the gaseous substances obtained from the thermal treatment of the waste in the gas plant are transferred to the power plant, the complex comprising the gas plant and the power plant must be regarded jointly for

the purposes of applying Directive 2000/76, by reason of the technical and functional link which then exists between the two installations. In addition, that outcome is justified by the fact that the harmful substances produced by the thermal treatment, commenced in the gas plant, to which the waste has been subjected are released and are discharged, at least in part, only when the crude gas has been transferred to the power plant.

58.

59. With regard to Lahti Energia's argument that the power plant at issue in the main proceedings can be regarded as a 'co-incineration plant' only if, when generating energy, it uses, for the most part, non-purified gas produced in the gas plant, it must be recalled that, as is apparent from recital 27 to Directive 2000/76, 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.

60.

61. The answer to the first question therefore is that a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, gas obtained in a gas plant following thermal treatment of waste is to be regarded, jointly with that gas plant, as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76 when the gas in question has not been purified within the gas plant.

62. *The second question*

63. The Korkein hallinto-oikeus asked its second question only for the case in which its first question was answered in the negative.

64.

65. Having regard to the answer provided to the first question, there is no need to rule on the national court's second

question.

66. **Costs**

67. 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.

68. On those grounds, the Court (Eighth Chamber) hereby rules:**A power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, gas obtained in a gas plant following thermal treatment of waste is to be regarded, jointly with that gas plant, as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste when the gas in question has not been purified within the gas plant.**[Signatures]* Language of the case: Finnish.