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THE LEGAL PROVISIONS GOVERNING WASTE IN THE ITALIAN LEGAL SYSTEM

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1. LEGAL PROVISIONS.

The consumer society in which we live involves the production of a large quantity of waste: in the Italian legal system, these wastes are divided into two distinct categories, wastes from consumption processes (urban wastes) and wastes from economic activities (so-called special wastes). Among the latter, certain are classified as hazardous because of their extremely harmful chemical components.

To get an idea of the scale of the phenomenon in Italy, consult the 2008 ISPRA report on wastes (www.apat.gov.it), which shows that in our country, annual waste production is approximately 33 million tonnes

of urban wastes. This means that, on average, each of us produces more than 500 kilos of urban waste a year! Of this, more than one third (12.4 million tonnes) is made up of packaging materials (cardboard, wood, plastic, glass, etc.). The quantities of special wastes produced, however, amount to approximately 135 million tonnes (of which approximately 10 million are hazardous wastes), i.e. approximately four times the amount of urban wastes. These do not include so-called RAEE (electrical and electronic equipment waste), which totals approximately 500,000 tonnes per year, and end-of-life vehicles (approximately 1.5 million vehicles are removed from the motor vehicle register each year).

Directive 2008/98 of the European Parliament and of the Council of 19 November 2008, which sets down the fundamental principles and rules for definition and management of waste, was incorporated into the Italian legal framework by Part IV of the Environmental Code (Legislative Decree 152 of 3 April 2006) as amended by Legislative Decree 205 of 3 December 2010 (this covers some sixty articles, Articles 177-238), to which the regional legal requirements must also be adapted (Article 177).

The provisions set down in the Environmental Code can be divided into two sections: a general section containing about forty articles (Articles 177-216), relating to the sphere of application of the associated provisions and corresponding exclusions, principles, prevention of wastes, definitions, the liability of the producer, by-products, so-called end-of-waste materials, classification of wastes, powers and jurisdiction, and the associated department and authorisations, and a special section containing about twenty articles (Articles 217-238), dedicated to coverage of specific types of wastes (packaging materials, electrical and electronic equipment, tyres, end-of-life vehicles, the various waste consortia, etc.).

From an historical point of view, after the first transposition of the Community provisions through Presidential Decree 914 of 10 September 1982, it is essential to consider the so-called Ronchi Decree (Legislative Decree 22 of 5 February 1997), which was immediately subject to two substantial corrections and has constituted the basis for innumerable detailed provisions. On various occasions, specifically with reference to waste, Italy has been subject to infringement proceedings for failing to incorporate or incorrectly incorporating the Community provisions: among the various penalties imposed on Italy, see Court of Justice, 18 December 2007, C-263/05, *Commission/Italy* (on the notion of waste)*;* Court of Justice, 10 April 2008, C-442/06, *Commission/Italy*, Court of Justice, 26 April 2007, C-135/05, *Commission/Italy*, Court of Justice, 9 April 2004, C-383/02, *Commission/Italy* and Court of Justice, 16 December 2004, C-516/03, *Commission/Italy* (in respect of waste dumps); Court of Justice, 24 May 2007, C-394/05, *Commission/Italy* (on end-of-life vehicles); Court of Justice, 18 December 2007, C-195/05, *Commission/Italy* (in respect of food waste); Court of Justice, 14 June 2006, C-82/06, *Commission/Italy*

(in respect of waste management plans); Court of Justice, 25 September 2008, C-368/07, *Commission/Italy* (in respect of management plans for port wastes);

We should note that fairly often, especially over the past few years, given the exceptional and urgent nature of the problems that have arisen from time to time, non-standard legal instruments have been used, such as emergency orders.

In this regard, the experience of Campania is typical: a state of emergency in the waste disposal sector was declared for the first time through the Prime Ministerial Decree of 11 February 1994 and has not yet been lifted. The emergency has resulted in the non-application of the ordinary rules governing jurisdiction, with the appointment of extraordinary bodies (from 1994 to 2004, the role of Commissioner for the waste emergency was performed by the President of the Campania region, from 2004 to 2007, other commissioners were appointed to fill this role, and from 2008, the tasks of the commissioner were attributed to the Head of the Civil Defence Department), a host of non-standard legal instruments (ten or so Prime Ministerial Decrees on declaration of states of emergency; a dozen orders through which the responsibilities and powers of the commissioners were enacted), a series of decree-laws (such as Decree-Law 90/2008 (the so-called waste decree) converted into Law 123/2008, Decree-Law 172/2008 converted into Law 210/2008; Decree-Law 195/2009 converted into Law 26/2010), certain rulings of the Constitutional Court (including, among the many, Decision 314/2009) and the Court of Justice (4 March 2010, C-297/08, which found that Italy was guilty of not having created, in Campania, a sufficient network of treatment plants for disposal), and the creation of a Parliamentary commission of inquiry.

2. THE NOTION OF WASTE AND THE RELATED NOTIONS OF BY-PRODUCTS AND END-OF-WASTE MATERIALS.

The first and fundamental problem facing Italian legislators was the definition of the notion of waste; this was absolutely essential, given that the inclusion of a substance or object in this category has important consequences in terms of how it is managed (requirement for authorisations, traceability obligations, criminal aspects, etc.).

Thus, for example, for the purposes of preventing situations where wastes, and above all special hazardous wastes, might be released in an uncontrolled manner into the environment, it is necessary to implement a system to ensure the comprehensive tracking of the various movements, “from the cradle to the grave”. In the past, this took place through completion of hard-copy forms (the so-called Environmental Declaration Form) by everyone who had at any point had control of the waste (producer of the waste, transport operator, etc.), and fairly recently a computerised system was approved, the SISTRI (waste control and traceability system), which makes it

possible to monitor movements of waste products nationally in real time, using a GPS detection system and a complex computer system (Article 188bis of the Environmental Code).

Waste means "any substance or object that the owner discards or has the intention or the obligation to discard" (Article 183(1)(a) of Legislative Decree 152/2006).

This notion contains two elements: one objective (any substance or object) and one subjective (that the owner discards or has the intention or obligation to discard).

With reference to the first element, it should be noted that, in Italian law, wastes are considered to include only movable property (and not, therefore, real property such as, for example, the contaminated land that is separated from a site for the purpose of performing clean-up operations), harmful emissions released into the air (such as the smoke from a factory) or waste water (which is covered by specific provisions).

In relation to the subjective requirement, any object may become waste: if a ripe apple is thrown into a rubbish bin, it becomes waste, although it does not have the corresponding objective characteristics, merely by the fact that there was a intention for it to be discarded.

It is important to classify the various types of waste, since, depending on inclusion in one or other category (urban; special; hazardous and otherwise: Article 184, Environmental Code), different types of obligations are assumed: for example, in general, Community provisions establish the objective of reducing and limiting movements of waste. On the basis of the principle of self-sufficiency and proximity (Article 182bis, Environmental Code), each optimal territorial area (which often coincides with the Province) must dispose of the waste that it produces. But this applies only for urban waste, while it does not apply for hazardous urban waste and for special waste (hazardous or otherwise), for which circulation outside the region is permitted.

While in the past, the tendency of the Community legislators (and, as a consequence, national legislators) was to broaden the notion of waste as much as possible (one such legislator incisively commented that the concept that "everything is waste" prevailed), including within that concept practically any type of substance, the opposite trend has gradually moved to the fore, and this has resulted, on the one hand, in the exclusion from the category of waste, under specific conditions, of various substances and objects (so-called by-products) and, on the other hand, the removal from the category of

waste of substances that previously were classified as such (so-called end-of-waste materials or secondary raw materials).

In the ongoing struggle between the concepts of “everything is waste” and “nothing is waste”, a median position has been adopted, whereby all waste can be referred to as being limited and constrained by the contiguous subsets of by-products and end-of-waste materials.

To clarify the notion of **by-product**, we should note that fairly often, industrial production creates unwanted secondary products that can be reused in the same process or in other production processes.

Initially, it was believed that these secondary products should be classified as waste, as their owner does in any case tend to discard them.

Between 1990 and 2000, there developed Community case law that was absolutely restrictive in respect of any scenario for reuse of production residues: "the essential purpose of Directives 75/442/EEC and 78/319/EEC would be compromised if application of those Directives were to depend on the intention of the owner of the waste as to whether to exclude economic reuse, by other people, of the substances or objects discarded" (Points 8, 11 and 12 of the grounds set out by the Court of Justice, 28 March 1990, C-359/88, *Zanetti* (in *Foro it.*, 1990, IV, 293)). This closed position in respect of any reuse of production residues was confirmed by Court of Justice Decision C-442/92 of 10 May 1995, *EC Commission versus Germany*, (in *Riv.dir.amb.*, 1995, 653) and by Court of Justice Decisions C-304/330, 342/94 and 224/95 of 25 June 1997, *Tombesi* (in *Riv.dir.amb.*, 1998, 47). In Court of Justice Decision C-129/96 of 18 December 1997, *Inter Environment Wallonie*, (in *Riv.dir.amb.*, 1998, 497), the Community judges, discussing the meaning to be given to the term "discard", on which the sphere of application of the notion of waste depends, confirmed that "the mere fact that a substance is used, directly or indirectly, in an industrial production process does not exclude that substance from the notion of waste" (Point 34). Along the same lines, Court of Justice Decisions C-418 and 419/1997 of 15 June 2000, *Arco*, (in *Riv.dir.amb.*, 2000, 691, with comment from A. Gratani) add that "simply because a substance is subject to performance of an operation listed in Annex II B of Directive 75/442/EEC does not mean that the operation consists in discarding that substance and that, therefore, that substance should be considered to be waste pursuant to the Directive " (see Point 51 in this regard).

Subsequently, following the *Palin Granit* decision in 2002 (Court of Justice, 18 April 2002, C-9/00), there was a distinction made between "production residues", i.e. substances that are not specifically sought for the purpose of possible subsequent use

(which should be considered to be waste), and "by-products", i.e. substances that, although not constituting the primary purpose of the production operation, are however "intended to be exploited or sold under favourable conditions, in a subsequent process, without preliminary transformation" by the company (Point 34).

In this ruling, the judges ruled that “the difference between products and wastes lies in the absence of any preliminary transformation operations and in the certainty of reuse without causing damage to the environment” and therefore "there is no justification for subjecting to the provisions of this latter, which are intended to envisage the disposal or recovery of wastes, goods, materials or raw materials that, in economic terms, have the value of products, irrespective of any transformation, and that, as such, are subject to the legal provisions applicable to those products" (Point 35).

The *positive position* in respect of by-products was subsequently confirmed by the Court of Justice, 11 September 2003, C-114/01, *Avesta Polarit Chrome*, (in *Riv.dir.amb.*, 2003, 995, with comment from L. Butti) through exclusion from classification as wastes of those goods, materials or raw materials ("by-products”) that, although obtained accidentally in the course of processing, i.e. as a result other than that principally intended by the production cycle, are actually reused, without preliminary transformation, in the course of the production process. And this was also confirmed by Court of Justice decision C-457/02 of 11 November 2004, *Niselli*, (in *Riv.dir.amb.*, 2005, 275).

While, in a preliminary phase, the notion of by-product was limited to scenarios in which the company that performed the production process subsequently used the by-product in the same production process, that notion was later broadened to include the scenario whereby the same company used the by-product in a different production process or, actually, where the same by-product was used by third parties in another production process.

We therefore arrived at the current definition of by-product, which means any substance or object that is generated on a secondary basis by a production process and that can be used, without any specific processing, in the course of the same or another production process (Article 184bis, Legislative Decree 152/2006).

The new definition of by-product appears to be particularly important, as it clarifies two fundamental points: a) a by-product is not necessarily required to be used in the same production process but may also be used in a subsequent production process; and

b) a by-product is not necessarily required to be used by the same producer but may also be used by a third party.

The notion of by-product is accompanied by the notion of **end-of-waste** or, to use the old terminology, secondary raw material. This type of product exists where the waste is subject to a recovery operation, including recycling and preparation for reuse, and there is a market or a demand for that substance or object and the use of the substance or object does not entail overall negative impacts for the environment or for human health (184ter, Legislative Decree 152 of 2006).

The fundamental difference between by-products and secondary raw materials lies in the fact that the former have never become wastes and, in some way, can be reused as they are without any form of processing, while the latter have become wastes but, following various processing operations, once more become usable products with economic value in the market.

The two notions contribute to limiting the scope of applicability of the notion of waste and, as such, obviously understood subject to the envisaged conditions, contribute to the creation of the recycling society, which constitutes the primary objective of the Community provisions in this area.Il primo e fondamentale problema che si è posto il legislatore italiano è quello di definire cosa sia un rifiuto; ciò appare di assoluto rilievo dato che l'inclusione di una sostanza o oggetto in tale categoria comporta importanti conseguenze in ordine alla sua gestione (necessità di autorizzazioni, obblighi di tracciabilità, aspetti penali etc.).

3. PREVENTION OF WASTE: THE SO-CALLED HIERARCHY.

While, on the one hand, the notions of by-product and end-of-waste materials tend to reduce the objective scope of applicability of wastes, with a prevalence of the concept of "nothing is waste", on the other hand, in current Italian law, there is an increasingly obvious trend towards preventing the formation of waste in all its guises.

And, therefore, while the regulatory approach in the past was geared fundamentally towards "managing" waste, essentially taking for granted the idea that this was a necessary product of contemporary society, a liability that could not be eliminated, today the priority trend is to avoid and/or drastically reduce the production of waste.

The key issue in the waste Directive currently applicable (and recently implemented) is specifically *recycling*, which aims to achieve a real circular economy, or a recycling and recovery society.

In the order of priority of the actions that are required to be performed (the so-called hierarchy in the management of waste or, more correctly, the hierarchy of the procedures for the approach to the environmental problems generated by the production of waste), first position is given over to prevention, with the associated activities (preparation for reuse, reuse, recycling and recovery) and disposal is considered only in very last place.

Each of the steps making up the hierarchy has a specific technical meaning: this ranges from actions that make it possible to reuse the product that has become waste without any processing, such as "preparation for reuse" ("operations associated with inspection, cleaning, disassembly and repair through which products and components of products that have become waste are prepared so that they can be reused without any other pre-treatment"; such as washing of glass bottles: Article 183(q), Environmental Code), and "reuse" ("any operation through which products or components that are not waste are reused for the same purpose for which they have been designed"; such as the use of glass bottles: Article 183(r), Environmental Code), to operations that entail processing such as "recycling" (in this case, the waste is treated to obtain products, materials and substances to be used for the original function: Article 183(u), Environmental Code) and "recovery" ("any operation where the principal outcome is to enable waste to perform a useful role, replacing other materials that would otherwise be used to perform a particular function or to prepare them to perform that function, within the plant or the economy in general"; such as use as fuel or as other means of producing energy; composting; recovery of metals; regeneration of oils, etc.: Article 183(t), Environmental Code).

For the purpose of creating the so-called recycling society, the legislators have identified specific objectives (defined in quantitative terms) and have envisaged a genuine prevention programme, where failure to comply may incur Community penalties.

With reference to the objectives for recycling, Article 181 of the Environmental Code provides that the reuse of materials originating from household waste, as a minimum cardboard, metals, plastics and glass, must be

increased in overall terms by 50% by 2020; and reuse of wastes from construction and demolition must be increased, also by 2020, by 70%.

To achieve these objectives, the national legislators have envisaged a system of differentiated collection (Article 205 of Legislative Decree 152 of 3 April 2006), setting the percentages that must be achieved: 35% by 2006; 45% by 2008 and 65% by 2012 (in 2007, on the basis of the data from the ISPRA, this was 27.5%).

Prevention, however, does not consist merely in the recovery or recycling of wastes, but also in directly avoiding the production of such wastes: significantly, the Environmental Code defines a prevention measure as those implemented before a substance, [a material] or a product has become a waste that reduces "a) the quantity of wastes, including through reuse of products or extension of their life; b) the negative impacts of wastes products on the environment and human health; c) the content of hazardous substances in materials and products" (Article 3(12) of Directive 98/2008 and Article 10 of Legislative Decree 205/2010).

On the basis of the slogan "the best waste is not produced", prevention, in this case, is based on intervention "upstream" from the production or consumption process aimed at reducing the quantity of materials produced and sold so as to obtain a saving in natural resources. This involves the application of the basic principle whereby the less industrial production there is, the less waste there is and, in terms of consumption, the fewer products sold, the less waste will be generated.

And this is what is defined as the "negative" meaning of the principle of prevention: its application results in "non-action" (resulting in "non-production" or "non-sale" of products or materials that could become waste).

In this regard, the principle of prevention may justify, for example, the adoption of real measures for prohibiting certain products: this is the case, for example, for certain products that are particularly damaging for the environment (such as asbestos, DDT, plastic shopping bags).

Still in terms of the same negative aspects, the principle of prevention may also justify the adoption of less extreme measures such as the imposing of taxes on products that may be deemed to be harmful for the environment or even actions intended to provide information to the public (such as labelling).

A further meaning of prevention (defined, in turn, as the "positive" meaning) is that of "production" of products that become waste as late as possible or to the smallest degree possible.

If we succeed in creating products that do not become waste (such as products that dissolve in the environment, because they are made of natural components); products that become waste over a longer period (technically durable products); products in which the components are reusable (multiple use); products in which the components are recyclable; products that are in case ecocompatible, we will truly and fully be applying the principle of prevention.

So as to assess the pollution caused by a product, we need to assess the costs for the entire life cycle of that product: such as, for example, the traditional plastic shopping bag, which, in terms of price, is certainly less than a biodegradable one, but, if we consider the cost of disposal, it is the latter that is better value than the former.

4. . THE "POLLUTER PAYS" PRINCIPLE: THE CHARGE AND THE LIABILITY OF THE PRODUCER.

Application of the "polluter pays" principle means that each consumer or each company that produces waste must pay in proportion to the quantity of waste produced. This therefore incentivises positive behaviours and penalises negative ones.

The problem can be resolved more easily for special wastes and is however particularly complex for urban wastes, as it seems to be particularly difficult to measure, in concrete terms, how much waste each has produced and what are the costs that are common to the entire community (such as those for street cleaning).

Although it is possible to use other types of systems (such as those that envisage the weighing of the waste produced or the sale of bags at a cost that covers collection), legislators have developed a system based on assumptions.

And therefore, in envisaging that the charge should be paid by "anyone who has or owns premises for any purpose", legislators have established that this is "commensurate with the average quantities and quality of the waste produced by unit of surface area, on the basis of the uses and the types of activities performed" (Article 238, Environmental Code) (a dwelling produces less waste, for example, compared to a professional studio).

This then poses the problem of whether this charge should be considered to be a fee and therefore whether it should be private, and the corresponding jurisdiction would therefore be the ordinary civil judge or, rather, a tax or levy and therefore should be public, and the corresponding jurisdiction would therefore be the tax offices. Recently, the Constitutional Court (Decision 238 of 24 July 2009) confirmed the nature of this levy but exclusively with reference to Article 49 of Legislative Decree 22/1997, i.e. the TIA (environmental hygiene tariff), which replaced the TARSU (urban solid waste disposal tariff) envisaged by Article 58 of Legislative Decree 507 of 15 November 1993: the Court avoided ruling on the nature of the TIA (integrated environmental tariff, the same acronym as the above but with a different meaning) envisaged, as we have seen, by Article 238 of the Environmental Code.

A further application of the "polluter pays" principle is the so-called liability of the producer: logic says that a party introducing onto the market a product intended to last for a limited period where there is no possibility that the product could be recycled contributes more to the production of waste than a producer of a durable product with recyclable components. In the same way, a producer who "reappropriates" a product at the end of its life, even if for the purposes of recycling or recovering it, pollutes less.

For certain types of waste, the legislators have envisaged systems of liability: this relates to electrical and electronic equipment, end-of-life vehicles and tyres, for example.

In the implementation of a later Directive, the "liability of the producer" was expressly envisaged (Article 178bis of Legislative Decree 152/2006), whereby anyone producing or selling products of any type may be required to pay the costs for disposal of the products that have been introduced onto the market. The basic idea is to promote ecocompatible design and the reusability of various products, rewarding those producers

that sell products that are more compatible with the environment and making those that produce harmful products pay for them.

5. THE WASTE CONTROL STRUCTURE.

The complexity of the problems facing the waste sector requires a series of entities acting together and that must therefore form the "complete synergistic system" to which reference is made in the Environmental Code (Article 177(6)).

This covers about ten entities with fairly diverse tasks and functions: 1) nationally, there is the Ministry for the Environment; 2) and then the Regions; 3) then the Provinces; 4) the Municipalities; 5) the local water boards (ATO); 6) the companies (frequently fairly mixed) that actually organise the collection and disposal of the waste; 7) the National Waste Observatory (Article 206bis of Legislative Decree 152/2006 (as subsequently amended)); 8) the National Register of Environmental Management Companies (Article 212, Legislative Decree 152/2006 (as subsequently amended)); 9) the Waste Register (Article 189, Legislative Decree 152/2006 (as subsequently amended)); 10) the ISPRA (Article 177(8), Legislative Decree 152/2006 (as subsequently amended)); 11) the Consortia.

In general, the Ministry for the Environment is responsible for setting policy and coordinating the system: it defines the general principles and objectives, the methodologies for integrated waste management, and the standards and technical requirements. At State level, there are also the organisations responsible for information and statistics functions, such as the National Waste Observatory, which is responsible for archiving and electronic documentation, with the support of the provincial observatories, such as the ISPRA, which coordinates the regional environmental protection agencies and performs a similar role for the regional territories, and such as the Waste Register (which records how much waste is produced, the types, where it is transported and where it is disposed of). Still at central level, there is the National Register for Environmental Management Companies, which is

responsible for certification and control functions (verification of the technical suitability of the entities operating in the sector).

The Regions are attributed powers for planning and scheduling (preparation and approval of waste management plans) and authorisation (authorisation for creation of disposal and recovery plant for waste).

The Provinces are responsible in general for powers associated with sanctions and for tasks relating to identification of dumps; the Municipalities and water boards have management authority (control of the management service); and the companies are responsible for operational tasks such as collection.

And then there are the Consortia, which are characterised formally as entities with private legal personality and functionally as entities responsible for the specific and correct management of public interests: this includes the mandatory consortia such as the Used Oils Consortium created in 1982, the Consortium for Disposal of Used Batteries (COBAT) created in 1988, the National Packaging Consortium (CONAI), the National Consortium for Collection and Treatment of Waste Oils and Vegetable and Animals Fats (CONOE) and the Consortium for Recovery of Polyethylene, Plastic, Cardboard and Cellulose, and Steel (POLIECO) created in 1997.

We cannot conclude this report without noting the fact that the fundamental entities required to create the recycling society are really the citizens and all those who perform economic activities: without the support and personal contributions of those people, any attempt to regulate and legislate seems inevitably doomed to failure.