

# GAVC LAW – GEERT VAN CALSTER

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## Ragn-Sells: Court leaves open violation of primary EU law by waste shipments Regulation – Free movement of services question left unanswered

The ECJ's December judgment in Ragn-Sells Case C-292/12 came recently to my attention in revisiting the waste ownership and freedom to provide services question for a brief. The case concerns the combined application of the waste framework Directive, the waste shipments Regulation, the public procurement Directives, the free movement of goods and of services, and, for good measure, competition law, exclusive rights and abuse of dominant position.

The dispute in the main proceedings concerns the lawfulness of contract documents stipulating that mixed municipal waste had to be transported to the landfill facility which was the subject-matter of an earlier public procurement procedure – located 5 km from the contracting town, whilst industrial and building waste was to be taken to a landfill site, located 25 km away.

Not all of these issues were addressed by the ECJ, though: for the issue relating to competition law /creation of exclusive rights which might lead to abuse of dominant position, not enough information had been furnished by the national court. For the issue of free movement of services, there was nothing in the file submitted to the Court indicating that undertakings established in other Member States have been interested in treating waste produced in the territory of the municipality at issue.

The latter especially is a pity (on the competition issue there is plenty of case-law): for the extent of free movement of services in the waste sector (and environmental services generally), is not at all clearly laid out in case-law. Hint for those wanting to use free movement of services arguments in their struggle against restrictive national measures: ensure paper trail of, or indeed if need be, trigger, foreign interest in the waste streams provided.

The Court did entertain the free movement of goods questions. As regards, first of all, waste destined for disposal operations and mixed municipal waste, it follows, the Court held, from Article 11(1)(a) of Regulation No 1013/2006, read in the light of recital 20 in the preamble thereto, and Article 16 of Directive 2008/98, that the Member States may adopt measures of general application restricting shipments of that waste between Member States, in the form of general or partial prohibitions of shipments, by way of implementation of the principles of proximity, priority for recovery and self-sufficiency under Directive 2008/98. By analogy the court then applied Case C-209/98 *Sydhavnens* to find eventually that *'Accordingly, in the case of waste destined for disposal operations and mixed municipal waste collected from private households and, as applicable, other producers, a Member State may confer on local authorities, on the geographical scale it deems appropriate, powers to manage the waste produced on their territory in order to ensure compliance with its obligations under Article 16 of Directive 2008/98. Those authorities may, as part of the powers conferred upon them, provide that those types of waste will be treated in the nearest appropriate facility (at 63).*

I continue to argue that especially with respect to mixed municipal waste, this room for manoeuvre provided for by the Regulation combined with the Directive, itself is incompatible with primary EU law. However I am not sure how much longer I can argue that as a result of judicial economy, the ECJ has never really properly addressed this question.

As regards, secondly, shipments of waste destined for recovery operations, other than mixed municipal waste, the Court by contrast held that the combined effect of Regulation and Waste Framework Directive does not provide for the possibility for a national authority to adopt a measure of general application having the effect of prohibiting, totally or partially, shipments of such waste to other Member States for treatment.

In summary, some remaining doubt re free movement of goods (primacy EU law) in my mind. Undoubtedly a lot of remaining doubt re free movement of services. Waste law

and free movement: they continue to fascinate!

Geert.

 **ENVIRONMENTAL LAW - EU, ENVIRONMENTAL LAW - INTERNATIONAL, EU LAW - GENERAL**

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