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The legal regime of olive pomace deriving from olive oil extraction at olive mills, waste, by-products and biomass.\*

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**FOREWORD: The IEE Project “MARKET of OLIVE RESIDUES for ENERGY”**

The main objective of “M.O.R.E.” is to generate renewable energy using solid residues deriving from olive oil production process. The project involves 5 European countries (the main world olive oil producers): Italy, Spain, Greece, Croatia and Slovenia, by means of six different local organizations that make up the partnership. In Italy, two partners are involved: the project leader - Liguria’s regional agency for energy, ARE Liguria – and the regional association of the four Ligurian Chambers of Commerce – Unioncamere Liguria.

In Croatia the partner is IPTPO, the Institute for Agriculture and Tourism

In Greece the partner is the Regional Agency for Energy of Central Macedonia

In Slovenia the partner is the Science and Research Centre in Koper

In Spain the partner is AGENER, the Regional Agency for Energy Management.

Running from November 2007 to April 2010, the project MORE aims to:

- Identify different methodologies to generate renewable energy using solid olive residues and produce related guidelines;
- Involve public and private stakeholders to develop the local markets and create supply chains;
- Carry out training and promotional activities;
- Define business plans for energy facilities running on olive solid residues;
- Deliver policy recommendations for local, national, EU governments.

This document refers to a study on the legal framework in application in Italy and possible suggestions at national and EU levels. Full documents on: [www.moreintelligentenergy.eu](http://www.moreintelligentenergy.eu).

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\* This paper is the result of research conducted by the writer at the Department of Public and Procedural Law, University of Genoa, on behalf of ARE s.p.a. - Agenzia regionale per l'energia della Liguria, member of the community project: “MORE: Market of Olive Residues for Energy”.

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## **1. Introduction.**

### **1.1 The Olive Mill Production Process and Possible Uses of Olive Mill Pomace.**

The olive mill processes olives directly after harvesting without any special treatment. Olive oil is produced by grinding olives and extracting the oil by mechanical means.

Pomace is a residue from this process.

There are several variables in this process that affect the physical properties of pomace, which, depending on the case, can range from a solid paste to a semi-liquid mash.<sup>1</sup>

In Italy the technique generally used produces a solid residue (although not completely dry). This substance is the main subject of this research.

To date the possible uses of pomace are as follows:

- (i) produce lower quality oil as a food product by means of a chemical process at facilities known as "olive pomace refineries";
- (ii) spreading over agricultural fields as fertilizer (or mixing it with ground for backfill, for instance at quarries);
- (iii) used in animal feed;
- (iv) fuel (or other forms of recovery) for plants producing energy from biomass;
- (v) disposal/recovery as waste.

### **1.2 The Objectives and Significance of the Research.**

The aim of this research is to clarify the legal regime for olive pomace gathered for the purposes mentioned above and to recommend legal amendments to assist olive mills and in particular to favour energy production from biomass.

a) concerning the first, the research especially focuses on the possible need to comply with the rules provided for waste management even when not falling under point (v) mentioned above, while it would appear appropriate to rule out the applicability *in limine* of regulation

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<sup>1</sup> For further information on the various methods of processing olives in olive mills to extract olive oil for human consumption please see, for instance, TDC *Olive - By-product reusing from olive and olive oil production*, at [www.biomatnet.org/publications](http://www.biomatnet.org/publications).

(EC) no. 1907/2006 concerning the registration, evaluation, authorisation and restriction of chemicals (REACH).<sup>2</sup>

The significance of the issue in question is that if the rules on waste management were applied the operators of olive mills would be burdened with extensive “bureaucratic” and operational obligations and would suffer a considerable financial impact as well as be exposed to a series of sanctions, also criminal, should they not comply with the aforementioned rules.

Considering the small “size” of most Italian olive mills such an outlook would put their very existence at risk and jeopardize not only the operators and workers, but also the growers that resort to their services.

Nonetheless, it should not be overlooked that from the standpoint of pure legal method it would be wrong to move on the consideration (though understandable) for the needs and expectations of a certain sector and “bend” the interpretation of environmental rules to meet their needs, although there are - in the framework of EU agricultural policy - also other European rules provided to aid olive oil production.<sup>3</sup>

Thus, it will be necessary to start from an objective reconstruction of the legal framework on waste management (also independently from current procedures) to determine in a “neutral” manner (as much as possible) the actual legal regime to regulate olive pomace regardless of the concern raised for the sector.

Even now, in light of recent developments in EC law and when considering the aforementioned uses, it should be possible to exempt olive pomace from being subject to the rules on waste management, albeit not *a priori* or in a sweeping manner. Nonetheless, certain legal specifications/amendments recommended hereafter should be taken into consideration, which is one of the main purposes of this research.

b) From another point of view, the availability of olive pomace from mills can contribute to the development of installations for generating energy from biomass, which should be fostered by member states in accordance with EU laws on renewable energy sources.

Here it would be important to examine the relating legal regime, which has been done herein, and to determine national<sup>4</sup> legal rules that might contribute to achieving the

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<sup>2</sup> This exclusion is based on the provisions of art. 2.7(b), with respect to point 8 of annex V, on substances present in nature that are not chemically modified and cannot be classified as hazardous substances pursuant to directive 67/548.

<sup>3</sup> In particular see regulation (EC) no. 73/2009 and regulation (EC) no. 1432/2004.

<sup>4</sup> Throughout this paper, “national” refers to Italian nation

aforementioned objective, especially considering the fact that, at the moment, biomass installations are not very widespread in Italy.

## **2. The Issue of Olive Pomace in Relation to the Concept of Waste and By-product.**

It would be necessary to start off from the issue of classifying olive pomace, in relation to the concept of waste and the concept of by-product.

### **2.1 Concepts of Waste and By-product.**

#### **2.1.1. Development of the Concepts.**

a) The concept of waste (in the context of the rules concerning waste) is one of the fundamental pillars of community environmental policy.

The latter is primarily geared towards achieving the general objectives set forth in art. 174 of the EC Treaty (now art. 191), in particular: safeguard, protect and improve environmental quality; protection of human health; careful and rational use of natural resources. The same requirement sets a high degree of protection and compliance based on a series of principles, including the precautionary principle and the principle of preventive action, remedying of environmental damage at its source and the well-known “the polluter-pays” principle.

For that purpose a series of community directives followed and gradually evolved over time to define waste and regulate its management (i.e., any kind of handling/treatment whether intermediate or final).

b) Since 1975 the definition of “waste” has been the following: “*any substance ... which the holder discards or has decided or is required to discard*” (art. 1(a), paragraph 1 of directive 75/442) or substantially equivalent definitions such as the current “*... which the holder discards or intends or is required to discard*” (art. 1(a)) of directive 2006/12 and now art. 3.1(a) of directive 2008/98).

This definition gave rise to extensive and complex case law interpretation and application by both the Court of Justice and by the Courts of the various member states.<sup>5</sup>

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<sup>5</sup> In general, for details on the concept of waste see L. Costato – F. Pellizzer, *Commentario breve al codice dell’ambiente*, Padova, 2007 (and its annex, 2008) Art. 183.

In particular, it is difficult to define "*discard*", even when considered only an "*intention*".

c) For the purpose of studying the rules regulating olive pomace it would be necessary to take into consideration, albeit briefly, the interpretation made within the EC Court of Justice concerning materials and substances deriving from a production cycle that are not considered the main purpose of the cycle.

The endless varieties of cases presented provided examples of industries that, in the production cycle for certain goods, inevitably produce "unwanted" materials even if the latter can be used for other production processes or where such materials are completely natural (such as olive pomace from olive mills).

Among these are: The case of a chemical facility that, in addition to the primary purpose of its production, generated a flow of hydrocarbons suitable for use as combustible fuel in the cement industry (without harming the environment);<sup>6</sup> the case of an extraction facility (granite quarry) with its debris (completely the same, by nature and composition, as the material extracted for the company's business);<sup>7</sup> the case of a zootechnic facility and the faecal matter it produced that could be used in agriculture<sup>8</sup> and, namely, the case of leftovers from the agro-food industry intended for the production of animal feed.<sup>9</sup>

The Court of Justice, in these cases and still others,<sup>10</sup> was asked to clarify, through a series of judgments, whether the "*discard*" or "*intention to discard*" was present in order to make the concept of waste applicable also for the substances not included as the primary objective of the production process. The Court above all referred to the objectives and fundamental principles of community environmental policy and inferred that the concept of waste should be based on a broad interpretation and not a restrictive one.

A number of specifications were made and in particular:

- (i) if a substance/material is not the primary aim of the industrial process but derives from that process (as a material not deliberately produced), then, in general, it is considered a material to "*discard*";<sup>11</sup>

<sup>6</sup> The case decided by the EC Court of Justice Sec. V, 15 June 2000, C- 418/97 and C- 419/97, *Arco Chemie*.

<sup>7</sup> EC Court of Justice Sec. VI, 18 April 2002, C-9/00, *Palin Granit Oy*.

<sup>8</sup> EC Court of Justice , 8 September 2005, C-416/02, *Commission v. Spain*.

<sup>9</sup> EC Court of Justice , 18 December 2007, C-195/05, *Commission v. Italian Republic*.

<sup>10</sup> For instance, EC Court of Justice, 22 December 2008, C- 283/07, *Commission v. Italian Republic*; 24 June 2008, C-188/07, *Commune de Mesquer*; 18 December 2007, C-194/05, *Commission v. Italian Republic*; 18 December 2007, C-263/05, *Commission v. Italian Republic*; 11 November 2004, C-457/02, *Niselli*; 11 September 2003, C-114/01, *AvestaPolarit Chrome Oy*.

<sup>11</sup> See, to that effect, all the decisions mentioned in the previous note and also the judgment *Palin Granit*.

- (ii) there can, however, be exceptions since the producer does not necessarily discard or intend to discard the material;
- (iii) therefore, the point is to establish where such conduct/intention can be excluded;
- (iv) there are certain conditions where it would be possible, namely:
  - the degree of likelihood that the substance will actually be used;
  - whether the substance can be used immediately, or without considerable delay, after the production process from which the substance/material derives;
  - the absence of preliminary processing treatment required for that purpose;
  - the economic benefit the producer of the substance/material receives if it is used;<sup>12</sup>
- (v) in addition to the conditions above, use shall not lead to overall adverse environmental or human health impacts exceeding those entailed in using ordinary raw materials or resources that the substances/materials would replace.<sup>13</sup>

From this standpoint there are certain clarifications needed, namely:

- (vi) the fact that the substance/material is subject to operations similar to those provided by the directive for waste disposal (for instance, incineration or landfill disposal) does not in itself and necessarily mean that they are to be automatically and inevitably classified as waste. This because such operations do not necessarily mean “discard”, which is the main focus of the concept in question;<sup>14</sup>
- (vii) on the other hand, the simple fact that the substance/by-product in question can be recovered for financial purposes or as fuel in line with environmental protection requirements and without transformation does not in itself determine whether it is to be “discarded” and so considered as waste,<sup>15</sup> since the mere possibility of future use is irrelevant if, in any case, the producer or holder discards or intends to discard the substance;
- (viii) similarly, a substance that has the same properties and characteristics of a raw material can still be considered as waste if the holder discards it or intends to discard

<sup>12</sup> See note 9.

<sup>13</sup> In particular see judgment *Commission v. Italian Republic*, C-283/07.

<sup>14</sup> To that effect, for instance, see the *Arco Chemie* judgment, point 50.

<sup>15</sup> See *Arco Chemie* judgment, point 65.

it (as in the case of the quarry operator that leaves extraction debris on the soil for a certain period);<sup>16</sup>

It follows that it will be necessary to check, on a case-by-case basis and supported by evidence, whether the conditions mentioned above apply (especially point iv),<sup>17</sup> while certain national laws do not conform to community law, where they exclude “by category” substances or materials from the concept of waste (such as the judgment against Italy concerning food scraps from the agro-food industry which were accompanied by a written statement certifying the intention to use them for the production of animal feed).<sup>18</sup>

To sum up, a substance, though not “desired” as the primary aim of the production process, can be excluded from being considered as waste when it can be re-used without any preliminary processing as a part of the same production process<sup>19</sup> or to meet the requirements of producers other than the one that produced the substance<sup>20</sup> and where it is certain that it will be used immediately or in any case within a reasonable amount of time and without having adverse environmental or human health impacts in comparison to any impacts from using raw materials.

d) Beyond the inevitable debate arising from the guidelines set by the Court, practical doubts still remained for operators.

The concept of waste not as general categories of substances/products/processes and instead strongly focused on a case-by-case approach with undefined variables, such as the implications of “discard”, does not guarantee *a priori* that the assessments made by the parties involved when managing the substances necessarily coincide with assessments made by the competent bodies responsible for enforcement and applying penalties and with the assessments made by the judges.

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<sup>16</sup> See *Palin Granit Oy* judgment, point 39.

<sup>17</sup> See *Arco Chemie* and *Palin Granit* judgments, points 83 et seq. and 36 et seq. respectively.

<sup>18</sup> See the judgment of case C-195/03, *Commission v. Italian Republic*. In this case the Court ruled that the mere stated intention is inadequate, regardless of actual use and added that, in any case, it would be necessary to conclusively verify – beyond any general regime – that the producer/holder of the residue substance or material deriving from agro-food industry gains more benefit in re-using the residue than any benefit from discarding it.

<sup>19</sup> See *Palin Granit Oy* judgment, point 36.

<sup>20</sup> To that effect see *Commission v. Spain*, point 90.

e) The EC Commission made an attempt to reduce these doubts – necessarily within the “scope” set by the Court, considering the legal value of its judgments – by issuing an interpretation communication on waste and by-products.<sup>21</sup>

With this act the Commission intended to strengthen the measures and clarify key concepts such as the definition of waste (as opposed to materials that are not the primary aim of a production process, but can be considered as by-products and not waste) in order to facilitate the work of competent authorities in determining on a case-by-case basis whether certain materials are to be considered as waste and, at the same time, adequately inform operators how such decisions are made.

With this regard the communication "explained" the concept of waste in light of the interpretation provided by the Court of Justice and produced a kind of checklist together with certain examples.

The Commission also made a specification on the economic value of the materials in question, stating (like the Court of Justice had already done in the past) that selling these materials for payment can be considered evidence that they are not waste, but not considered unequivocal proof (since it is likely that the waste has their economic value<sup>22</sup>). On the other hand, it added, it is always necessary to ensure that a token price is not offered in order to exclude a material from being classified as waste (even if it would seem unlikely to envisage manure used for agricultural purposes, which the Court considers a by-product and not waste, being sold at a price, and not even at a token price).

### **2.1.2. The Current Community Legal Framework.**

The European Parliament and Council took the developments and interpretations – though not sufficient to fully clarify – into consideration when drafting the new directive regulating waste and repealing the previous ones mentioned above.

EC Directive 2008/98 specifies in the preamble (under point 22), the need to avoid confusion with regards to the various aspects of the concept of waste and so make a distinction between waste and by-products.

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<sup>21</sup> Communication issued by the Commission to the Council and the European Parliament concerning the interpretative communication on waste and by-products, Com(2007) 59 final.

<sup>22</sup> To this effect see *Arco Chemie* judgment, point 65. Also confirmed by recital 42 in the preamble of Directive 2008/98, mentioned herein.

Consequentially, the concept of waste (art. 3) remains unaltered and art. 5 of the directive introduces the concept of by-products in community law for the first time.

This has a very important innovative effect as a specification and limit to the concept of waste (though unaltered).

Even though the provisions regulating by-products are intended to act as exceptions or a departure from the rules on waste and so the interpretation is restrictive – in the spirit of environmental protection and precautionary principles set forth in art. 174 of the Treaty, which so far has led the Court to interpret the “opposite” concept of waste – the fact remains that, in any case, the meaning of “discard”, which is the centre of the issue at hand, should be interpreted in light of the new directive, also with regard to the concept of “by-product”, since it no longer only concerns case law interpretation, nor should it, necessarily, be found in the findings from time to time subject to the previous community rules.

Pursuant to art. 5 of the new directive, a by-product is “*a substance or object, resulting from a production process, the primary aim of which is not the production of that item*” provided it satisfies the following conditions:

- (i) use of the substance or object is certain;
- (ii) it can be used directly without any further processing other than normal industrial practice;
- (iii) the substance or object is produced as an integral part of a production process;
- (iv) “*further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts*”.

For the most part these requirements draw on the ones mentioned above and are “acquired” based on the development prior to the new directive.

One point that stands out is the omission – not by chance – of the economic/profit factor of use, which the Court had previously considered important “evidence” to consider a substance as a by-product, and now no longer appears as a requirement.

It would seem that this corresponds to a specific legal choice and thus art. 5 of the directive does not need any “supplemental” interpretation.

This is also found in preliminary work which produced an “intermediate” version of the directive approved by the European Parliament on 13 February 2007,<sup>23</sup> containing a

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<sup>23</sup> P6\_TC1-COD(2005)0281.

reference to the fact that there is a market for substances/materials classified as by-products. However, the final version does not contain any reference to a "market" and settles for re-use in a production process.

In order to clarify doubts raised in the past, art. 5 of the directive also provides that, following a specific procedure ("Committee procedure"), the EC Commission can "*adopt measures to determine the criteria to be met for specific substances or objects to be regarded as a by-product and not as waste*", i.e. acts laying down the conditions and technical criteria, also in detail, for each sector and so also oil mills and olive pomace accordingly. Take, for instance, the requirement (though merely a generic reference in the directive) prohibiting preliminary processing "*other than normal industrial practice*", with regards to drying the olive pomace intended for use or the process needed when removing the pit from the pomace (national case-law, perhaps slightly excessive, has recently decided that this is sufficient to exclude it as a by-product<sup>24</sup>).

Similar specifications might be advisable to provide also by national sources as long as they fully comply with the directive and any other measures adopted by the Commission.

In any case, an extremely important factor and innovation in the directive is the provision laid down by art. 5 where the measures of the Commission are even "*designed to amend non-essential elements of this directive by supplementing it*" (a provision which national legislation would not be able to provide).

This is an extremely important "flexibility" provision from a practical standpoint, which naturally falls under the general principles of the Treaty and so cannot be used in such a way that would put the environment or human health at risk – even only when considering the precautionary and preventive principle – however it can help simplify the rules on materials that do not have any such risks and at the same time can be classified as by-products only thanks to these non-essential amendments/supplements of the directive (take, for instance, the possible treatment necessary for olive pomace that, because of the production process used, are "produced" by the mill in semi-liquid form and so require extensive preliminary processing, unless new technologies emerge to enable it to be used in that state).

It is up to the Commission to assess in which cases and which precautions to take in order to exercise the power accordingly, on the one hand depending on legal clarity and on the other

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<sup>24</sup> See Criminal Cassation, Sec. III, no. 773 of 11 January 2010.

depending on the support of other community policies such as agricultural policies on the production of olive oil.<sup>25</sup>

A Commission act which, in light of the above, should clarify the conditions to enable olive pomace to be considered as a by-product, albeit not of particularly high value, would in any case be useful for the sector in question.

### **2.1.3. The Current National Legal Framework.**

Italian law, with legislative decree no. 152/2006 containing environmental provisions (the so-called environmental code), provides definitions of “waste” and “by-product” for the purpose of bringing national legislation in line with the community legal framework. They are laid down in art. 183.1(a)(p), the latter is the result of an amendment through legislative decree no. 4/2008, which in any case was enacted prior to EC directive 2008/98 CE.

While the laws regulating the concept of waste correspond and comply with community rules, the concept of by-product (defined only later by the new EC directive 2008/98) is problematic.

Art. 183.1 (p), after indicating by-products as substances and materials the producer does not intend to discard, provides a list of criteria, requirements and conditions to meet; while the first four points on the list<sup>26</sup> essentially correspond to the community concept laid down by the directive (though with doubts, which can be overcome by interpretation, and with certain clarifications) the fifth, where the substances and materials classified as by-product shall have a “market value”, reflects the state of Court case law at the moment the national law in question was drafted, which, however, is repealed since the new directive is now in force, which does not provide that requirement.

Art. 183(p) of legislative decree no. 152/2006 should therefore be amended – which would be easily accomplished when transposing directive 2008/98 – in order to comply with the European legal concept of by-product laid down in art. 5 of the directive.

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<sup>25</sup> Community production of olive oil is protected by community agricultural policy. For further information see regulation (EC) no. 79 of 19 January 2009, and regulation(EC) no. 1234 of 22 October 2007.

<sup>26</sup> Namely, the following conditions: (i) the materials or substances should derive from a process not directly intended for their production; (ii) their use is certain, already in the production phase, in a predetermined and defined process; (iii) product requirements are met and environmental quality is adequate to guarantee that their use does not cause emissions and environmental impacts that are qualitatively and quantitatively different from those authorized for the facility (or site) where they are intended to be used; (iv) absence of prior processing or preliminary processing for the purpose of satisfying the requirements set forth under point (iii).

The amendment is necessary because, without, application in Italy would result in a restrictive concept of by-product and so the concept of waste would be further extended. The result of this would be legally admissible, also in terms of consistency between community and national legal rules, since the Italian law would be even stricter (in accordance with the precautionary principle for environmental and human health protection) and so it would anyway be consistent with the community directive.<sup>27</sup>

The Italian lawmaker's intention is to anticipate this aspect of directive 2008/98 with a provision to redefine by-products, which indeed would no longer consider economic value (AS no. 1781, art. 21).

Furthermore, it appears that the new provision *en route* will contain a supplement<sup>28</sup> – certainly not needed at community level – where certain substances, namely residues from agricultural, livestock and forestry processes, would be subject to additional conditions. The rule providing for a traceability mechanism would on the one hand complicate by-product management, making it even more burdensome and, on the other hand, there is a risk that it will not be immediately possible to apply the rule to exclude the by-products from waste management rules while awaiting the Ministry decree to be implemented.

However, it would appear that the provision is not intended to be applied to olive pomace and so the latter may end up being subject only to the "general" by-product requirements, meaning the community requirements, rather than a residue in the agro-food industry (this classification will be dealt with from another point of view in section 2.2.1.2., letter d)).

## **2.2. Olive Mill Pomace: between Waste and By-product.**

The details provided above now make it possible to analyse the classification and legal rules on pomace deriving from olive mills with respect to the legal rules on waste and by-products.

<sup>27</sup> For further details, albeit regarding a different issue, see Constitutional Court no. 482 of 7 November 1995.

<sup>28</sup> The provision laid down by art. 183.1(p) of legislative decree no. 163/2006 would be as follows: "*Residues from agricultural, livestock and forestry processes are also considered as by-products not subject to the provisions laid down in part four of this decree provided they comply with previous provisions and where they respect the traceability requirements prescribed by decree from the Ministry of Agriculture and Forestry, together with the Ministry of the Environment*".

### **2.2.1. Olive Pomace as By-product.**

#### **2.2.1.1. In general.**

a) The conditions for using, as a by-product, pomace from the pressing process in an olive mill, without applying the rules on waste, can exist with regard to all its intended uses mentioned above: selling it to olive pomace refineries for chemical processing to extract olive pomace oil; spreading it as fertilizer (or mixed with backfill ground); as an additive in animal feed; for fuel (or similar), such as biomass, at energy production installations.

Having mentioned this, it is not the intention of the writer to hold that these uses are such to make olive pomace classified, without discussion, as a by-product rather than as waste.

Indeed, it would be necessary for olive mills to organize their operations to ensure the conditions mentioned above are in place (since it is not possible to provide general categories or presumptions, as clarified by the Court of Justice through the aforementioned cases, which, on this point, is not superseded by the directive of 2008).

For the sake of clarity the existence of these conditions/requirements are set forth in a different order from the order set forth in art. 5 of directive 2008/98 (and more or less corresponding to art. 183 of legislative decree no. 152/2006, as mentioned above).

b) First of all, olive pomace deriving from mechanically pressing olives in the mill, for producing olive oil, conclusively meets the second condition where a by-product can be obtained only if the substance is produced as an integral part of the process (or not as the primary aim of production).

In addition, with regard to all the possible uses mentioned above, it might be possible to consider that olive pomace can be used directly without needing any special processing other than normal industrial practice and so essentially in the same state as when it is pressed in the mill, especially if the latter operates using the most common procedure found in Italy, which makes the pomace already sufficiently dry. Although it is true that further drying may sometimes be needed, it can still be considered (without prejudice to what was mentioned in section 2.1.2.) as “common industrial practice” and so it complies with the legal rules provided for by-products.

c) The rule regarding the certainty and immediate (or within a reasonable timeframe) use of the substance has not been underestimated.

The mere fact that the substance can objectively be used is not sufficient, as laid down by the directive, which requires certainty, and as set forth in the example of community case law regarding quarry debris or mining residues.<sup>29</sup>

Furthermore, the burden of proof regarding certainty and immediacy (or reasonable timeframe) falls on the producer (whether entrepreneur or artisan) operating the olive mill and holder of the substance.

Regarding this point, for instance, evidence may include the fact that the producer has stipulated agreements with other operators, providing for the sale of olive pomace in amounts and respecting specific timeframes that would make it certain and consistent with the overall volume of production. Furthermore, the consolidated practice of actual re-use (for each olive mill taken into consideration) might also be sufficient, even in the absence of the aforementioned agreements.

d) It does not appear to be essential - in view of the community legal framework, and in particular the current provisions regulating by-products pursuant to art. 5 of directive 2008/98 – that use should be by virtue of agreements against payment or in any case against payment of a price (not a token price) in favour of the mill operator.

Naturally, considering the above – and awaiting the amendments recommended - while national law expressly requires (art. 183.1(p), 5) that the by-products have a market value, the agreements for the use of olive pomace should also comply with that requirement (which, however, could be “broadly” interpreted in light of the changes in community rules, and so, for instance, be fulfilled merely by the fact that the party acquiring the by-products collects them from the mill at their own expense).

e) Lastly, for what concerns the last condition prescribed by art. 5 of the directive, all the uses of olive pomace under study are certainly legal (since they are not forbidden and/or no rule is in force that would prevent such use), while it would remain to be seen case by case, also from a technical standpoint, whether and under what additional conditions (where necessary) the by-product satisfies (i) “*all relevant product, environmental and health protection requirements*” and (ii) is without any “*adverse environmental or human health impacts*”.

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<sup>29</sup> See the aforementioned judgments for *Palin Granit* and *AvestaPolarit Chrome*.

The vagueness of the clauses in the directive, which at first may give rise to uncertainty, would be lessened if the party interpreting the clauses make due consideration for the aforementioned case law underlying them.

It is correct to infer the meaning of point (i) that all relevant product, environmental and health protection requirements are to be satisfied since it is laid down by specific legal rules, which should in any case be complied with for operations using olive pomace (also prescribed by art. 183.1(p), 3), where it is necessary that the by-products *“meet product requirements and environmental quality is adequate to guarantee that their use does not cause emissions and environmental impacts that are qualitatively and quantitatively different from those authorized for the facility (or site) where they are intended to be used”*). From this standpoint none of the possible uses under study for olive pomace would pose particular problems and any issues that might arise would be easily overcome.

The provision of art. 5 of the directive, which requires that there are no adverse environmental or human health impacts simply reiterates the fundamental objectives of community environmental policy established by the Treaty. Since all human activity has, in itself, an environmental impact it would be necessary to define the meaning of the term “adverse effect”. Considering the case law preceding the new concept, which undoubtedly had an influence, the correct meaning should be not to allow any use of by-products that may be more harmful to the environment or human health than using "raw" materials or products.

Since olive pomace is a natural substance, and considering its properties, it might be assumed that there is no adverse impact.

Such a conclusion, however, cannot be accurately made by legal theory which, nonetheless, can only provide a single and final procedural solution to the issue – for this requirement and all the others – through the EC Commission's enactment of a specific "measure" (as mentioned, art. 5 of the directive) aimed at providing legal rules to establish specific criteria to satisfy in order to make olive pomace considered as a by-product (and not as waste) for use at olive pomace refineries and for other uses described herein (also through amendments/supplements to the directive as non-essential items, as provided by art. 5).

Without such actions – and it would appear that the Commission is not geared towards undertaking such measures in a time soon – it could be carried out (except for an amendment/supplement to the directive) by means of national provisions (as prescribed

already by art. 185.2 of legislative decree no. 152/2006, naturally as an example and not conclusive, with regard to other materials – faecal and vegetable matter deriving from agriculture; lithoid matter from crop fields; leftovers from food preparation – but in that case without having the absolute certainty that it is consistent with community legal rules, where only the Court of Justice would have the power to decide).

#### 2.2.1.2. ... and concerning each of the possible uses mentioned.

Concerning the possible uses of olive pomace, other than sales to olive pomace refineries, amply described above, there are a few considerations to add.

- a) Using olive pomace as an additive in animal feed has already met with a favourable opinion, to the point where it is possible to classify it as a by-product, and the aforementioned interpretative communication issued by the EC Commission in Annex I, which lists some examples, expressly indicates by-products from the agro-food industry, including by-products from oleaginous grinding, used as raw materials in animal feed. As mentioned, this is not, however, sufficient to establish a general rule or presumption but depends on whether the conditions provided in art. 5 of the directive are actually met on a case-by-case basis.
- b) Spreading over crop fields as fertilizer – if certain and if used in a way to meet the other conditions mentioned above (not if used as a landfill, whether clear or not<sup>30</sup>) – is possible without the material being classified as waste (though it can objectively be considered as one of the disposal acts – on the soil – covered by the rules on waste<sup>31</sup>), in any case based on what has already been ruled on that specific point (already prior to the new directive) by the Court of Justice for animal manure, which ruled that it could not be considered "discard"<sup>32</sup> (especially after the directive expressly defines by-product without any reference to its market value).

<sup>30</sup> There are rulings from the Criminal Court of Cassation issuing sentences for violating the rules regulating waste, against mill operators who would indiscriminately dump mountains of olive pomace in the surrounding areas and so they could not hold that they intended to use it for agricultural purposes. See, for instance, Criminal Cassation, Sec. III, 4 April 2007, no. 13.753; 27 March 2007, no. 928; 5 June 2007, no. 943/2007, with commentary by V. Vattani, *La sansa e le acque di vegetazione delle olive rientrano nella categoria dei rifiuti*; M. Santoloci, *Cassazione: 1) la sansa di olive non rientra tra i sottoprodotti; di regola – e salvo eccezioni – è rifiuto. Lo spandimento illegale è reato e non sanzione amministrativa; 2) Gli allevamenti di bestiame sono di regola insediamenti produttivi e le acque reflue di tipo industriale. Lo scarico è reato*; M. Santoloci e V. Vattani, *L'utilizzazione agronomica dei reflui dei frantoi oleari. La disciplina in deroga ed il sistema sanzionatorio delle illegalità*, all found at [www.dirittoambiente.com](http://www.dirittoambiente.com).

<sup>31</sup> See Annex I of directive 2008/98(D1).

<sup>32</sup> See the judgment mentioned in note 7.

After all, spreading olive pomace (and runoff water deriving from the process) over crop fields as fertilizer is legally provided for in law no. 574/1996, implemented as a technical and “bureaucratic” detail through Ministry Decree of 6 July 2005 and regional regulatory/administrative acts;<sup>33</sup> these regulatory provisions were subsequently “confirmed” in the environmental code under art. 112.

Similarly (though without specific provisions), it should be possible to use olive pomace/by-product as an additive for backfilling, for instance, in quarries.

c) In addition, and on the basis of the same inclination, it should be possible to use olive pomace as biomass for generating energy (which is intended to be destroyed by incineration and so not considered as an object to “discard” by the producer if the latter ensures it is used without delay and without special preliminary treatment).

After all the Court of Justice clarified, as mentioned above, that the simple objective practice of processing a substance according to the type of waste disposal does not mean that the substance necessarily becomes considered as waste.

The rules on energy production using biomass are described below.

At this point it should be mentioned that biomass, according to those rules, can be considered as both waste or “non-waste”, which further confirms how the destruction of a substance for the purpose of energy production does not in itself mean “discard” and so an indicator that it should be considered as waste.

Thus, if a substance deriving from a production process (in this case olive pomace) is intended for certain use as biomass in compliance with the conditions of art. 5 of directive 2008/98, it is not waste. This does not mean that other substances producers or holders have actually discarded (or intend to discard), considered as waste for that reason, cannot be used for producing energy from biomass (take, for instance, scrap from landscaping given to the operator performing urban public management services or collected from the latter).

d) Concerning this use (agricultural use and energy production from biomass) it would be important to make another consideration.

Art. 2.1(f) of directive 2008/98 provides that waste rules are in no way applied (*a priori*) to “*non-hazardous agricultural or forestry material used in farming, forestry or for the production of energy from such biomass through processes or methods which do not harm*”

<sup>33</sup> See, for instance, the resolution passed Liguria regional authorities on 27 July 2007, no. 848 (B. U. 22 August 2007, no. 34, part II) and the resolution passed by Tuscany regional authorities D.P.G.R. 8 September 2008, no. 46 (B. U. 17 September 2008, no. 29, part I).

*the environment or endanger human health*” (which is also prescribed by art. 185.2 legislative decree no. 163/2006).

One might be led to believe that olive pomace would be classified as a natural non-hazardous agricultural material and so it should fall under this rule.

In that regard the term “agricultural material” is not specifically defined.

In community law there is a definition of “agricultural product”, contained in art. 32 of the Treaty (now art. 38) and laid down by regulation (EC) 3/2009, according to which agricultural products are *«products of the soil ... and products of first-stage processing directly related to these products»*.

These agricultural products, art. 32 continues, are listed in annex I of the Treaty and it includes, inter alia, oily fruits and olive oil, but also “*residues and scrap from the food industry*”, therefore, this also includes olive pomace.

This means that when referring to products art. 32 does not only allude to those that – using unclear terms from the waste sector – are deliberately produced as the primary aim of the agricultural process and first-stage processing, but also those that are an inevitable result even if not produced on purpose.

It is therefore necessary to establish what the relationship is between the rules related to agricultural policy, by which olive pomace is considered as an agricultural product, and the provisions of directive 2008/98, which under art. 2 clearly and resolutely exempt it from the rules on waste (and so also by-products), not exactly “agricultural products” pursuant to art. 32 of the Treaty, but “agricultural materials” not better defined by the same directive.

Considering the reverberation, one would be led to believe that the latter coincide with the former.

However, it does not seem correct to interpret these rules to that effect since the interpretation policies for community law are very different and they compel you first to consider the purpose of the rule and their actual effect.<sup>34</sup>

From this standpoint, though similar in wording, the purposes of agricultural policy and environmental policy do not necessarily make the two concepts coincide.

Even more so, again strictly literal, but from a different point of view, it is not obvious nor is it clear whether olive pomace is an agricultural product since it does not actually derive directly from agriculture. This should not be underestimated if you consider the need

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<sup>34</sup> See EC Court of Justice, 4 October 2001, C-403/99, *Commission v. Italian Republic*.

(constantly felt by the Court of Justice) to broadly interpret environmental rules in order to effectively pursue the objectives of art. 174 of the Treaty.

With this in mind, it is important to mention, and actually it is a determining factor, the fact that in the definition provided by directive 2008/98, art. 3.1(4), "biodegradable waste" expressly covers also those products from facilities in the food industry. This does not mean that olive pomace is conclusively waste (biodegradable), but, if in a specific case where the conditions do not enable it to be considered as a by-product, it is not exempt (only because it is an agricultural "derivative") from the rules on waste. Basically, also art. 3.1(4) helps define (restrictively) the concept of "agricultural material" in order to outline the scope of the rules on waste and by-products. Olive pomace cannot be considered in this concept and so the substance cannot be considered completely and absolutely exempt from those rules, unlike, instead, those substances that can be classified as agricultural materials used in agriculture or used for the production of energy from biomass.

In any case, it should be reiterated that the considerations made above remain valid and so olive pomace (though not excluded from the scope of directive 2008/98) should be managed under the legal regime for by-products and not for waste (also agricultural use or for generating energy from biomass).

### **2.2.2. Olive Pomace as Waste.**

On the other hand it is also possible to consider olive mill pomace to be considered as waste. In particular, this may happen if the mill operator is unable or does not want to arrange for certain use in one of the activities described above.

In this case additional issues would arise on the application of rules regulating waste.

#### **2.2.2.1. Responsibility for Proper Recovery or Disposal.**

The mill operator, as a producer of waste, is (under certain conditions) responsible for proper management of such waste until recovery or disposal.

According to the general rules of directive 2008/98 (art. 15), laid down for member states and intended for implementation in detail:

(i) Member States shall take the necessary measures to ensure that any original waste producer or other holder (i.e. the mill) personally carries out the treatment of waste or has

the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector in accordance with the rules of the directive on waste hierarchy and Protection of human health and the environment;

(ii) When the waste is transferred from the original producer or holder (i.e. mill) to one of the parties referred to in paragraph 1, the responsibility (also held by the producer or holder) for carrying out a complete recovery or disposal operation shall not be discharged as a general rule;

(iii) Member States may specify the conditions of responsibility and decide in which cases the original producer is to retain responsibility for the whole treatment chain (i.e. until it is no longer considered waste, after recovery or until disposal is complete).

Italian law provides two distinct regimes (to implement directive 2006/12), one for municipal waste and similar, where basically the producer is relieved from all responsibility by having the waste managed by public municipal waste management services, and the another regime for other forms of waste, i.e. special waste (including, by express legal provision - legislative decree 152/2006, art. 184.3 – waste deriving from the agricultural and agro-food industries and artisan activities, thereby conclusively including olive mill pomace), which is more burdensome.

Indeed, the producer's responsibility for special waste can be relieved (pursuant to art. 184 of legislative decree no. 152/2006):

(i) by on-site disposal;

(ii) by assigning public waste management (which, however, for special waste is allowed only by stipulating an agreement between the producer of the waste and the operator of the public service at a fee that is decided by negotiation and not set by regulatory provisions);

(iii) by having the waste handled and disposed by an authorized party provided that the producer receives a copy of transport documents signed and dated by the recipient within three months after the waste is transferred (otherwise the producer shall file a report with the authorities if the term is not respected);

(iv) by having an authorized party handle prior blending or mixing, repackaging and storage if, in addition to meeting the condition set forth in paragraph (iii), the producer has also received the disposal certificate issued by the operator of the facility carrying out disposal.

#### 2.2.2.2. Recovery or Disposal Options.

a) In accordance with the framework described above the party operating the olive mill that produces "olive pomace waste" basically has four options:

(i) On-site disposal, or on-site recovery, by installing a suitable system at the olive mill (which could also follow a simplified regime thereby not requiring the permits prescribed by art. 23 of directive 2008/98, pursuant to art. 24 thereafter, which provides for exemptions where the member state can lay down, in respect of each type of activity, general rules specifying the types and quantities of waste that may be covered by an exemption, and the method of treatment to be used in accordance with waste hierarchy and in the case of on-site disposal operations those rules should consider best available techniques; for Italy see Ministry Decree of 5 February 1998, which lays down specific rules for recovery of olive pomace waste),<sup>35</sup>

(ii) have the waste managed by public municipal waste management services under a specific agreement;

(iii) deliver the waste, by means of an authorized waste collector, to authorized recovery or disposal installations (with the precautions mentioned above to avoid shared responsibility if the waste collector in question does not deliver the waste to the intended installation);

(iii) deliver the waste, by means of an authorized waste collector, to a party authorized to handle prior blending or mixing, repackaging and storage for subsequent transfer to authorized recovery or disposal installations (also in this case with the precautions mentioned above to avoid shared responsibility not only if the waste collector in question does not deliver the waste to the intended installation, but also if such party does not fulfil legal obligations).

b) The situation would be simplified if the "olive pomace waste" were treated as municipal waste, at least for smaller olive mills.

Indeed, in this case the producer would only need to deliver it to a municipal waste service without needing to stipulate an agreement and pay only the waste management tax or fees.

In any case, although this would not seem to correspond to a specific community limit, national lawmakers, even after giving municipalities the power to determine which waste can be treated as municipal waste (under qualitative and quantitative criteria established by the State), still excluded the possibility to provide such treatment for "*waste produced in*

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<sup>35</sup> In particular, annex 1, paragraph 11.12.2 and annex 2, subannex 1, paragraph 3.2.

*production areas, including storage facilities for raw materials and finished products, except for waste produced in offices, cafeterias, sales outlets, cafes and facilities serving workers or open to the public"; which, as is, prevents a priori treating olive pomace as municipal waste since it is produced in a production area.*

Concerning this, it would seem reasonable to envisage an amendment to the provisions (state) in order to enable it to be treated as municipal waste when produced by smaller olive mills operated by artisans, after conducting an economic study for that purpose (to compare the cost of having the special waste handled by municipal waste services and the cost in terms of taxes and fees for regular municipal waste disposal).

This would also enable the waste management service receiving the olive pomace send it to a recovery facility or transfer it for producing energy from biomass thereby meeting the objectives of waste hierarchy and provide further incentives to produce energy from renewable sources.

#### 2.2.2.3. Cost of Managing Olive Pomace as Waste.

Possible application of the rules on waste to olive pomace (for the reasons mentioned above) would result in considerable costs which would be difficult for olive mills to sustain, especially for smaller mills.

For instance, in addition to the costs for transport and disposal/recovery, there are also the costs for complying with the rules regulating documentation for producers of special waste.

These costs do not always depend on community rules regulating waste since they often bear the result of national decisions made during transposition (already mentioned by the Court of Justice).<sup>36</sup>

Although it would seem unlikely to obtain specific legal amendments just for olive mills (also due to issues relating to the principles of equality and reasonableness), it is clear that the matter cannot and should not be ignored by national lawmakers. Take, for instance, the obligation to transport waste with special vehicles equipped for that purpose. For a natural, non-hazardous material such as olive pomace this is without a doubt an exaggeration and without any sense.

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<sup>36</sup> See, for instance, the conclusion of the abovementioned judgment *Commission v. Italian Republic*, C-195/05.

### **3. Olive Pomace as Biomass for Energy Production in Terms of Regulatory Provisions for the Sector.**

As mentioned, using olive pomace as biomass deserves special notice,<sup>37</sup> since in this case the rules regulating energy should also be taken into consideration.

a) The promotion of energy from renewable sources is already fostered in community law with directive 2001/77 and is now pursued above all in the new directive 2009/28.

Both use the same definition of biomass: “*the biodegradable fraction of products, waste and residues from biological origin from agriculture (including vegetal and animal substances), forestry and related industries, ... as well as the biodegradable fraction of industrial and municipal waste*”(art. 2(e) of directive 2009/28).

b) If biomass constituting waste (i.e. the producer discards or intends to discard) is legally material, nonetheless the plant where combustion takes place for generating energy is not subject to these provisions (permits and, in general, regulatory) laid down specifically for waste incineration facilities (EC directive 2000/76, which after indicating its scope with reference to waste incineration and co-incineration facilities, excludes (under art. 2) facilities that treat only “*vegetal waste deriving from food processing industries, if the heat is recovered*”; which is also prescribed by legislative decree no. 133/2005, art. 3).

It is still necessary to comply with other general rules laid down by directive 2008/98 (formerly 2006/12) providing the obligation to obtain permits for treating waste (art. 23) without prejudice to the possibility (art. 24) of member states to introduce exemptions - and so a simplified regime requiring only registration with a set of general technical rules - for facilities that arrange for disposal of their own non-hazardous waste at the place of production and recovery of waste. The latter also includes fuel for energy production pursuant to annex II.

The simplified regime can be used in Italy under the technical conditions provided by Ministry Decree of 5 February 2008, also for vegetal scrap originating from the oil industry (annex 2, subannex 1(3)).

c) If, instead, olive pomace is legally material as biomass not constituting waste, but as a by-product intended for use as fuel (complying with all the conditions mentioned above), the facility is not subject to the rules on waste, but is subject to those regulating energy production.

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<sup>37</sup> For technical details see M. MORINI, M. PINELLI, *Energia da biomasse*, at [www.energiaspiegata.it/2009](http://www.energiaspiegata.it/2009); N. GRANIGLIA, *La valorizzazione energetica delle biomasse*, at [www.chim.unisi.it](http://www.chim.unisi.it).

In this context directive 2001/77, drafted to favour energy production from renewable sources, already required member states to reduce any legal obstacles in order to increase the production of energy from renewable sources and rationalize and speed up procedures. In Italy, legislative decree no. 387/2003 was passed (as implementation), which, inter alia, laid down a single regime for issuing permits (for plants) following a simplified procedure; the biomass plants that are not required to obtain special permits are expressly exempt (legislative decree no. 387/2003, art. 12.5).

d) The new directive 28/2009<sup>38</sup> – still awaiting transposition – strengthens the community action to foster energy from renewable sources by providing specific objectives that each member state should reach for using such energy (art. 3 and annex I), as well as the possibility for support measures, such as investment grants and tax breaks or exemptions (articles 2, (k), and (3), with additional detailed rules on the characteristics of procedures for obtaining permits to ensure simplification and acceleration, objectivity, transparency and proportion (art. 13.1).

In this context the directive also prescribes the introduction of “*simplified and less burdensome authorization procedures, including through simple notification if allowed by the applicable regulatory framework, are established for smaller projects and for decentralized devices for producing energy from renewable sources, where appropriate*” (art. 13.1(f)).

e) This does not mean that using biomass to produce energy should mean not complying with other general provisions on environmental protection, especially with regards to air pollution.

This holds true, for instance, in the case of Italy, for rules that define for that purpose the product properties of fuels that can be used by the various types of combustion plants and the conditions to comply with in the process, expressly allowing for biomass as one of the fuels and, among these, both “*vegetal material produced from mechanical processing of agricultural products*”, such as olive mill pomace, and also olive pomace chemically processed by olive pomace refineries. Furthermore, the latter are subject to a series of significant requirements concerning packaging and labelling (cf., currently, annex X, part V of legislative decree no. 152/2006, part II, section 4, and previously (though the same)

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<sup>38</sup> See B. Pozzo, *Le politiche comunitarie in campo energetico*, in Riv. Giur. Amb., 2009, 873 and W. Lenert – J. Vollprecht, *Neue Impulse von Europa: Die Erneubare-Energien-Richtlinie der EU*, in ZUR, 2009, 307.

council of ministers presidential decree of 8 March 2002, amended by council of ministers presidential decree of 8 March 2004, annex III, no. 1, (e) and (f)).

f) It is clear that the legal framework on biomass, including olive pomace, and its use to produce energy is abundant and favourable.

The space for implementation at national level, both in terms of support measures and in terms of simplifying “bureaucratic” issues, is clear and should be exploited accordingly, also when transposing directive 2009/28.

In addition, there is already a provision, in art. 5 of legislative decree no. 387/2003, for a commission of experts with a series of duties, including the power to specify the technical, economic, legal and organizational conditions for energy recovery from a number of substances (attributable to biomass) such as food scraps from the agro-food industry. Without actual legislative power, the commission could in any case provide a valuable contribution to interpreting rules, also with respect to technical features relating to the issue at hand.

Furthermore, since (i) many olive mills, due to their size, would be unable to power an entire biomass facility on their own and (ii) there are no valid reasons that would exclude the latter from being considered as a local public service<sup>39</sup> (*«activities whose object is the production of goods and activities for social purposes and to promote the economic and civil development of local communities»*), pursuant to art. 112 of legislative decree no. 267/2000), since they can provide services such as district heating and supply a part of the electricity demand, for instance, for public lighting, and since they support local producers of biomass in addition to the fact that they have a beneficial impact on employment and the environment. It would be recommendable to introduce laws that expressly facilitate and, at the same time, provide incentives (e.g. economic incentives) for municipalities to build such installations (especially small ones) in the scope of their local public services, also based on regional agreements with olive mills and with other parties that would significantly contribute to providing biomass for energy production.

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<sup>39</sup> On the concept (debatable and controversial) of local public service see, for instance, A. Police, *Spigolature sulla nozione di servizio pubblico locale*, in *Dir. Amm.* 2007, 79; G. Piperata, *Gli incerti confini del servizio pubblico locale*, in *Giorn. Dir. Amm.*, 2007, 498 et seq.; and concerning case law see the next footnote.

After all, case law has affirmed (though not common ground) that municipalities, also based on local situations, have the “political” discretion to undertake certain activities as public service when they fall under the aforementioned concept.<sup>40</sup>

This is consistent with the principle of horizontal subsidiarity, pursuant to art. 118.5 Const., which states that public powers can undertake and perform activities which, though of public interest, are not sufficiently guaranteed by free private initiative.

In this context, the fact that a specific activity is legally construed as free – which happens also for energy production, pursuant to legislative decree no. 79/1999 - this in itself does not prevent municipalities from making it a public service, especially when there is no adequate “spontaneous” private offer for the activity in question (however, even when there is private offer, for instance for beach establishments or for funeral services).

Moreover, if the facilities were built by municipalities or in the scope of their local public services:

- it would be easier to subsidize the facilities, in accordance with community law;
- there would likely be less local opposition;
- the “producers” of biomass would not need to deal with, directly and under their own responsibility, the complex procedures and authorizations needed to build and operate the facilities.

<sup>40</sup> For instance, the following was affirmed: “In fact, for the purpose of qualifying an activity as a local public service or not it is necessary to take into consideration art. 112 Consolidated Local Body Act, according to which “*local bodies, in the scope of their respective competence, shall provide for the management of public services whose object is the production of goods and activities for social purposes and to promote the economic and civil development of local communities*”. The general nature of the law is due to the fact that local bodies, and the municipality in particular, are bodies for general purposes with organizational, administrative and financial autonomy (art. 3 Consolidated Local Body Act), meaning that they are able to determine their objects on their own and, in particular, to decide which activities to undertake as their duty for the production of goods and for social purposes and to promote the economic and civil development of the local communities in question (art. 12 Consolidated Local Body Act). Thus, what is legally material is the political-administrative choice made by the local body to undertake the service in order to satisfy objective collective needs on a continuing basis. (...) Therefore, considering the legal factor provided by art. 112 Consolidated Local Body Act, one would conclude that activities qualifying as local public service is any activity that, objectively, pursues social and civil development, selected based on political choices as well as the allocation of available economic resources and scope of intervention, and, subjectively, based on direct or indirect (by virtue of concessionary relationships or participation in the organizational structure of the body) relation with a significant public figure” Council of State, Sec. V, 13 December 2006, no. 7369; and the same by Sardinia Regional Administrative Court, Sec. I, 11 June 2009, no. 966 and Campania Regional Administrative Court, Naples, Sec. I, 24 April 2008, no. 2533); furthermore, «public services are not only those services specifically named as such by the law and reserved for municipalities and provinces, but all activities providing services meeting the needs of social purpose and promotion» (Council of State, Sec. V, 8 September 2008, no. 4265).

In addition, nothing would prevent the facilities from being “privatized” after the start-up phase if the activity is sufficiently profitable to attract private investment.

It is safe to say that such initiatives are already possible with current legislation in force (also thanks to the flexibility of the concept of local public service) and so they could be included in regional plans and agreements to provide the incentives for energy from renewable sources mentioned in art. 2.170 et seq. in law no. 244/2007 (also through pilot projects). However, a legal clarification to that effect would be needed especially when considering that (i) the electricity sector is not subject to the laws on the organization of local public services (which does not mean that the activity in question cannot be undertaken as a local public service, according to the description above, but it might give rise to uncertainty on organization models needed) and that (ii) the municipalities, pursuant to art. 3.27 of law no. 244/2007, *«cannot incorporate companies whose object is the production of goods and services that are not strictly necessary to pursue their institutional purpose, nor can they directly undertake or hold shareholdings, also minority, in these companies»*. This law, in turn, might give rise to doubts on the role of municipalities in the aforementioned cases (even if the activities attributable to local public services, where allowed, would ensure they pursue their institutional purpose).

After all, a (new) specific law would be desirable in the hopes that a policy providing incentives, also economic, will be undertaken to build the facilities described above.

#### **4. Conclusion: Legal Recommendations.**

In conclusion, and in brief, the study has led to the following legal recommendations to facilitate the management of olive mill pomace and to provide incentives for producing energy from biomass starting from this (by-)product:

- (i) The EC Commission should provide technical specifications, pursuant to art. 5 of directive 2008/98, on the conditions for using olive pomace as a by-product regardless of their economic value and regardless of the possible need of a drying phase and/or pot removal. In the meantime this could also be provided for in national law (albeit with less space to work in and a lower degree of "reliability");
- (ii) National law should be brought in line with this the new concept of by-product by amending art. 183(p) of legislative decree no. 152/2006, namely the part that still provides

for the economic value of by-products as a requirement (however, without providing regimes that can make operations particularly burdensome and/or complex, or delay application, which is the risk of “traceability” during transposition *en route*, with regards to residues from agricultural processing, without prejudice to the fact that olive pomace does not fall under this category since it is a residue from the agro-food industry);

(iii) if olive pomace is considered as waste national law should allow it to be treated as municipal waste when produced by smaller olive mills;

(iv) Furthermore, the prohibition against transporting waste with vehicles that are not specially equipped for that purpose should be dropped when the materials to be transported are natural and non-hazardous;

(v) More favourable national laws should be introduced for obtaining permits for facilities producing energy from biomass, especially when they are small;

(vi) National law should expressly provide that, in the absence of adequate private initiative, municipalities are able to build such facilities (or have them built) and operate them (at least during the start-up phase) within the scope of their local public services and with corresponding forms. Economic incentives should also be provided to ensure this actually happens (or at least the regions can be oriented to that effect, in collaboration with local "pilot" bodies within the scope of regional plans providing incentives for energy from renewable sources).