

## B.6 Distinction between waste and non-waste

The question of whether a material is deemed to be waste or not has to be answered on the basis of the definition of the term 'waste substances' in Article 1.1(1) of the Environmental Management Act. That definition reads as follows:

'all substances, preparations or other products ... which the holder thereof discards, intends to discard or must discard'.

Article 1.1(6) of the Environmental Management Act also refer to specific conditions laid down in the Waste Framework Directive under which materials are deemed to be non-waste substances. These conditions apply for 'by-products' of production processes and substances with 'end-of-waste status'. The latter criterion concerns waste substances that cease to be waste when they have undergone a recovery operation.

Where the term 'materials' is used in this section, it refers to substances, preparations or other products.

### B.6.1 Basic principles for the application of the definition of waste ('discard')

The definition of the term 'waste substances' is connected with the question of whether the owner discards, intends to discard or is obliged to discard a material. Neither the Waste Management Act nor the Waste Framework Directive provides a further definition of the term 'discard'. However, the following general principles can be formulated on the basis of the case law of the European Court of Justice.

According to the Court of Justice, the term 'waste substance' has to be interpreted broadly. On the basis of the definition of 'waste substance', in principle every substance and every product can be a waste substance if its owner discards it, intends to discard it or must discard it. The question of whether or not something is a waste substance ('discard') must always be assessed in light of all the facts and circumstances of the specific case. In this context, the objectives of the Waste Framework Directive also have to be taken into account. The directive has two environmental objectives (Article 1):

- environmental protection: to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste ;
- efficient use of resources: reducing overall impacts of the use of natural resources and improving the efficiency of their use.

It follows from this that even materials that are fit for economic reuse and/or can be used without risk to the environment or human health can also be waste substances if the owner decides to discard them or if he intends or is required to discard them.<sup>43</sup> Materials with an economic value and/or materials that are not harmful to humans or the environment can therefore also not automatically be excluded from the scope of the broad definition of waste.

On the other hand, according to the case law, there must be a legitimate ground, on the basis of the environmental objectives of the Waste Framework Directive, for regarding a material as waste in a specific case. In general, it can be argued that it is in principle not legitimate to regard a particular material as waste if that material will be used for a specific purpose and is not a burden for the owner. In connection with the conditions for by-products and the end-of-waste phase referred to below, that use must be 'certain', 'lawful' and of a sufficiently high value.

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<sup>43</sup> The same applies for the by-products and end-of-waste materials discussed below. If their owner (later) discards them or intends to discard them or must discard them, these materials can also be waste.

### Certainty, legality and high value

When in a specific case

- the use of the material that will be purchased by a (potential) customer is sufficiently certain, for example by virtue of contracts, invoices, binding declarations, statements of intent; and
- it is clear that the prescribed specifications, prevailing environmental and health rules and standards are complied with, and
- there will be no overall adverse effects for the environment or human health,

as a rule there will be no specific waste-related risks to justify deeming the material to be waste. In such a situation, the relevant application of the material, provided it is of sufficiently high value, will actually contribute to meeting the directive's objective of protecting natural resources. This is very important in the context of the transition to a circular economy.

The assessment of whether there are adverse environmental impacts can usually be based on the applicable legislation and other rules that apply for the use of the material. In addition to the prevailing environmental and health rules and standards, the legislation on substances (REACH and the POP regulation; see section B.14) and products (e.g., for food packaging and toys) must in any case be considered in the assessment.

However, certain adverse effects for the environment and health are not yet governed by existing laws and regulations. Issues that require attention in this context are:

- the presence in the material of so-called 'substances of very high concern (SVHC)' which are not yet regulated under the substances legislation or products legislation (see section B.14);
- risks posed by the material during later phases of the life cycle, such as diffuse contamination by the material when their use has ended and the material is given a new application;
- the use of material with a lower value than the minimum standard (for example, its use as fuel rather than as a raw material); after all, the Waste Framework Directive's objective of efficient use (with a sufficiently high value) of resources is then threatened.

## **B.6.2 Conditions for by-products**

If a material is consciously produced in a production process with the intention of bringing it onto the market, it can generally be regarded as a product that does not have the status of waste.<sup>44</sup> In general, in a production process one or more 'primary' products can be identified as being a consciously produced result of a process on the grounds of technical choices made during that process. In the case of a material that is the result of a production process that is not primarily intended for the production of that material, the Waste Framework Directive prescribes conditions under which that material is to be deemed to be a 'by-product'. On the basis of Article 1.1(6) of the Environmental Management Act and Article 5 of the Waste Framework Directive, such materials can be classified as by-product (non-waste) if the following conditions are met:

- a. it is certain that the material will be used;
- b. the material can be used directly without any further processing other than normal industrial practice;
- c. the material is produced as an integral part of a production process; and
- d. further use is lawful; in other words, the material complies with all the rules governing products, the environment and health protection for the specific use and does not lead to any overall adverse effects for the environment or human health.

If any of these conditions are not met, the material is not a by-product. In light of the underlying environmental objectives of the Waste Framework Directive, the material concerned must then be regarded as waste. This has to be determined in each individual case.

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<sup>44</sup> 'In general' because it can happen that an owner discards, intends to discard or must discard products which were consciously produced at the time.

In practice, conditions a. and d. ('certain' and 'lawful') are particularly important for establishing whether there are specific waste-related risks that justify treating the material as waste in a specific case (see sub-section B.6.1). Condition b. ('direct use') makes it clear that the mere fact that the material still has to be processed does not necessarily mean that it is a waste substance. After all, the point, according to this condition, is whether the material can be directly used without further processing other than processing that is 'normal industrial practice'. In practice, condition c. ('integral part of a production process') generally has no separate significance. It is closely related to condition b. and is primarily intended to clarify that 'normal' industrial production processes must be distinguished from waste processing operations as set out in appendices I and II of the Waste Framework Directive. Insofar as there is a recovery operation, the rules for the end-of-waste phase in Article 6 apply. Further considerations with regard to conditions b. and c. can be found in the explanatory memorandum to the [Regulations on criteria for by-products under the Waste Framework Directive](#) (Government Gazette 2015, 7458), which were adopted on the basis of Article 1.1(6) of the Environmental Management Act.

### **B.6.3 Conditions for the lapse of waste status (end-of-waste phase)**

Article 1.1(6) of the Environmental Management Act refers to the regulation of the so-called 'end-of-waste phase' in Article 6 of the Waste Framework Directive. Article 6 provides that specific waste ceases to be waste if it has undergone a recovery operation and complies with criteria formulated in accordance with the following conditions:

- a. the material is commonly used for specific purposes;
- b. there is a market or demand for the material;
- c. the material fulfils the technical requirements for the specific purposes and the existing legislation and standards for products; and
- d. the use of the material will not have any overall adverse effects for the environment or human health.

To establish whether end-of-waste status applies, it is first necessary to investigate whether any European criteria apply for the waste concerned (see sub-section B.6.4.1). If not, it will have to be investigated whether there is a national scheme for the waste concerned (see sub-section B.6.4.2). If that is also not the case, whether end-of-waste status applies will have to be assessed on the basis of case law. It has been established in the case law that what has to be assessed is whether there has been a completed recovery operation. That is the case if after a recovery operation (for example, recycling or preparation for reuse) a material of equal value to a raw material is produced from waste which can be used without special precautionary measures to protect the environment and human health. In practice, this is essentially an assessment in light of the four conditions a. to d. mentioned above.

### **B.6.4 Assessment of a material's status in practice**

A producer who brings a production residue onto the market as a by-product or the owner who first brings a waste substance onto the market as an end-of-waste substance after a recovery operation is responsible for ensuring compliance with the relevant conditions in the directive. The same applies for the owner of other materials, since it is the owner who is discarding or wishes or is obliged to discard the material.

#### **B.6.4.1 European criteria**

Assessment criteria have been adopted at EU level for establishing the existence of a by-product or end-of-waste status for specific production residues and waste. These criteria can be used to determine whether the conditions for by-product or end-of-waste status have been complied with.

No criteria have yet been established for by-products. EU assessment criteria have been formulated for some waste substances. They are:

- Iron, steel and aluminium scrap – [Regulation \(EU\) No. 333/2011 of 31 March 2011](#);
- Glass cullet – [Regulation \(EU\) No. 1179/2012 of 10 December 2012](#);
- Copper scrap – [Regulation \(EU\) No. 715/2013 of 25 July 2013](#).

#### **B.6.4.2** [National criteria](#)

In the absence of assessment criteria for by-products or end-of-waste status at EU level, each member state can draft and adopt its own criteria. These assessment criteria then only apply within that country.

For application within the Netherlands, a ministerial regulation with criteria for end-of-waste status has been adopted for recycling granulates: [Regulation on the establishment of end-of-waste status for recycling granulate](#) (Government Gazette. 2015, 3498).

The [Waste Framework Directive \(Criteria for By-products\) Regulation](#) contains further criteria for the application of conditions b. and c. with respect to specific by-products. The regulation currently only applies for the substance 'crude glycerol'.

In other words, assessment criteria have only been formulated for a small number of by-products and waste substances. This means that there are no specific assessment criteria for most materials. Whether a substance is waste on the basis of the definition of the term waste ('discarding') and the conditions laid down in Articles 5 and 6 of the Waste Framework Directive therefore has to be determined on a case-by-case basis.

#### **B.6.4.3** [Guideline and web assessment](#)

The Ministry of Infrastructure and Water Management is drafting a guide for assessing whether a substance is waste or non-waste. The guide, which will be published after the National Waste Management Plan (NWMP, in Dutch the *Landelijke Afvalbeheerplan*, or LAP) has been adopted, will address the subjects discussed above in greater detail. The guide will provide practical tips for the application of the definition of the term 'waste' ('discarding') and the use of the conditions or specific criteria for by-products and end-of-waste substances. The guide will contain an overview of the relevant case law and legal opinions.

In association with representatives from the relevant government agencies and the business community, the Ministry of Infrastructure and Water Management has also developed a web tool called 'Waste or resource?' ([www.ishetafval.nl](http://www.ishetafval.nl)) for carrying out assessments of whether something is a by-product or has end-of-waste status and to promote uniformity in the method of assessment by the competent authorities. It is not yet possible to use the tool to determine whether a substance might be a non-waste substance in situations other than by-products or waste. The possibility of doing so will be investigated in the coming period.

To assist in the process of assessing 'waste or product' in a specific case, the ministry has written a series of legal opinions with its judgement of the status of a number of materials. The assessments are based on the policy line set out in this section. For situations not involving by-products or end-of-waste status, and insofar as the web tool has not yet been adapted for them, enquiries can be made to Rijkswaterstaat's waste management helpdesk.

In principle, the legal opinion does not have the status of a decision that is subject to appeal within the meaning of the [General Administrative Law Act](#). It is intended to assist the administrative body that is the competent authority with respect to a company's activities to make assessments and decisions. Legal opinions are provided to the applicant and are then published, in anonymised form or otherwise, on Rijkswaterstaat's website.

#### **B.6.4.4** [Transnational transport of waste](#)

The provisions of the EU's Waste Shipment Regulation (EWSR) apply to the transnational shipment of waste. However, each member state can make its own decision on the status of a material being shipped, regardless of the opinion of another member state. But Article 28 of the regulation provides that if any of the relevant countries feels that a material is waste, the material must be shipped as waste (in which case the strictest regime applies) in accordance with the applicable procedures.

#### **B.6.4.5** [Burden of proof](#)

Case law provides that the burden of the proof for showing that material is not waste initially lies with the owner of the material. If the evidence is not provided, the competent authority can treat ~~the material as waste and all the existing requirements of the waste legislation must be complied~~

with. It is therefore important for the owner of the material to provide clear and comprehensive substantiation, in writing and in practice, that the material is non-waste. This can avoid problems and uncertainties during supervision and enforcement. The evidence provided should show that the conditions and any specific criteria under the Waste Framework Directive for by-products and substances with end-of-waste status are complied with, as well as documentation showing that it is not material that the owner is discarding, must discard or intends to discard.

As regards the aforementioned EU assessment criteria for end-of-waste status for iron, steel and aluminium scrap, copper scrap and glass cullet, the owner must issue a so-called statement of conformity to notify the first and subsequent buyers of the material that the prescribed criteria have been complied with. The Regulation on the establishment of end-of-waste status for recycling granulate contains a similar obligation.

In light of the competent authority's task of guaranteeing compliance with the waste legislation, the enforcement agency can request this documentation in the context of risk-based enforcement.

Since 1 January 2016, this practice has also been explicitly anchored in the EWSR<sup>45</sup> for transnational shipments of materials. Article 50(4), bis and ter, of the EWSR explicitly provide that a shipment of a substance or object can be regarded as an illegal shipment if the holder (or the person who arranges the shipment) cannot adequately prove within a prescribed period that the material is not waste.

#### **B.6.4.6** [Cooperation with competent authority](#)

As already mentioned in sub-section B.6.1, in principle every material can be waste as soon as its holder discards it, intends to discard it or is obliged to discard it. In other words, the same type of material can be waste in one situation and non-waste (a primary product, a by-product or, in the case of material produced during waste processing, a substance with end-of-waste status) in another. The task of monitoring the correct quality and use of the material with the status of waste (enforcement and supervision of compliance with waste legislation) can then be delegated by law to another government agency than in the case of material with the status of non-waste (enforcement of and supervision of product legislation) or to a different department of the same government body. This calls for coordination between the relevant government bodies or departments.

### **B.6.5 Core of the policy with respect to waste or non-waste**

This final sub-section summarises the points that form the core of the policy set out in this section.

The entire section forms the core of the policy on 'waste or non-waste'. With the exception of amendments to update the legislation, changes in this section will always be preceded by a public consultation procedure.

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<sup>45</sup> Regulation (EU) no. 660/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EC) no. 1013/2006 on shipments of waste.