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Guidance on the legal definition of waste and its application

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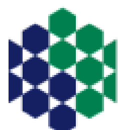
Environment Agency

Llywodraeth Cymru
Welsh Government



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This document/publication is also available on the following websites at:

http://www.defra.gov.uk/environment/waste/legislation/eu-framework-directive/

http://wales.gov.uk/consultations/environmentandcountryside/wastedefinition/?lang=en

http://www.doeni.gov.uk/index/protect_the_environment/waste.htm

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A copy of the responses to the consultation received in Wales will be placed in the Publication Centre, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

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Introduction

1. The definition of waste has been in use in its current wording for over three decades and it is now embedded in the 2008 Waste Framework Directive (Directive 2008/98/EC). This set of guidance provides a legal analysis of Article 3(1) which defines "waste" as:-

   "…any substance or object which the holder discards or intends or is required to discard…"

2. The guidance in this document has been prepared by the Department for Environment, Food and Rural Affairs (Defra) in conjunction with the Welsh Government (WG), the Department of the Environment in Northern Ireland, the Environment Agency[1] and the Northern Ireland Environment Agency (NIEA). These organisations are subsequently referred to as "the competent authorities".

3. This guidance is aimed at waste operators with good knowledge and understanding of waste management system in the UK as well as anyone who needs to gain a more thorough understanding of the definition of waste. Part two of these documents provides an introduction to the Definition of Waste for those with a less technical background on the subject.

4. Businesses and other organisations take decisions about whether something is or is not waste on a day-to-day basis. In most cases, the decision is straightforward and whoever is taking the decision does not need guidance from the competent authorities to help them take it. However, in some cases, the decision is more difficult (e.g. where the substance or object has a value or a potential use or where the decision is about whether waste has been fully recovered or recycled and has therefore ceased to be waste). The aim of the guidance is to help ensure that the right decision is taken in these more difficult cases.

5. However this guidance does not change the legal definition of waste and it does not take precedence over the case law on the definition's interpretation – **it only provides guidance on that case law according to the competent authorities' knowledge at the time of publication of the guidance**.

How to read this Guidance

This paper is divided in three parts.

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1 The Natural Resources Body was created in July 2012 and will replace the Environment Agency in Wales from 2013.

Part 1 – Background and Rationale

This part sets out the background to and explains the rationale for providing guidance on waste. Its aim is to set the context in which the guidance is provided and to explain how it relates to other developments e.g. the development by the European Commission of EU-wide end-of-waste criteria for certain specified types of waste under Article 6 of the WFD and, where no such criteria have been adopted, national end-of-waste protocols.

Part 2 – A Practical Guide For Businesses and Other Organisations

The aim of the practical guide is to help those running businesses and other organisations to take day-to-day decisions about whether the substances or objects they are dealing with are likely or unlikely to be waste. The practical guide addresses two questions:-

- Has the substance or object become waste; and
- If a substance or object is waste when does it cease to be waste?

Part 2 is also available as a separate publication entitled “A Practical Guide for Businesses & Other Organisations”.

Part 3 – Detailed Guidance on The Legal Definition Of Waste and Its Application

This part provides detailed guidance on the case law on the definition of waste and is intended for those with a specialist interest in the issue. The European Court[2] and our national Courts have been asked to interpret the definition on a number of occasions and a substantial body of case law now exists. This part of the guidance seeks to make the principles established in this case law more accessible for those who need to assess whether they are subject to waste management controls. The practical guide in Part 2 of the guidance is based on the detailed guidance in Part 3.

2 The case law referred to was established in judgments by the European Court of Justice (ECJ) which, under the Lisbon Treaty, is now known as The Court of Justice of the European Union. For ease of reference the term used in the guidance is “the European Court”.

Part 1: Background and Rationale

Consultation

G1.1 The competent authorities published a draft of their guidance on the interpretation of the definition of waste for consultation in January 2010[3]. The responses to that consultation have been considered and have been taken into account in the preparation of this guidance.

G1.2 A significant development since then is the transposition and implementation of the latest revision of the Waste Framework Directive (WFD) – Directive 2008/98/EC (see paragraph G1.11 below). This guidance is published, alongside the Commission guidance[4] interpreting the key provisions of the Directive, and provided by the competent authorities on the transposition and implementation of the revised WFD and takes account of the Directive's definitions and provisions.

The Waste Framework Directive

G1.3 The WFD was originally adopted in 1975 as Directive 75/442/EEC. The focus of the Directive's provisions at that stage was on ensuring the safe disposal of waste. The original WFD enabled Member States to adopt their own national definitions of waste.

G1.4 The WFD was the subject of substantial amendment in 1991 in Directive 91/156/EEC - taking account of the experience gained by Member States in the implementation of the original Directive. One of the major changes made in 1991 was to extend the scope of the WFD's objectives and controls from waste disposal to also cover waste recovery – with "recovery" including recycling, re-use of waste, reclamation and the use of waste as a source of energy. The amended WFD also introduced a new EU-wide definition of waste and the reasons for doing so are explained in the following recital to the Directive:-

"(3) Common terminology and a definition of waste are needed in order to improve the efficiency of waste management in the Community".

G1.5 The definition of waste introduced in Directive 91/156/EEC was:-

"'waste' shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard".

G1.6 Because of the extent to which it had been amended since its original adoption in 1975, the WFD was "codified"[5] in Directive 2006/12/EC[6]; and Directive 75/442/EEC (as amended) was repealed with effect from 17 May 2006.

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3 Available at: http://webarchive.nationalarchives.gov.uk/20100505154859/http:/www.defra.gov.uk/corporate/consult/waste-definition/index.htm.
4 http://ec.europa.eu/environment/waste/framework/guidance.htm
5 A measure of this kind is known in the UK as the "consolidation" of legislation.
6 Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:114:0009:0021:EN:PDF.

G1.7 On 21 December 2005 the European Commission published **(a)** A Thematic Strategy on the prevention and recycling of waste ("the Waste Thematic Strategy")[7]; and **(b)** proposals for associated legislation comprising **(i)** a revision of the WFD, **(ii)** the repeal of the Waste Oils Directive[8] and **(iii)** the repeal and integration of the Hazardous Waste Directive[9] into a revised WFD.

G1.8 As to the definition of waste, the Commission stated in the Waste Thematic Strategy that:-

Annex I: paragraph 1

"In the light of extensive stakeholder consultation the Commission has concluded that there is no need substantively to amend the definition of waste, but that it is necessary to clarify when a waste ceases to be a waste (and becomes a new or secondary raw material)."

G1.9 The Commission's proposal for a revision of the WFD was the subject of consideration by the Council of Ministers and the European Parliament under the co-decision procedure. That procedure was completed on 20 October 2008 when the Environment Council adopted the Common Position as amended by the European Parliament on 7 June 2008. The revised WFD was published in the Official Journal on 19 November 2008 as Directive 2008/98/EC and entered into force on 12 December 2008[10].

G1.10 Directive 2008/98/EC re-enacts the definition of waste adopted in Directive 91/156/EEC but without the reference to any substance or object "in the categories set out in Annex I" (see paragraphs G1.4-G1.5 above). The definition of waste, as re-enacted in the Directive 2008/98/EC, is:-

"'waste' means any substance or object which the holder discards or intends or is required to discard."

G1.11 **Transposition**: Directive 2008/98/EC has now been transposed throughout the UK and the following is the transposing legislation in the administrations covered by this guidance:-

England and Wales

(a) The Waste (England and Wales) Regulations 2011 (S.I. 2011 No. 988)[11].

(b) In Wales, the Regulations at (a) above are supplemented by the Waste (Miscellaneous Provisions) (Wales) Regulations 2011 (S.I. 2011 No. 971 (W.141))[12]. The latter Regulations make a number of consequential amendments to several Welsh Statutory Instruments and revoke one Wales–only instrument (i.e. the

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7 Available at http://ec.europa.eu/environment/waste/strategy.htm.
8 75/439/EEC.
9 91/689/EEC.
10 Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:312:0003:0030:EN:PDF.
11 Available at http://www.legislation.gov.uk/uksi/2011/988/contents/made.
12 Available at http://www.assemblywales.org/bus-home/bus-guide-docs-pub/bus-business-documents/bus-business-documents-doc-laid.htm?act=dis&id=213822&ds=3/2011,

Environmental Protection (Duty of Care) (Amendment) (Wales) Regulations 2003). The reason for the additional instrument is that the amendments and revocation, which mirror changes to the equivalent English Statutory Instruments that have been made in the Waste (England and Wales) Regulations 2011, must be made bilingually; and a decision was made to make them in a separate Wales-only instrument. The effect of the transposing legislation is the same in Wales as it is in England.

Northern Ireland

(c) The Waste Regulations (Northern Ireland) 2011 (SR 2011 No. 127)[13].

G1.12 Although the definition of waste itself remains unchanged in the revision of the WFD, there are two provisions in Directive 2008/98/EC which may have an impact on what is or is not classified as waste. These provisions are:-

By-Products

(a) Article 5(1) of the WFD provides that a substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as a non-waste by-product – **but only if all** of the conditions set out in Article 5(1)(a)-(d) are met. The provision was introduced on the initiative of Member States during the negotiation of Directive 2008/98/EC and was intended to reflect, and place on the face of the Directive, existing case law by the European Court on the distinction between production residues as waste and non-waste by-products.

(b) The decision as to whether or not a substance or object meets the conditions set out in Article 5(1)(a)-(d) must be made on a case-by-case basis in the light of all the circumstances and in a way which does not undermine the effectiveness of the WFD.

(c) The effect of Article 5(2) of the WFD is to enable measures to be adopted, under a procedure known as "comitology with scrutiny", to determine the criteria to be met for specific substances or objects to be regarded as non-waste by-products. Under EU legislation, the initiative for proposing any such measures rests with the European Commission. To date no measure has been proposed by the Commission under Article 5(2). However, attention is drawn to paragraphs G1.13-G1.14 below which discuss guidance on by-products published by the European Commission in the context of the European Court case law referred to in subparagraph (a) above.

End-of-waste criteria

(d) The effect of Article 6(1) and (2) of the WFD is to enable measures to be adopted, under a procedure known as "comitology with scrutiny", providing end-of-waste criteria for specified waste streams. Article 6(1) provides that the certain specified waste ceases to be waste within the meaning of Article 3(1) when it has undergone a recovery operation, including recycling, and complies with end-of-waste criteria adopted under the terms of Article 6(2). The criteria must be adopted in accordance with the conditions set out in Article 6(1)(a)-(d).

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13 Available at http://www.legislation.gov.uk/nisr/2011/127/contents/made.

(e) Following adoption of Directive 2008/98/EC, the European Commission published information about its Article 6 end-of-waste project on its website[14] which confirmed that it "intends to prepare end-of-waste criteria for ferrous scrap metal, aluminium scrap metal, copper scrap metal, paper and glass." Since then the Commission has also initiated work on end-of-waste criteria for biodegradable waste (compost and digestate) and waste plastics[15].

(f) End-of-waste criteria have been adopted for ferrous and aluminium scrap metal. New criteria on Glass were adopted in July 2012 and should come into force in the course of 2013. Proposals for Copper and Paper were put forward at the same time as those for glass, but Member States did not reach an agreement and those proposals were not adopted. The criteria for ferrous and aluminium scrap are set out in Council Regulation (EU) No 333/2011[16] which applied from 9 October 2011. The Regulation has direct effect – which means that it applies throughout the EU and does not have to be transposed by Member States into their national legislation.

European Commission's guidance on by-products

G1.13 The European Commission announced in the Waste Thematic Strategy (see paragraph G1.7 above) its intention to publish a Communication on by-products and when they should or should not be considered as waste. Following consultation with Member States and stakeholders in August-October 2006, the Commission published its guidance on 21 February 2007 as COM(2007) 59 final – "COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on the Interpretative Communication on waste and by-products". The Communication is available on the Commission's website[17] and is referred to in Part 3 of this guidance (page 24).

G1.14 The Commission has published guidance on the interpretation of key provisions of Directive 2008/98/EC[18]; which covers both the European Court's case law on by-products and Article 5(1) of Directive 2008/98/EC.

Why is the definition of waste important?

G1.15 The definition of waste is important because the classification of substances as waste is the basis for the formulation of waste management policy and the application of regulatory controls to protect the environment and human health. The WFD contains not only provisions which have the aim of directing waste management policy but also provisions which are regulatory in nature.

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14 At: http://ec.europa.eu/environment/waste/framework/end_of_waste.htm.
15 The technical development work is carried out under the auspices of the Commission's Joint Research Centre (JRC) and information about this work is available at http://susproc.jrc.ec.europa.eu/activities/waste/.
16 Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:094:0002:0011:EN:PDF.
17 At: http://ec.europa.eu/environment/waste/framework/by_products.htm.
18 http://ec.europa.eu/environment/waste/framework/pdf/guidance_doc.pdf

G1.16 The WFD includes the waste hierarchy which applies as a priority order in waste prevention, waste management legislation and waste policy (Article 4); the "polluter pays" principle (Article 14); the self-sufficiency and proximity principles (Article 16); permits or registration for "establishments or undertakings" carrying out waste disposal and recovery operations (Articles 23-26); registration for (i) "establishments or undertakings" which collect or transport waste on a professional basis and (ii) dealers or brokers (Article 26); waste management planning (Article 28); waste prevention programming (Article 29); and "appropriate periodic inspection" of those carrying out the operations subject to control under Articles 23-26 and of "establishments or undertakings" which produce hazardous waste (Article 34). The competent authorities consider that the term "establishments or undertakings" includes any organisation or sole trader (e.g. a business, company, partnership authority, society, trust, club or charity)[19].

G1.17 Since the WFD was originally adopted, a significant body of other measures has been introduced which applies the WFD's definition of waste. The list of such measures includes Directive 78/176/EEC on waste from the titanium dioxide industry, the Packaging and Packaging Waste Directive (94/62/EC), Directive 96/59/EC on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (PCBs/PCTs), the Landfill Directive (1999/31/EC), the End-of-Life Vehicles Directive (2000/53/EC), the Waste Incineration Directive (2000/76/EC)[20], the Waste Electrical and Electronic Equipment Directive (2002/96/EC), Regulation (EC) No 850/2004 on persistent organic pollutants (POPs), the Mining Waste Directive (2006/21/EC), the Waste Shipments Regulation (EC No. 1013/2006) and the Batteries Directive (2006/66/EC), the IPPC Directive (2008/1/EC), and the Industrial Emissions Directive (2010/75/EU)[21].

G1.18 **REACH**: A related consideration is the adoption and entry into force of the REACH Regulation[22]. Waste is specifically excluded from REACH. This means that the REACH requirements for substances, preparations, and articles (e.g. registration, authorisation, and communication of information along the supply chain) do not apply to waste. However, where waste is recovered back into substances that are placed on the market for further commercial use, REACH applies as it does to any other substance placed on the market from the point a recovered substance ceases to be

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19 The competent authorities do not consider that the term applies to private individuals acting in a personal capacity.

20 In the *Lahti Energia Oy* case (Case C-317/07), the European Court found that "..it is evident that the clear wording of Article 3(1) of Directive 2000/76 [the WID] defines 'waste' in the context of that directive as any 'solid' or 'liquid' waste as defined in Article 1(a) of Directive 75/442 [the WFD]....A literal interpretation of that provision is sufficient for a finding that only waste in solid or liquid form is covered by Directive 2000/76, and there is therefore no need to examine in addition whether the definition of 'waste' in Directive 75/442 itself covers waste in gaseous form." On this basis, the Court concluded that, "The definition of 'waste' in Article 3(1) of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste does not cover gaseous substances."

21 The effect of Article 81 of Directive 2010/75/EU is to repeal Directives 78/176/EEC, 1999/13/EC, 2000/76/EC and 2008/1/EC with effect from 7 January 2014.

22 Regulation (EC) No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) etc. Since its original adoption the Reach Regulation has been substantially amended. The bibliographic notice for the Regulation, which lists the amendments and includes a reasonably up-to-date consolidated version of the Regulation, is available at: http://eur-lex.europa.eu/Notice.do?val=444402:cs&lang=en&list=451174:cs,451273:cs,451272:cs,449534:cs,449533:cs,444403:cs,470577:cs,444402:cs,573339:cs,&pos=8&page=6&nbl=59&pgs=10&hwords=1907/2006~.

waste and waste management controls no longer apply. Guidance on “REACH and recovered waste substances” is available on the European Commission website[23].

National guidance on the definition of waste

G1.19 As indicated in paragraph (of the introduction), the aim of this guidance is to help ensure that the right decision is taken in the relatively small number of more difficult cases where the decision as to whether or not a substance is waste is not straightforward. The guidance seeks to do so by identifying the principles deriving from case law and the considerations that have to be taken into account, and the criteria that need to be satisfied, when deciding that a substance is or is not waste.

G1.20 But it is also important to emphasise what the guidance does **not** do. The guidance does not change the legal definition of waste and it does not take precedence over the case law on the definition’s interpretation – **it only provides guidance on that case law according to the competent authorities’ knowledge at the time of publication of the guidance**. It remains the responsibility of businesses and other organisations to ensure that they comply with the law; and the interpretation of the law is ultimately a matter for the Courts. Should there be a disagreement between a competent authority and a business or other organisation as to whether a particular substance is waste, it is recommended that the business or organisation obtains its own legal advice and acts on the basis of it.

National end-of-waste protocols

G1.21 The Waste Protocols Project (now closed) has been jointly run by the Environment Agency and the Waste and Resources Action Programme (WRAP) using funding made available by the Government and contributions from NIEA. The main aim of the project has been to develop national protocols to help determine when specified wastes can be considered to have been fully recovered and no longer waste for the purposes of the WFD.

G1.22 The European Court confirmed in case C-194/05 that, “Since the directive does not provide any single decisive criterion for discerning whether the holder intends to discard a given substance or object, Member States are free, in the absence of Community provisions, to choose the modes of proof of the various matters defined in the directives which they are transposing, provided that the effectiveness of Community law is not thereby undermined (see *ARCO Chemie Nederland and Others*, paragraph 41, and *Niselli*, paragraph 34).” The national end-of-waste protocols developed by the Environment Agency and WRAP are essentially “modes of proof” for certain specified waste streams – taking account of European Court case law. As such, the protocols are recognised in the “end-of-waste status” provision in Article 6(4) of the WFD which provides that:-

> “4. Where [end-of-waste] criteria have not been set at Community level...., Member States may decide case by case whether certain waste has ceased to be waste taking into account the applicable case law. They shall notify the

23 At:http://ec.europa.eu/enterprise/sectors/chemicals/reach/waste/index_en.htm

Commission of such decisions in accordance with Directive 98/34/EC...where so required by that Directive."

G1.23 Further information about the Waste Protocols Project, and the waste streams for which end-of-waste protocols have been or are being developed, is available on the Environment Agency's website[24] (England and Wales); and on the NIEA website (Northern Ireland)[25].

Code of practice on guidance on regulation

G1.24 The guidance does not constitute guidance falling within the scope of the Government's ***Code Of Practice On Guidance On Regulation***[26]. However, in preparing the draft guidance the competent authorities have had regard to "the eight golden rules of good guidance" set out in the code.

G1.25 In preparing the guidance, the competent authorities have tried to adopt a purposive, risk-based approach; to ensure that the guidance is clear and concise; and to make use of examples to aid understanding. Part 2 of the guidance provides a practical guide for businesses and other organisations (page 15) which sets out, in diagrammatic and textual formats, the factors that need to considered when deciding (i) whether or not a substance or object is waste and (ii) when waste ceases to be waste.

Impact assessment

G1.26 This guidance does not constitute a Government intervention within the terms of the guidance on impact assessments[27]. As indicated in paragraphs and G1.19-G1.20 above, the purpose of the guidance is to advise on existing and binding case law on the definition of waste and to help ensure that the right decision about the classification of a substance as waste is taken in a relatively small number of more difficult cases. The guidance in itself does not impose or reduce costs on businesses, civil society organisations, the public sector or bodies that deliver public services.

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24 At: http://www.environment-agency.gov.uk/business/topics/waste/32154.aspx.
25 At: http://www.doeni.gov.uk/niea/index/about-niea/better_regulation/waste_quality_protocols.htm.
26 Available at http://www.bis.gov.uk/policies/better-regulation/code-of-practice-on-guidance-on-regulation.
27 Available at http://www.bis.gov.uk/assets/BISCore/better-regulation/docs/I/11-1111-impact-assessment-guidance.pdf.

Review of guidance

G1.27 The competent authorities will review the guidance as necessary to ensure that users of it remain confident that it is accurate and current. Several factors may necessitate an updating of the guidance e.g. further case law by the European Court or national courts on the interpretation of the definition of waste; the adoption by the European Commission of measures to implement the WFD (see paragraph G1.12(a)-(f) above) and the revision of the WFD Guidance by the EC (see footnote 16 at paragraph G1.14); or feedback from users of the guidance.

Part 2: A practical guide for businesses and other organisations

G2.1 Any substance or object is capable of being waste. A substance or object is waste if it is discarded within the particular meaning of the Waste Framework Directive[28] (WFD). The decision on whether something is discarded must take account of all the circumstances, and have regard to the aims of the WFD. This means that every case must be assessed on its merits.

G2.2 This section aims to provide a practical guide to help businesses and other organisations to take the right decisions on a day-to-day basis about whether something is or is not waste. It does so by setting out criteria below and is in two parts:-

- Q1/8 address whether a substance or object has become waste; and
- Q9/14 consider when wastes should be considered to have ceased to be waste.

G2.3 In cases where the answer to these questions is not clear-cut, reference should be made to the more detailed guidance provided in Part Three.

Has the substance or object become waste?

G2.4 A substance or object becomes waste when it is **discarded.** Discard has a special meaning which is not necessarily the same as its dictionary meaning. It includes not only the disposal of a substance or object but also its recovery or recycling. Whether a substance or object is being discarded has to be decided on a case-by-case basis, and taking account of all the circumstances, to ensure the aims of the WFD (i.e. protection of the environment and human health) are not undermined. In other words, each case must be assessed on its own merits.

G2.5 The following criteria, set out in diagrammatic and textual formats, can help with this assessment:-

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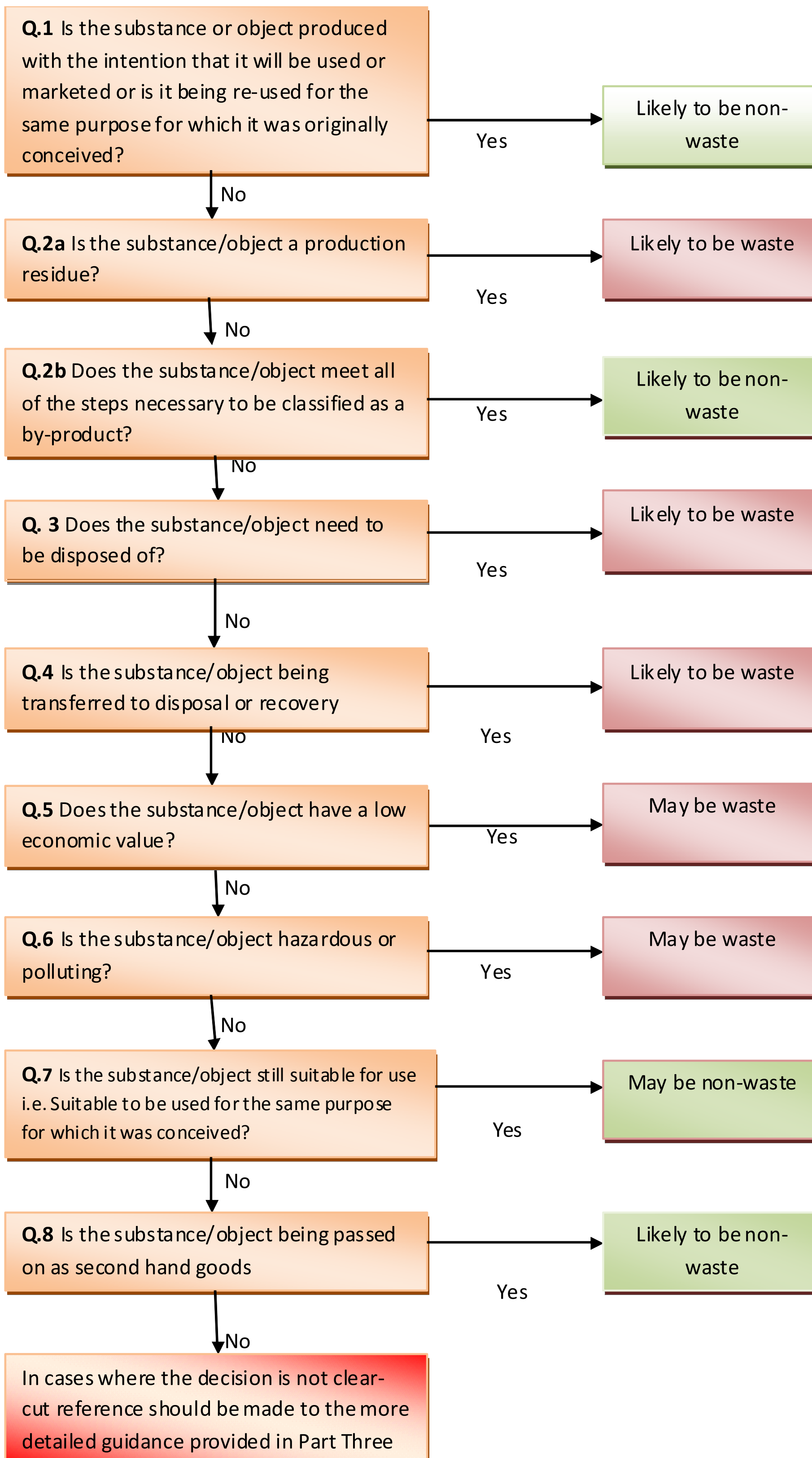
28 Directive 2008/98/EC – available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:114:0009:0021:EN:PDF.

Has the substance or object become waste criteria

NB – all questions should be asked in all cases (to reflect the fact that you have to assess each case with reference to all the case law indicators



Q.1: Is the substance or object produced with the intention that it will be used or marketed or is it being re-used for the same purpose for which it was originally conceived?

If the answer to either of these questions is “yes” then it is likely that the substance or object is not waste.

Q.2: Is the substance or object a by-product of a production process?

Production residues[29] are likely to be waste. However, under Article 5 of the WFD production residues can be classified as by-products if specified conditions are met. If a substance or object is a by-product it is not waste. If the answer “yes” can be given to **all** of the following four questions, this will help indicate that a residue is a by-product and not waste:-

- Is further use of the substance or object not just a possibility but a certainty?
- Can it be used directly, without any further processing prior to its use?
- Has it been produced as an integral part of a production process?
- Is its further use lawful in the sense that:-
    - it fulfils all relevant product, environmental and health requirements for the specific use to be made of it; and
    - it will not have an adverse impact on the environment or human health?

The answers to the following questions are likely to be helpful in deciding whether the four basic conditions for classification as a by-product have been met:-

- Is the substance or object fully suitable for the proposed use?
- Can it be used without any special precautions being taken to ensure protection of the environment or human health?
- Is there a genuine market for it?
- Is it free of any contaminants that could have an adverse effect on its use?
- Can it be used without any additional risk to the environment or human health, when compared with an equivalent raw material?

Q.3: Does the substance or object need to be disposed of?

A substance or object might have to be disposed of because of a legal requirement (e.g. mercury or some animal by-products). It might also have to be disposed of because of its condition or its continued use might be dangerous (e.g. some out-of-date medicines). If so, it is waste.

Q.4: Has the substance or object been transferred to a disposal or recovery operation?

If a substance or object is sent on for disposal or recovery that will indicate that it is waste.

It is sometimes difficult to tell what a “recovery operation” is and what just the normal use of a product is. For example, “use as a fuel” could be either, depending on the circumstances. However, if a particular operation is generally accepted as being a

29 A residue is a substance or object which results from a production process which is not, in itself, sought for a subsequent use

common way of recovering waste, that may indicate that it is a recovery operation. Examples of disposal and recovery operations are listed in Annexes I and II to the WFD.

Q.5: Does the substance or object have a low economic value?

If the substance or object has a low or negative economic value, this points to its being waste since it is a burden on the producer or holder who then may have an incentive to get rid of it.

It does not follow, though, that a substance or object with a good economic value to the producer is not a waste.

Q.6: Is the substance or object hazardous or polluting?

Wastes can be quite harmless in themselves, and they may be processed without harmful impacts on the environment. On the other hand, some non-waste products are polluting or hazardous (e.g. poisonous chemicals). So this question of harm is not always relevant to the issue of whether something is waste.

The question does become relevant where the substance or object has become or is contaminated, is leftover, unwanted, or a burden on its holder. It is also relevant when a substance or object has become contaminated with something that presents a risk. In these circumstances, the hazardous or polluting nature of the substance or object can indicate that it is waste.

Q.7: Is the substance or object still suitable for its use?

Substances or objects that can no longer be used for their original purpose (e.g. because they are out-of-date) or have become damaged or unsuitable for use are likely to be waste.

Q.8: Is the substance or object being passed on as second hand goods?

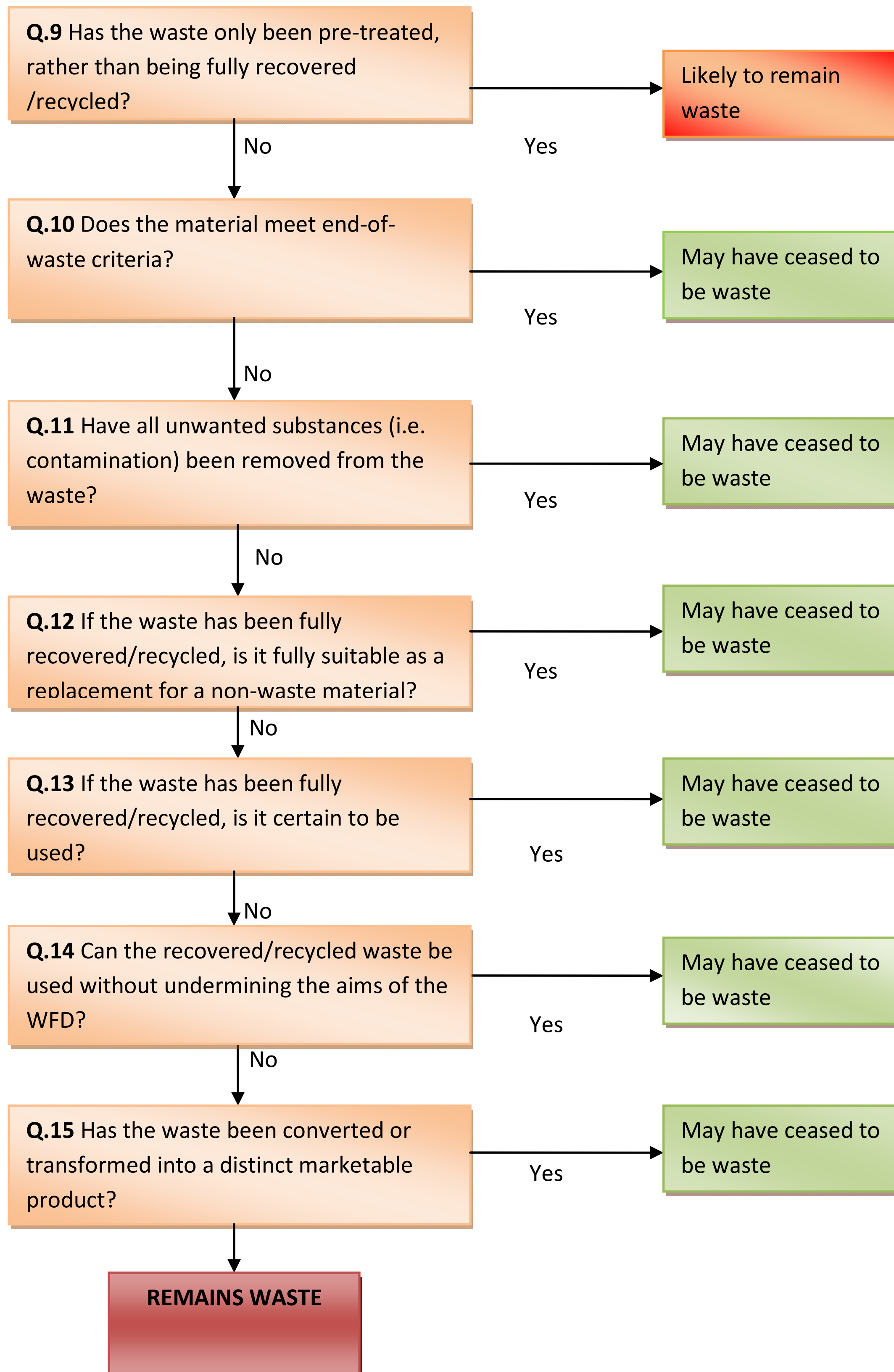
A substance or object may be unwanted by one owner, but it is passed on to be used for its original purpose without needing any processing or treatment. If so, it is generally not waste.

If a substance or object is waste when does it cease to be waste?

G2.6 Once a substance or object has been discarded and is waste, something usually needs to be done to it for it to cease to be waste. This can range from something relatively minor to quite extensive processing, comprising one or more recovery operations. It may be necessary for waste to undergo a series of recovery operations before it ceases to be waste.

G2.7 The following criteria, set out in diagrammatic and textual formats, can help decide whether a waste has ceased to be waste:-

When does it cease to be waste criteria



Q.9: Has the waste only been pre-treated, rather than fully recovered or recycled?

If waste has gone through one treatment but needs further treatment before being ready for re-use, this will indicate that it has not ceased to be waste. Sorting and size reduction often fall into this category.

Q.10: Does the material meet end-of-waste criteria adopted under Article 6 of the WFD?

Article 6(1) of the WFD provides that specified waste ceases to be waste when it has undergone a recovery operation, including recycling, and complies with EU-wide end-of-criteria adopted under the terms of Article 6(2). At the date of publication of this guidance, EU wide end-of-waste criteria have been adopted under Article 6(2) for ferrous and aluminium scrap metal and glass. Proposals are at various stages in relation to copper, paper, plastic and biodegradable waste.

Q.11: Have all unwanted substances been removed from the waste?

Often, waste is contaminated because of its origins or previous use. It will not cease to be waste until the contamination is removed – either so that it can be used again for its original purpose or made into a new product.

Q.12: Is recovered/recycled material fully suitable as a replacement for a non-waste material?

To cease to be waste, the material that results from the recovery or recycling of waste must be **fully suitable** as a replacement for the non-waste material for which it is substituting.

Q.13: If the waste has been fully recovered/recycled, is it certain to be used?

Only if there is a genuine market for the recovered or recycled material and its future use is certain, it is likely to cease to be waste. Otherwise it will remain a waste.

Q.14: Can the recovered/recycled material be used without undermining the aims of the WFD?

The recovered or recycled material will not cease to be waste if it poses greater risk to the environment or human health than the non-waste material it replaces, as this would undermine the aims of the Directive.

Q15: Has the waste been converted or transformed into a distinct product?

On the other hand, if the waste has been converted or transformed to the extent that it has become a new product in its own right, it may no longer be waste. The new product needs to be distinct from the original waste and minor changes to its composition are unlikely to be sufficient.

Where no EU wide criteria exist or in circumstances where waste does not meet such criteria,. the Agency will assess end of waste on a case by case basis, or in accordance with a national end of waste protocol, applying the case law on end of waste in accordance with Article 6(4) of the WFD.

Part 3: Detailed guidance on the legal definition of waste and its application

Section One: Backround

Introduction

G3.1 Article 3(1) of the Waste Framework Directive[30] (WFD) defines "waste" as:-

"…any substance or object which the holder discards or intends or is required to discard…"

G3.2 This definition is at the heart of waste management policies and controls. It is used not only in the WFD but in a number of other Directives (see paragraph G1.17 above). The application of this legislation is dependent on the substance in question being classified as waste. The Courts have been asked to interpret the definition on a number of occasions and a body of case law now exists at both EU level and national level.

G3.3 This guidance seeks to make the principles established in this case law more accessible for those who need to assess whether they are subject to waste management controls. Examples are also provided in the guidance to help clarify what is and is not waste. Of course, whether or not a substance or object is waste must be decided on the facts of each case and the interpretation of the law is ultimately a matter for the Courts.

Why regulate waste?

G3.4 The European Court's intention in interpreting EU legislation is to give effect to the objectives of the legislation. The primary objectives of waste management legislation are to protect the environment and human health, to reduce the overall impacts of resource use and to improve the efficiency of resource use[31]. But these are not the only objectives. It may be worth setting out, therefore, the main reasons for regulating waste as these will be behind any decision as to whether something is, or is not, waste. The main reasons are: **(a)** the risk to the environment and human health; **(b)** waste as a resource; and **(c)** the economic dimension.

G3.5 First and foremost, waste is regulated because it may present **a risk to the environment and human health**. This risk derives from waste's collective qualities – its nature and composition, the variety of sources from which it originates and its potential to cause harm to the environment and human health. Waste is by definition something that is not wanted by its producer and by its nature has the potential to pollute the environment and to harm human health. Waste can constitute a burden to its holder which may lead to its being dealt with in socially or environmentally

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30 Directive 2008/98/EC – available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:114:0009:0021:EN:PDF.

31 Article 1 of the WFD (Directive 2008/98/EC).

unacceptable ways or in its being abandoned or dumped. The composition of waste is often uncertain and it is sometimes hazardous.

G3.6 Waste also often attracts a stigma which is not traditionally associated with products which are manufactured, and can be sold only if there are consumers willing to pay for them. In other words, it is often the case that the producers and holders of waste do not have the same self-interest to ensure the provision of appropriate safeguards as those who extract raw materials or manufacture and place products on the market.

G3.7 For these reasons, waste is the subject of EU-wide legislation to protect the environment and human health from its potentially adverse impacts; and to ensure that it is safely recovered or disposed of.

G3.8 The key environmental and human health objectives of the WFD itself are set out in Article 13 and require Member States to take:-

> "..the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular:
>
> (a) without risk to water, air, soil, plants or animals;
>
> (b) without causing a nuisance through noise or odours; and
>
> (c) without adversely affecting the countryside or places of special interest."

G3.9 Waste legislation also needs to be considered in the context of the EU's wider environmental policies and, in particular, Article 191(2) of the Treaty on the Functioning of the European Union32 which provides that:-

> "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

G3.10 It was against this background that the European Court stated in the *Arco Chemie* case[33] that:-

- the [second] recital to the Directive[34] states that "the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste";

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32 Amended by the Treaty of Lisbon.
33 Joined Cases C-418/97 and C-419/97, paragraphs 36 to 40 and 73.
34 The WFD as codified in Directive 2006/12/EC.

- by virtue of article 174(2)[35] EC policy is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken; and
- consequently, **the concept of waste cannot be interpreted restrictively**.

G3.11 However, **waste is also a resource**, albeit one which may present risks to the environment and human health. But the environment is to be protected not only through the application of waste management controls but also by promoting the efficient use of resources. The WFD recognises that, in order to achieve a high level of environmental protection, Member States should not only take action to ensure the safe recovery and disposal of waste but also to give priority to the prevention of waste – including the re-use of products and the recycling of substances and objects that have been discarded and are waste[36]. Article 1 of the WFD therefore addresses not only the protection of the environment and human health but also sets the objective of reducing the overall impacts of resource use and improving the efficiency of such use. And Article 4 of the WFD requires Member States to apply a waste hierarchy as a priority order in waste prevention, waste management legislation and waste policy. The waste hierarchy identifies waste management options and ranks them in order of environmental impact as follows:-

- Prevention;
- Preparing for re-use;
- Recycling;
- Other recovery, e.g. energy recovery; and
- Disposal.

G3.12 The most sustainable and environmentally friendly option is to reduce the amount of waste which is produced in the first place. The hierarchy promotes this but also seeks to encourage the efficient use of waste as a resource. To this end, recycling is to be preferred to other recovery operations as in many cases recycling will have an ecological advantage in terms of the quantities of energy and raw materials used and saved.

G3.13 Waste is not only an environmental issue – **it is also an economic issue**. The European Court found in "the *Walloon* waste judgment"[37] of July 1992 that:-

> "It must… be concluded that waste, whether recyclable or not, is to be regarded as 'goods' the movement of which, in accordance with Article [28] of the Treaty, must in principle not be prevented."

G3.14 Following that judgment, Council Regulation (EEC) No. 259/93[38] on the supervision and control of shipments of waste between Member States was adopted and the Court held that: **(a)** the conditions and procedures established by Regulation No.

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35 Article 174 of the EU treaty was re-enacted in Article 191 of the Treaty on the Functioning of the European Union.
36 See Recital (6) to the WFD (Directive 2008/98/EC).
37 Case C-2/90 paragraph 28.

38 Regulation (EEC) No 259/93 was repealed with effect from 12 July 2007 by Regulation (EC) No 1013/2006 of 14 June 2006 on shipments of waste.

259/93 were adopted with a view to ensuring the protection of the environment, taking account of objectives falling within the scope of environmental policy such as the principles of proximity, priority for recovery and self-sufficiency at Community and national levels[39]; and **(b)** that the Regulation governed in a harmonised manner, at Community level, the question of shipments of waste in order to ensure the protection of the environment[40].The European Court found in its judgment of 8 November 2007 in the *Austrian taxation* case[41] that once a Member State has refrained from taking measures to prohibit, or to object systematically, as provided for in Article 4(3)(a)(i) of Regulation No 259/93 and has not raised any reasoned objections, to a shipment of waste, as provided for in Article 4(3) of Regulation 259/93 it cannot impose restrictions or limitations on the free movement in its territory of shipped waste.

G3.15 The European Court also recognised the economic dimension in the *Mayer Parry* case[42] when it explained that:-

> "First, obstacles to trade could arise if different concepts of recycling were applied in the Member States, so that the same material or product could be regarded as recycled in one Member State - and would accordingly have ceased to be classified as packaging waste and been freed from all waste-specific controls - while that would not be the case in another Member State."

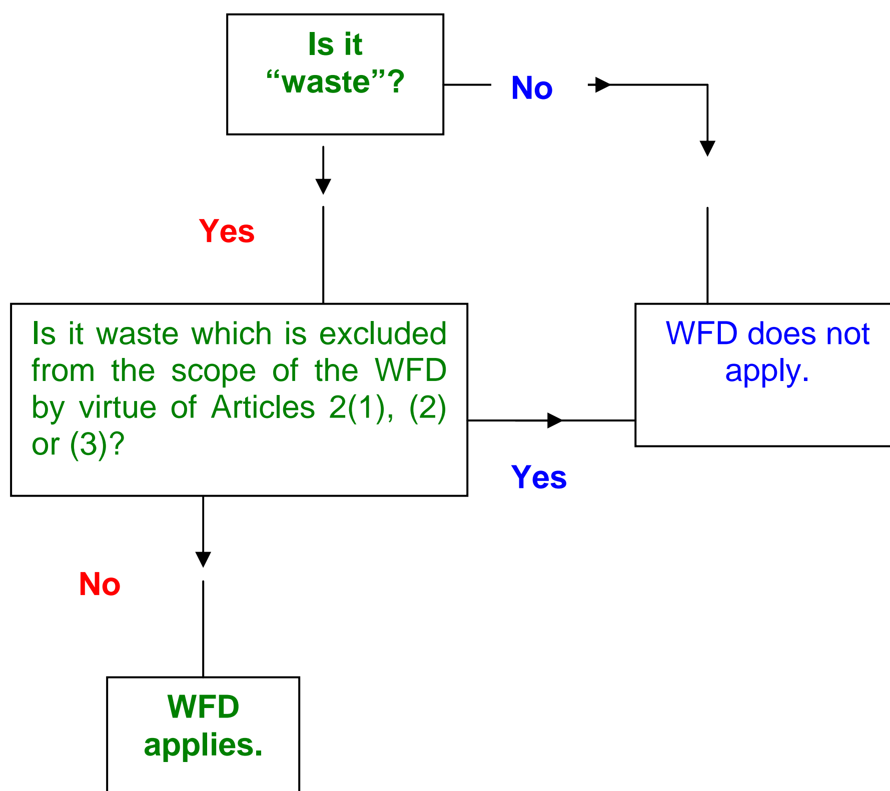
G3.16 For all of these reasons, it is important that the concept of waste is interpreted neither too widely nor too narrowly.

Exclusions from the scope of the WFD

G3.17 The effect of Article 2(1), (2) and (3) is to exclude specified wastes from the scope of the WFD. However, Articles 2(1), (2) and (3) do not declassify substances as waste. What these provisions do is to provide exclusions from the scope of the WFD for the specified types of waste. The way in which this works is shown in the following diagram:-

39 Case C-187/93 *Parliament v Council* [1994] ECR I-2857, paragraphs 21 and 22, and Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 41.
40 *DaimlerChrysler* [2001] ECR I-9897, paragraph 42.
41 Case C-221/06, paragraph 67.
42 Case C-444/00.

Figure 1



G3.18 The exclusions are transposed by means of the following provisions in the Regulations listed in paragraph G1.11 above. The effect is to provide that "waste" in the transposing Regulations means anything that is waste within the meaning of Article 3(1) of the WFD, as read with Article 5(1) on by-products, and which is not excluded from the scope of the WFD by Articles 2(1), (2) or (3):-

England and Wales	**Northern Ireland**
Regulation 2	Regulation 9(2)
Regulation 47	Regulation 25
Schedule 2 paragraph 1	Regulation 46
Schedule 3 paragraphs 2, 4(2), 6 to 8, 13	Regulation 36(c) and (j)
Schedule 4 paragraphs 2 and 3(6)	

G3.19 An amendment to Article 2(1)(a) of the WFD as codified in Directive 2006/12/EC was made by Article 35 of Directive 2009/31/EC on the geological storage of carbon dioxide[43]. The exclusion is for carbon dioxide captured and transported for the purposes of geological storage and geologically stored in accordance with Directive 2009/31/EC, or excluded from the scope of that Directive by virtue of its Article 2(2). This exclusion is not listed in Article 2 of the WFD as revised in Directive 2008/98/EC. However, the European Commission has advised Member States of its view that the exclusion continues to apply in relation to the WFD as revised in Directive 2008/98/EC by virtue of Article 41 of that Directive and the provision that, "References to the repealed Directives shall be construed as references to this Directive...".

G3.20 There are three types of exclusions from the scope of the WFD:-

Type 1: The exclusions provided in Article 2(1)(a)-(e) are absolute exclusions in the sense that the exclusion of the specified wastes from the scope of the WFD is not dependent on the waste's being covered by other [Community] legislation. Further advice on Article 2(1)(d) and radioactive waste is provided in paragraphs G3.21-G3.22 below.

Type 2: The exclusions provided in Article 2(2)(a)-(d) are dependent exclusions. That is to say, the specified wastes are excluded from the scope of the WFD only "to the extent that they are covered by other Community legislation"; and

Type 3: The exclusion provided in Article 2(3) is "without prejudice to obligations under other relevant Community legislation". It applies to sediments relocated inside surface waters for certain purposes and if it is proved that the sediments are non-hazardous. This exclusion is in a different form to types 1 and 2 because its origins are in an amendment to the Environment Council's Common Position proposed by the European Parliament (i.e. the exclusion was not proposed by the European Commission or the Member States).

G3.21 The effect of regulation 15 of the Hazardous Waste (England and Wales) Regulations 2005[44], the Hazardous Waste (Wales) Regulations 2005[45] and the Hazardous Waste Regulations (Northern Ireland) 2005[46] is to treat certain types of radioactive waste as hazardous waste for the purposes of those Regulations. The radioactive wastes subject to control as hazardous waste are those which are exempt from the requirement for an environmental permit under regulation 12 of the Environmental Permitting (England and Wales) Regulations 2010[47] or Schedule 2, paragraph 38(a) to the Waste Management Licensing Regulations (Northern Ireland) 2003[48] by virtue of a suite of exemption orders made under the Radioactive

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43 Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0114:0135:EN:PDF.
44 S.I. 2005 No. 894.
45 S.I. 2005 No. 1806 (W. 138).
46 S.R. 2005 No.300.
47 S.I. 2010 No. 675.
48 S.R. 2003 No.493.

Substances Act 1993 and previous legislation; and now having effect in relation to the environmental permitting regime by virtue of regulation 72A-72D.

G3.22 Notwithstanding the exclusion provided by Article 2(1)(d) of the WFD, the effect of the transposing regulations for England and Wales and Northern Ireland is to apply non-hazardous and hazardous waste management controls to radioactive waste where an exclusion for the requirement for an environmental permit/waste management licence under a radioactive substances exemption order applies. These controls include the requirement for a permit for the recovery or disposal of waste, the registration of waste carriers and the duty of care.

G3.23 Article 2(4) of the WFD provides that, "Specific rules for particular instances, or supplementing those of [the WFD], on the management of particular categories of waste, may be laid down by means of individual Directives." However, in the *AvestaPolarit case*[49], the European Court explained that the categories of waste that are the subject of individual Directives under Article 2(4) remain subject overall to the WFD, even if individual rules derogating from its provisions are adopted on certain aspects or supplementary rules are adopted with a view to more extensive harmonisation of the management of the waste in question.

G3.24 As indicated in paragraph G1.17 above, there is a body of other legislation that applies the WFD's definition of waste. These other measures include the Landfill Directive and the Waste Incineration Directive[50] which set down minimum standards for particular waste disposal or recovery operations; the IPPC Directive[51] which applies to some waste management operations; and the Waste Shipments Regulation which sets down procedures and control regimes for the shipment of waste between Member States etc.

G3.25 This category of legislation may either have the same scope as the WFD - as in the case of the Landfill Directive, the IPPC Directive and the Waste Shipments Regulation; or it may set its own scope - as in the case of the Waste Incineration Directive. It depends on what provision is made in the legislation itself.

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49 Case C-114/01.

50 In the *Lahti Energia Oy* case (Case C-317/07), the European Court found that "..it is evident that the clear wording of Article 3(1) of Directive 2000/76 [the WID] defines 'waste' in the context of that directive as any 'solid' or 'liquid' waste as defined in Article 1(a) of Directive 75/442 [the WFD]....A literal interpretation of that provision is sufficient for a finding that only waste in solid or liquid form is covered by Directive 2000/76, and there is therefore no need to examine in addition whether the definition of 'waste' in Directive 75/442 itself covers waste in gaseous form." On this basis, the Court concluded that, "The definition of 'waste' in Article 3(1) of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste does not cover gaseous substances."

51 The effect of Article 81 of Directive 2010/75/EU is to repeal Directives 78/176/EEC, 1999/13/EC, 2000/76/EC and 2008/1/EC with effect from 7 January 2014.

Section Two: General principles of European court case law

Meaning of discard

G3.26 The definition in Article 3(1) of the WFD (see paragraph G3.1 above) provides a general test for whether a substance or object is to be regarded as waste or not. The basic question which the European Court has consistently addressed is whether the substance or object has been discarded by its holder. And a substance or object may be discarded for a range of reasons: it may be intentional or accidental, it may be voluntary or required and it may even occur without the holder's realising it. The "discard" test is applied in a very wide range of circumstances but, in each case, the test must be interpreted so as to give effect to the aims of the WFD and related legislation.

Discard has a special meaning

G3.27 The dictionary definition of discard is to get rid of something as useless or undesirable. That definition covers disposal operations but not recovery operations where waste is put to some use. But one of the main aims of the WFD is to ensure that recovery operations, as well as disposal operations, are carried out in a way which protects the environment and human health.

G3.28 Accordingly, the European Court has explained that the term "discard" has a specially extended meaning in the WFD and includes the recovery of a substance or object[52] as well as its disposal. So, a person may be regarded as discarding a substance or object if they are carrying out a recycling or other recovery operation in the course of their business even though the substance or object has a commercial value to them. And it makes no difference whether a disposal or recovery operation is carried out by the person who produced the waste or someone else[53]. In both cases the substance or object will be "discarded" and will be waste.

Intention to discard

G3.29 The WFD makes it clear that a substance or object is to be classified as waste if the holder ***intends*** to discard it. This might make it seem that the state of mind of the holder is key. However, the European Court has recognised that this would make the application of the WFD too arbitrary. The holder's intention is therefore to be inferred from his actions in the light of the aims of the WFD and having regard to factors set down by the European Court. It is a question of considering the factual circumstances and having regard to the aims of the WFD. The test is therefore an objective and not a subjective one.

Requirement or obligation to discard

G3.30 Sometimes it will not be necessary to infer intention. Under the WFD a substance or object which is required to be discarded is also to be classified as waste. The classification of a substance or object as one which its holder is required to discard

52 Joined Cases C-418/97 and C-419/97 *Arco*, paragraph 47.
53 Case C-129/96 *Wallonie*, paragraph 29.

may derive from an obligation imposed by EU law, national law or even as a matter of contract[54] – in each case the item will be waste.

G3.31 For example, Article 12 of the EU Animal By-Products Regulation[55] requires high risk Category 1 material to be "(a) disposed of as waste by incineration: (i) directly without prior processing…" or "in the case of Category 1 material referred to in Article 8(f), disposed of by burial in an authorised landfill…". These requirements constitute an obligation to discard such material and it must therefore be regarded as waste.

G3.32 Another example of a requirement to discard is Article 2 of the Mercury Regulation[56] which provides that, "From 15 March 2011, the following shall be considered as waste and be disposed of in accordance with [the WFD] in a way that is safe for human health and the environment:

(a) metallic mercury that is no longer used in the chlor-alkali industry;

(b) metallic mercury gained from the cleaning of natural gas;

(c) metallic mercury gained from non-ferrous mining and smelting operations; and

(d) metallic mercury extracted from cinnabar ore in the Community as from 15 March 2011."

Deliberate and accidental discards

G3.33 Article 36(1) of the WFD requires Member States to take the necessary measures to prohibit the abandonment, dumping or uncontrolled management of waste. The UK has put in place a range of controls to ensure that the management of waste is properly controlled; and to prohibit the abandonment or dumping of waste. The deliberate discarding of a substance or object (e.g. by abandonment or dumping) will result in its being classified as waste.

G3.34 But a substance or object discarded involuntarily may also be waste. In the *Van de Walle* case[57] the hydrocarbons that were accidentally spilled and which caused soil and groundwater contamination were held by the European Court to be waste even though no one knew at the time of the spill what was happening.

Case-by-case approach

G3.35 The difficulties in applying the discard test in a very wide range of circumstances have led the European Court to recognise a need for flexibility in adopting a case-by-case approach. The Court has consistently cautioned Member States not to adopt modes of proof, such as statutory presumptions, which would have the effect of restricting the scope of the Directive[58].

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54 Joined Cases C-418/97 and C-419/97 Arco, paragraph 86.
55 Regulation (EC) No 1069/2009.
56 Regulation (EC) No 1102/2008 on the banning of exports of metallic mercury and certain mercury compounds and mixtures and the safe storage of metallic mercury.
57 Case C-1/03.
58 Joined Cases C-418/97 and 419/97 *Arco*, paragraph 41; Case C-194/05 paragraph 52; and Case C-195/05

G3.36 This means that whether or not a substance or object is waste must be determined on a case-by-case basis in the light of all the circumstances and in a way which does not undermine the effectiveness of the WFD[59]. The Directive does not provide any decisive criteria for determining the intention of the holder to discard a given substance or object. The guidance in this Section explains the factors that the European Court has considered to be relevant in deciding whether or not something is waste. Often the European Court simply states that the existence of a particular factor **does not rule out** a classification as waste. There are however some positive indicators that the European Court has identified. It must be recognised that no single factor or indicator is conclusive. It is always necessary to consider all the circumstances.

Characteristics of the substance or object

G3.37 **The discard test relates to the conduct of the holder** and not to the intrinsic characteristics of the substance or object. This is consistent with the notion that any substance or object can be waste if its holder decides to discard it. **The consequence of this is that the characteristics of the substance or object cannot by themselves determine whether a substance or object is waste or not**. But this does not mean that the characteristics of the substance or object are not relevant at all.

Economic value

G3.38 The concept of waste does not exclude substances or objects even if they have a commercial value[60]. The WFD applies to the use of waste in recovery operations and in such circumstances the waste often has an economic value. Many wastes have some value in different parts of the world. If waste were to be defined in a way which confined it to items with no economic value that would undermine one of the WFD's main purposes (i.e. to control recovery as well as disposal operations and to ensure that both kinds of operation are carried out in a way which protects human health and the environment). There might also be an incentive in some cases to make nominal payments in order to avoid regulation.

G3.39 Substances and objects which have been discarded remain waste even though they have value to their current holder who collected them on a commercial basis for recycling[61]. Scrap metal is not recycled until it meets end-of-waste criteria adopted under Article 6 of the WFD (see paragraph G1.12(d)-(f) above) or it is re-processed into a new product (see references to the *Mayer Parry* case in paragraph G3.15 above and to the *Niselli* case in paragraphs G3.138-G3.139 below). So someone who purchases scrap metal with the intention of its being re-processed into steel is taken to have the intention to discard that material even though they may regard it as a valuable secondary raw material. There is no distinction based on whether a substance or object is marketable or not.

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paragraph 51.
59 Joined Cases C-418/97 and 419/97 *Arco*, paragraph 97.
60 Case C-359/88 Zanetti, paragraph 9.
61 Case C-359/88 *Zanetti*, paragraph 9.

Polluting characteristics of a substance or object

G3.40 Neither the potential to pollute nor the harmlessness of the substance or object in question is a decisive criterion for determining what its holder intends to do with it and hence whether it is waste.

G3.41 In the *Palin Granit* case[62], leftover stone resulting from stone quarrying had very little potential to pollute as it was inert. However, it was stored for an indefinite length of time to await possible use and so was waste. The Court found that the long-term stockpiling which was necessary was a burden to the holder and also presented the type of nuisance which the WFD seeks to address.

G3.42 There are also substances with hazardous properties which are not waste even if they cause pollution. An ordinary fuel may be burned without becoming waste even if it causes pollution. But waste which is recovered by burning as a fuel will be classified as waste and hence subject to regulation even if it presents a lower pollution risk when burned.

G3.43 This latter point is quite naturally sometimes difficult to understand – particularly where the degree of regulation that turns on the application of the waste definition is significant. Where the level of regulation is accepted as proportionate then there is usually no debate about the definition of waste. But where there is little or no flexibility in the regulatory regime, attention is often focussed on the definition of waste as the only means of avoiding regulation. The definition is seen as the problem even if the real argument concerns whether the controls applied are proportionate. The Court recognised this in the *Arco Chemie* case[63] when it explained that the polluting characteristics are only relevant to the level of control to be applied:-

> "The fact that substances may be recovered as fuel in an environmentally responsible manner and without substantial treatment is, indeed, material to the question whether the use of that substance as fuel should be authorised or encouraged or to the decision as to the degree of control to be exercised."

G3.44 The differences can perhaps be explained by considering the differences in our approach to products and waste. There are many products which present an environmental risk. The risks presented by such products are justified by the benefits of using the products. It is only when the risks are considered too high that products are banned (e.g. CFCs). Products will also be designed with particular uses in mind and will usually meet specifications. There will be instructions relating to their use and regulation in some form ensuring their safe use. Those who acquire the products will do so with the intention of using them in the way specified and will be careful to use them efficiently in order to keep costs down. However, the risks associated with the use of products are also increasingly being recognised and, as this occurs, the distinction between waste regulation and product legislation becomes less marked. In this context, examples of product legislation include the Construction Products Directive[64] and the REACH Regulation[65].

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62 Case C-9/00.
63 Joined Cases C-418/97 and C-419/97.
64 Directive 89/106/EEC (as amended).

Transfer to another person

G3.45 Sometimes a person may not have a use for a substance or object but may know that some other person would have use for it. The questions in such cases are whether the fact that the first person wants to get rid of the substance or object means that it is waste or whether the fact that another person has a use for it means that it is not waste? The answer is that simply transferring a substance or object from one person to another does not in itself affect its classification as waste.

G3.46 For example, the Freecycle Network™[66] is a scheme aimed at encouraging people to offer to others, free of charge, goods they no longer have a use for (e.g. a television (TV) or personal computer (PC)). In many ways, this is similar to someone taking clothes to a charity shop. And in neither case is the substance or object waste. In both cases, the substance or object is being transferred with the intention that it should continue to be used for its original purpose (i.e. it is being re-used as non-waste).

G3.47 However, a TV or PC is classified as waste if a householder decides to take their TV or PC to a local authority/district council "civic amenity site". This is because civic amenity sites are facilities which local authorities/district councils, as waste disposal authorities, have a duty to provide as places "at which persons resident in its area may deposit their household waste…". The intention of the householder in taking the TV or PC to a civic amenity site is to ensure that it can be safely recovered/recycled or disposed of.

G3.48 The difference between these two situations is the circumstances that surround the transfer. In the former, the person transferring the substance or object has made an assessment that someone else actually wants it. In the latter, the assumption is that no one else wants the TV or PC and they will therefore remain waste until they have been subject to a recovery operation (see paragraphs G4.11-G4.16 below).

G3.49 Another context where the issue of transfer arises is where activities give rise to a residue for which the holder has no use; and if there is a demand for that residue the holder may argue that it is not waste. The European Court has addressed this type of situation through the case law on by-products; and whether the residue is waste or not will be assessed according to the principles set down in the case law. However, it is clear that the mere transfer again does not determine whether the residue is waste. For example, a construction activity may generate large amounts of excavated unpolluted natural soil. If the holder has no use for the soil then it may present a disposal problem that has to be addressed by the soil's classification as waste. However, if that soil is suitable for use without any treatment and is certain to be used for that purpose, it may be classified as a non-waste product, i.e. on the basis that it satisfies the by-products legal test. The Definition of Waste: Development Industry Code of Practice version 2[67] explains how this can be achieved in Section 2 "Principles for the use of Materials as Non-waste".

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65 Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).
66 See http://www.freecycle.org.
67 At: http://www.claire.co.uk/index.php?option=com_content&view=article&id=444:version-2-of-the-definition-of-waste-development-industry-code-of-practice-released&catid=1:news&Itemid=93

Some positive indicators

G3.50 The indicators below are positive indicators in favour of a substance or object being classified as waste, although no one indicator is conclusive.

The European Waste Catalogue

G3.51 Article 1(2) of the WFD as codified in Directive 2006/12/EC required the Commission to draw up a list of wastes ("the European Waste Catalogue" (EWC)) belonging to the categories listed in Annex I to that Directive and to review and revise it from time to time. (See also Article 7 of the WFD as adopted in Directive 2008/98/EC.) The first EWC was initially established by Commission Decision 94/3/EC and then replaced by Commission Decision 2000/532/EC[68].

G3.52 However, the EWC[69] is not an exhaustive list of wastes. Indeed it would be very bureaucratic to attempt a comprehensive list of all wastes as new substances are produced and new uses for existing substances are found. A substance or object is therefore only to be classified as waste if the holder discards or intends or is required to discard it[70]. It is also the case that an item not included in the EWC will be classified as waste if the holder discards or intends or is required to discard it.

G3.53 ***But the inclusion of a substance or object in the EWC is indicative that it may be waste***. It can therefore be a helpful starting point in assessing whether a substance or object is waste or not - even if it is not the end of the story.

Residues

G3.54 Waste often arises from something that is left over from some other process or use. It is not the intended result and hence it is not designed for use in a particular manner. Or it can no longer be used for the purpose for which it was originally conceived. Its composition may be uncertain or it may contain impurities or contaminants from processing. Its economic value may be low. There are not the same incentives to treat it with the same care or the same guarantees that it will be used in the intended manner. The likelihood is that its holder will seek to get rid of it in some way which has the potential to cause pollution. For these reasons, the starting point is that residues are waste - even if they can be used in some way. Many waste residues can be put to beneficial use. A precautionary approach should be adopted when it comes to waste.

G3.55 However, some residues may be viewed as by-products and classified as non-wastes. There is a large body of case law dealing with this and Section 3 explains the criteria for deciding in what circumstances a residue is a non-waste by-product.

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68 A consolidated text of the Decision is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:226:0003:0024:EN:PDF.
69 Transposed in the List of Wastes (England) Regulations 2005 (S.I. 2005 No. 895) – available at http://www.opsi.gov.uk/si/si2005/20050895.htm.
70 Paragraph 1 of the *Introduction* to the Decision states, "..the inclusion of a material in the list does not mean that the material is a waste in all circumstances, Materials are considered to be waste only where the definition of waste in Article 1(a) of Directive 75/442/EEC is met." Directive 75/442/EEC was codified/consolidated in Directive 2006/12/EC, which has been replaced by Directive 2008/98/EC.

Negative economic value

G3.56 Although the value of a substance or an object does not preclude it from being waste (see paragraphs G3.38-G3.39 above), its value may be a relevant factor in deciding whether or not its holder discards or intends to discard it. If a substance or object has a negative value (so that the person disposing of it has to pay for it to be taken away) or depending on market conditions may at times have a negative value, that points towards its being waste since it is a burden on the producer or holder who therefore has an incentive to abandon, dump or otherwise dispose of it unlawfully.

Contaminating substances

G3.57 One of the reasons for controlling waste is that it is frequently contaminated by other substances which are a danger to human health or the environment. So, in the *Arco Chemie* case[71], the European Court considered that waste in the form of wood which was impregnated with toxic substances did not lose its classification as waste when it was transformed into chips or those chips were reduced to wood powder since it did not purge the wood of the toxic substances[72].

G3.58 Where a substance is contaminated by reason of its provenance, that may serve to indicate that it is waste. This is also true if its composition is uncertain.

Substance or object is commonly regarded as waste

G3.59 If something is commonly regarded as waste then that may serve to indicate that it is in reality waste. Not too much store can be set by this – for instance in the *Saetti* case[73] there was an indication that the company concerned regarded the petcoke as waste but this did not affect the conclusion of the European Court that it was a product and not a production residue. The European Commission's guidance on by-products discounts this as a factor too (see paragraph G1.13 above). Perhaps this is simply a reflection that in most cases it is clear whether something is waste or not – but in difficult cases the way a substance is commonly regarded will not help very much.

Substance or object has been consigned to an operation which is a common method of disposing or recovering waste

G3.60 When a substance or object has been consigned to an operation commonly regarded as a recovery operation (e.g. solvent regeneration) or a disposal operation (e.g. tipping underground), that will indicate the existence of waste. It is not always easy to tell, however, whether an operation is actually disposing or recovering waste and this is discussed below.

The relationship between the concept of waste and disposal, recovery, recycling and re-use

G3.61 The point that the European Court always returns to when interpreting the definition of waste is that it must consider the objectives of the WFD. The designation of waste is therefore to ensure that the aims of the WFD are met.

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71 Joined Cases C-418/97 and C-419/97.

72 Joined Cases C-418/97 and C-419/97 Arco, paragraph 96.

73 Case C-235/02.

G3.62 The WFD has two main objectives relevant to the interpretation of the definition of waste and both of these objectives need to be met:-

- to ensure that waste is controlled until it has been safely disposed of or recovered (Article 13) – see paragraph G3.8 above; and
- to reduce the overall impacts of resource use and to improve the efficiency of such use (Article 1). The WFD itself seeks to fulfil this objective by requiring Member States to apply a waste hierarchy as a priority order in waste prevention, waste management legislation and waste policy (Article 4) – see paragraph G3.11 above.

G3.63 There is a degree of tension between these two objectives because the WFD seeks both to encourage the use of waste as a resource and, in the interests of the environment and human health, to regulate the use of waste. The question in many "definition of waste" cases is whether a particular operation is to be regarded as the ordinary use of a substance or its submission to a waste management operation which is subject to regulation. It is helpful therefore to consider the nature of these waste management operations.

Disposal

G3.64 Disposal operations are primarily aimed at getting rid of waste. Any benefit that results as a secondary consequence will not affect the nature of the operation. There will usually be very little debate as to whether an operation which looks like disposal involves waste or not. If the ultimate aim of the operation is to get rid of the waste, there is a clear intent to discard.

G3.65 Sometimes, though, it will not necessarily be obvious. The use of slurry as a fertiliser does not amount to the disposal or recovery of waste where the use is part of a lawful practice of spreading and the spreading takes place on clearly identified parcels of land without prior processing[74]. The reason for this is that animal faeces amount to a by-product of keeping animals and comprise a traditional fertiliser for which proprietary fertilisers may be regarded as a substitute. However, if slurry is simply spread as a means of disposal then it will be waste.

G3.66 It should not be difficult in practice to distinguish between the use of slurry as a natural fertiliser and the spreading of slurry on land as a means of simply getting rid of the slurry. It should be obvious that slurry is being spread on land simply to get rid of it where such application is in quantities which exceed those necessary to benefit the land. This can be judged from the point of view of good agricultural practice – and it will be clearer in cases where there is a breach of the Nitrates Directive (91/676/EC).

Recovery

G3.67 Recovery is defined in Article 3(15) of the WFD as:

"…any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfill a particular

74 Case C-416/02.

function, or waste being prepared to fulfill that function, in the plant or in the wider economy".

G3.68 The principal objective of a recovery operation is to ensure that the waste serves a useful purpose by replacing other substances which would have had to be used for that purpose and thereby conserving natural resources. This is known as "the substitution principle" [75].

G3.69 Submission of a substance to a recovery operation will involve the discarding of the substance as any other interpretation would mean that recovery operations would not be subject to regulation. This is why it is important to distinguish between recovery and the ordinary use of substances or objects. Recovery operations are still to be promoted in order to achieve more efficient use of resources. But the latter objective is not an argument to free from regulation what is properly regarded as a recovery operation. The effect of classifying something as waste is not to prevent its being recovered by being used in some way - it is to prevent that operation taking place without the necessary precautions also being taken to protect the environment and human health. It is incumbent on legislators to promote recovery through the design of the regulatory regime. The UK has done this, in particular, by making use of its discretion under Article 24 of the WFD to adopt a number of exemptions from the Directive's permit requirements for recovery operations.

G3.70 Given that the primary objective of someone who carries out a recovery operation is to derive benefit from the substance (which they may have paid to obtain), it is unsurprising that there is often a great deal of difficulty distinguishing the recovery of waste from the ordinary use of substances. For instance, if a substance needs to be ground up in order to be used, is that to be regarded as ordinary processing or a recovery operation to enable use of the substance? The answer will depend on the circumstances as many factors will be relevant. The European Commission's WFD guidance on by-products (see paragraph G1.13 above) gives one example where the grinding or crushing of blast furnace slag is not regarded as waste processing but is instead an ordinary part of the industrial process carried out by steel producers. But grinding up waste wood into powder so that it can be used as fuel in a power station is a recovery operation – the wood is to be recovered by burning and grinding it as a necessary step in the process.

G3.71 The WFD includes a non-exhaustive list of recovery operations in Annex II to the Directive. These are intended to provide illustrations of the way these operations are carried out in practice. An operation may be a disposal or recovery operation within the meaning of the WFD even if it is not listed. Analogous operations also fall within the scope of the WFD. The Directive applies to new methods of disposing or recovering waste as well as existing methods which are not listed.

G3.72 A consequence of this is that the European Court has cautioned against concluding that a substance or object is waste solely on the basis that it undergoes an operation described in the Annexes to the Directive[76]. Some of the descriptions in the Annexes

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75 This substitution principle which was originally set in Case C-6/00 *Abfall Service AG*, paragraph 69 and is now incorporated in Article 3(15) of the WFD.
76 Joined Cases C-418/97 and 419/97 *Arco*, paragraph 49.

are confined to operations which apply only to waste but others are more abstractly expressed and could be applied to raw materials and other substances which are not waste. Thus, for example, R1 (use principally as a fuel or other means to generate energy) could be read as applying to ordinary fuels such as oil, gas or kerosene, but those substances are not waste. Similarly, R10 (land treatment resulting in benefit to agriculture or ecological improvement) could be read as applying to the use of fertilisers on land, which similarly should not be regarded as waste[77].

G3.73 This does not mean that no help in deciding whether a substance is waste or not can be derived from the way in which a substance is treated. ***The fact that a substance undergoes a process which is a common method of recovering or disposing of waste may be taken as evidence that it is being discarded and hence is waste***. For example, a lot of waste burns well and it is a common way of getting rid of waste. So if you have something which is unwanted or cannot be used for its original purpose, and you decide to burn it, that is a strong indication that it is waste. But all the circumstances must be considered.

G3.74 In the *Saetti* case[78], the European Court held that petroleum coke (petcoke) produced in an oil refinery and used to produce electricity which met the needs of the refinery was the result of technical choice and intended for use as a fuel (i.e. the Court found that the petcoke was a product and not a production residue). In such cases, the fact that use as a fuel for energy production is a standard waste recovery method is not evidence of discarding, since the intention is to produce a type of fuel which can be burned. If the fuel had not been regarded as a product, the conclusion may have been different.

G3.75 Another point to note is that recovery may take place over several stages. This means that submission to a recovery operation may not result in the substance or object being declassified as waste. If further recovery is necessary then it remains waste until it is the subject of a complete recovery operation and is fully recovered. Only in those examples of recovery operations that result in a final use of the substance (e.g. where waste is used as fuel to generate energy or as a fertiliser to benefit agriculture) will the waste always cease to be waste. In other cases, it will be necessary to assess whether the resulting substance needs to be controlled in order to meet the aims of the WFD. In the waste wood example (see paragraph G3.70 above), the grinding into powder is a necessary step in order to enable the waste to be used as fuel. In the *Arco Chemie* case[79], the resulting wood powder remained contaminated and so it was clear that it should still be controlled under the WFD and so continued to be classified as waste.

Recycling

G3.76 Recycling is a form of recovery and as such pursues the same objective of saving natural resources. Article 3(17) of the WFD defines recycling as follows:-

77 Joined Cases C-418/97 and 419/97 *Arco*, paragraph 50.
78 Case C-235/02.
79 Joined Cases C-418/97 and C-419/97.

"... any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It includes the reprocessing of organic material but does not include energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations".

G3.77 It is evident that a substance or object must first be classified as waste in order to be recycled within the terms of the WFD and related EU waste legislation (e.g. the Packaging Waste Directive). In other words, **recycling can only ever be carried out on substances or objects that are classified as waste.**

G3.78 One of the key aims of the WFD and related EU legislation is to promote the better use of resources by recycling. In this context, it is important to emphasise that products made from recycled waste are not inherently inferior or more dangerous than those derived from virgin products. The "stigma" of waste has been perceived as a problem which limits the beneficial use of many wastes - regardless of any regulatory impact of waste controls. The definition of waste is characterised in this context as "a barrier to recycling". But anyone engaged in recycling is processing waste so it is misconceived to argue that a recycling operation cannot be carried out because something is regarded as waste. The underlying policy behind the WFD is that recycling is to be promoted as a virtuous activity and that waste is a useful resource - and not simply inferior material that needs to be disposed of. This policy means the response to the perception of stigma is not to argue that only substances or objects that are disposed of are waste but is instead to acknowledge the waste origins of recycled products and to promote their use as a more sustainable use of resources.

G3.79 The definition of recycling requires the waste to be re-processed so as to obtain **a product, material or substance whether for the original or other purposes.** This differs from recovery operations which result merely in a change in the nature or composition of the waste (e.g. reducing waste wood into powder) so that the waste can serve a useful purpose. A new product, material or substance has been recovered and so all the material has re-entered the productive cycle. No further processing is required. **A recycling operation is therefore different in nature to other recovery operations in that it will always result in the substance in question ceasing to be waste when it is transformed.** The substance will cease to be waste before its final use.

Re-use

G3.80 It is perhaps also useful to clarify the position on re-use. The WFD as adopted in Directive 2008/98/EC draws a clear distinction between "re-use" and "preparing for re-use". The distinction is that the former is an activity which **does not** involve waste and the latter is an activity which **does** involve waste. The WFD defines these terms as follows:-

"'re-use' means any operation by which products or components that are not waste are used again for the same purpose for which they were conceived;" and

"'preparing for re-use' means checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing;"

G3.81 **A substance or object is not waste when it is being used for the purpose for which it was conceived** – unless the circumstances are exceptional (e.g. the use is unlawful). An example of such exceptional circumstances is Article 5(1) of Directive 96/59/EC on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (PCBs/PCTs) which provides that, "By way of derogation from Article 3 of [the WFD] Member States shall prohibit the separation of PCBs from other substances for the purpose of reusing the PCBs".

G3.82 **A distinction should be made between re-use as a waste prevention operation and re-use following a recovery operation**. In the former, the substance or object in question never becomes waste because it is designed or used in such a way as to enable re-use. The classic example in the packaging context is a milk bottle. In the other case, the object becomes waste but is then recovered in some way so that it can once again be used for the purpose for which it was conceived. In contrast to the milk bottle example, used chemical drum containers are likely to require a recovery operation to remove contaminating material and make the drum ready for use again. Another example here would be electrical equipment which is discarded by its holder at a civic amenity site. At that stage it is waste (see paragraphs G3.47-G3.48 above). However, if the waste is sorted to identify the equipment that is still fully functional and ready for use, then that equipment may cease to be waste once it is certain to be re-used.

G3.83 This guidance focuses on the key European Court decisions but the competent authorities recognise that there have been some important domestic cases on this issue too. For example, in *Inglenorth*[80] the High Court upheld a magistrates' decision to dismiss a waste prosecution on the basis that hardcore from a demolished building was not waste, even when the demolition was on one site and the intended re-use was on another. The Court considered the fact that the party producing the demolition material intended for it to be re-used as determinative. In reaching this conclusion, the Court focused on the status of the materials at the point where they were re-used, rather than the point at which they were produced and arguably this is the incorrect approach: If materials have already become waste, their subsequent re-use cannot "cure" them of their waste status.

G3.84 This view is consistent with the approach taken by the Court in the case of *R. v. W, C and C*[81]. This case arose out of the deposit at a farm of a large quantity of soil and subsoil, extracted from neighbouring farm land in the course of construction on

80 [2009] EWHC 670 (Admin).
81 [2010] EWCA Crim 927.

that land of new hotel premises. In assessing whether the material was “waste” the Court found that the question of immediate re-use could not determine the status of the material regardless of other considerations. The term “discard” had to be interpreted in the light of the aims of the WFD and material which was originally waste needed to continue to be so treated until acceptable recovery or disposal has been achieved. That is, having become waste, material remains waste unless something happens to alter its status.

Section Three: By-products

Products, by-products and residues

G3.85 Production processes produce a range of substances. Some of these substances will be sought (i.e. they will be products of the process) whereas others will not (i.e. they will be residues of the production process). The question arises as to whether production residues should be regarded as waste or not. If a residue can be regarded as a by-product then it does not become waste. This section provides guidance on Article 5 of the WFD and on the case law on by-products. Reference should also be made to guidance on the WFD which includes by-products issued by the European Commission which is explained in paragraph G1.13 above. The guidance in paragraphs G3.86-G3.115 below follows the structure adopted by the Commission in order to make it easier to read the two together. The starting point for this analysis is to describe the **three key concepts at the heart of this debate: products, residues and by-products.**

Products

G3.86 **A product is something which is manufactured or produced with the intention of using or marketing it.** Short of some problem occurring (e.g. a defect in the product or a market collapse), it will not be waste when manufactured. Products are not manufactured with the intention of their being discarded.

G3.87 A production process may be intended to produce several different products. Each will be a product as long as it is sought by the producer – that is it is intentionally produced as a result of a technical choice.

G3.88 If a substance or object results automatically from the process (i.e. it is not intentionally produced), it may still be regarded as a product if it is like other products which are produced by the same enterprise and is certain to be used. This may occur in industries which split raw materials into several different fractions which often have very similar end uses. It may be difficult in such cases to decide which fraction is the residue. The case law recognises that in such cases there is no practical difference between a residue that arises automatically and products which are intended to be produced. The case of *Saetti* (refining of crude oil to produce fuels) is an instance of this[82]. In that case the Court commented that even if petroleum coke had automatically resulted from the refining process it would still be regarded as a petroleum product and not a waste residue if certain to be used mainly for the same purposes as the other substances produced in the refinery.

G3.89 In *Commune de Mesquer* v *Total France SA, Total international Ltd*[83], the European Court confirmed that a marketable and useable fuel is not a waste, but if it is spilt and can no longer be used without having to be processed, it is waste. The question was whether heavy fuel oil, as the product of a refining process, meeting the user's specifications and intended by the producer to be sold as a combustible fuel, could be treated as waste within the meaning of the WFD. The European Court held that such a substance does not constitute waste where it is used or marketed on

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82 Case C.235/02, paragraph 45,
83 Case C-188/07.

economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing. The European Court also held that, conversely, such hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and washed up on the coast, constitute waste where they are no longer capable of being exploited or marketed without prior processing.

Residues

G3.90 **A residue is a substance or object which results from a production process which is not, in itself, sought for a subsequent use[84].** The fact that a residue is unwanted when it is first produced is evidence that it is waste since unwanted objects are more likely to be discarded.

G3.91 Note that this analysis applies to **production** residues[85]. It does not apply to consumption residues. The circumstances when residues arise will influence their nature and composition and hence the likelihood that they are waste. It is felt that a general approach is possible in relation to production residues that cannot be applied to consumption residues. For example, scrap metal may arise in the context of a production process (e.g. offcuts) or following the use of products (e.g. from end-of-life vehicles). The former is likely to be less contaminated and more predictable and, if it complies with the by-product criteria, it will not be waste[86]. That said - whether any substance is waste or not ultimately depends on the discard test.

By-products

G3.92 It is recognised that there are circumstances where a genuine use may be found for a residue. In such circumstances the substance may not be regarded as waste but instead may be regarded as a by-product which the undertaking intends to exploit or market.

G3.93 **It is important to understand the distinction between a product and a by-product. The former is intended to be produced whereas the latter is not.** If a substance is intentionally produced, it is a product and in principle is not waste. If it is not intentionally produced then it is necessary to assess whether it is a residue which is being discarded or a by-product which is being used. The concept of a by-product is used to distinguish between residues which are waste and those which are not. If it is considered to be a by-product then, at that point, it has the same legal status as a product - and so for instance would be subject to any applicable product legislation (e.g. the REACH Regulation[87]).

Is the substance or object a product or a residue?

G3.94 It can be seen from the above that the first question is whether a particular substance is a product or a residue. If the substance is deliberately produced as a result of a technical choice then it will be a product and will not be waste.

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84 Case C-9/00 *Palin Granit*, paragraph 32.
85 Article 5(1) of the WFD specifically refers to substances or objects resulting from a production process.
86 The European Court has applied the by-products test by analogy in this way – see case C-188/07.
87 Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

G3.95 The European Commission points to some considerations which are relevant to assessing this question. If the manufacturer could have produced the primary product without producing the material concerned but chose to do so then this is evidence that the material concerned is not a production residue. Other evidence that the production of the material concerned was a technical choice could include a modification of the production process in order to give the material concerned specific technical characteristics.

G3.96 If the undertaking seeks to limit the production of the substance concerned then that too might indicate that it should be considered a residue and not a product. If you try to limit the amount produced, that suggests that you do not intend to produce it. However, it may still be the case that it is certain to be used. This factor may be an indicator that the residue concerned might be waste.

G3.97 The Commission's guidance includes some examples of substances which are not waste. In the case of blast furnace slag for instance, they note that a technical choice is made which determines the type of slag that is produced, and that the material can be considered a by-product, falling outside the definition of waste.

G3.98 The Environment Agency regards gypsum from flue gas desulphurisation (FGD) abatement which is produced to a European specification and which is certain to be used for the manufacture of plasterboard to be a product specifically sought and not a waste residue. In that case, additional steps have been introduced to the process to convert calcium sulphite to calcium sulphate and then refine it to a specification to be usable as gypsum raw material. There would appear to be no other reason for putting the additional steps in other than to produce gypsum and so it should be considered an intended product.

If the substance or object is not intentionally produced and hence is a production residue, in what circumstances is it not considered waste?

G3.99 Article 5(1) of the WFD provides that a substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as a non-waste by-product – **but only if all** of the four conditions set out in Article 5(1)(a)-(d) are met. The provision was introduced on the initiative of Member States during the negotiation of Directive 2008/98/EC and was intended to reflect, and place on the face of the Directive, existing case law by the European Court on the distinction between production residues as waste and non-waste by-products.

G3.100 The decision as to whether or not a substance or object meets the four conditions set out in Article 5(1)(a)-(d) must be made on a case-by-case basis in the light of all the circumstances and in a way which does not undermine the effectiveness of the WFD. The conditions are that:-

(a) further use of the substance or object is certain;
(b) the substance or object can be used directly without any further processing other than normal industrial practice;
(c) the substance or object is produced as an integral part of the production process; and

(d) 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.

G3.101 As indicated in paragraph G3.99 above, these conditions/criteria have been drawn from principles developed in European Court case law which spell out when it is consistent with the WFD to regard the use of a production residue as a by-product which the undertaking wishes to exploit rather than a waste residue that is being discarded.

G3.102 It is important to stress that the Article 5 conditions may not provide the whole picture. As the Court explained in the *KVZ* case[88]:-

> "However, whether it is in fact 'waste' within the meaning of [the WFD] must be determined in the light of all the circumstances, regard being had to the aim of that directive and the need to ensure that its effectiveness is not undermined."

Certainty of further use

G3.103 The main consideration here is to be satisfied that there is a genuine demand for the substance. If there is no demand, the undertaking which produces the substance or object may have to store it for a significant period until a customer comes along. In those circumstances, the substance or object is to be regarded as a burden on the holder and hence waste.

G3.104 Circumstances may arise in which some of the residue which is produced is classified as waste because it is discarded but an identifiable proportion of the residue is not classified as waste because it is capable and certain of use without prior processing. This distinction was made in relation to leftover rock in the *AvestaPolarit* case[89]. In that case, the European Court found that the holder of the leftover rock from a mining operation discarded it with the consequence that it was classified as waste – even where it was put to alternative use (because some prior processing was required in many of those cases). However, the Court also found that the leftover rock could be classified as a non-waste by-product where the holder used it lawfully for the necessary backfilling of the mine from which it had been extracted and provided guarantees as to the identification and actual use of the leftover rock to be used for that purpose.

G3.105 One way in which certainty of further use may be demonstrated is through the existence of contracts – although contracts are not always necessary. As explained in paragraphs G3.38-G3.39 and G3.56 above, the economic value of a residue can be relevant in assessing whether the likelihood of the proposed use occurring is sufficiently high to conclude that the substance will be used. This is not to say that economic value will by itself determine that the substance or object is not waste. Other circumstances will be relevant (e.g. whether it needs to be processed or whether the proposed use presents risks which the WFD seeks to control).

88 Case C-176/05.
89 Case C-114/01.

Further processing prior to reuse

G3.106 All raw materials require some processing in order to be made into products. Processing as part of an ordinary production process is not ordinarily a waste management operation.

G3.107 However, a substance or object may be classified as a production residue, and as waste, if it is necessary to subject it to further processing in a pre-treatment or recovery process before it is suitable for use [90]. Processing in this context is there to address the characteristics that render the substance waste.

G3.108 Article 5 of the WFD does not preclude further processing which is "normal industrial practice". Whether further processing falls within this definition will be determined by reference to the overall circumstances. An example of the European Commission's approach is given in its guidance on by-products (see paragraph G1.13 above) regarding blast furnace slag. Whilst this slag needs to be ground up so that it can be used for construction purposes, doing so is not to be regarded as further processing prior to re-use; and the Commission concludes that: "This material can therefore be considered a by-product and fall outside the definition of waste."

Produced as an integral part of a production process

G3.109 Prior to the adoption of the WFD as Directive 2008/98/EC, there was some debate as to whether the residue had to be used in the production process which gave rise to it for it to be considered a by-product. In this context, the European Court considered what "integral to the production process" meant. The requirement in their terms is not that the substance is **used** as an integral part of the production process but that it is **made ready for further use** as an integral part of the production process. This is consistent with the wording of Article 5(1)(c) of the WFD which makes no reference to the substance being used in the process.

G3.110 The production process may in principle be the original production process or a different one, run by the same or by different operators. A good example of these conditions applied in practice is spent grains at a brewery which are used as animal feed or spent yeast used in Marmite™ production. It would be misleading to describe the brewing process and the Marmite™ production process as integral parts of the same production process. But it would be accurate to say that the spent grains or spent yeast are certain to be used in a subsequent process. As far as the brewery is concerned, spent yeast is as much a part of its business as beer production. It is certain to be used and its further use does not involve any processing outside a normal production process. An example of a by-product that can be marketed and used directly is uncontaminated sawdust from a sawmill that may be used without any further processing as animal bedding.

Further use is lawful

G3.111 Article 5(1)(d) effectively defines this test by stating that the term means that "the substance or object fulfils all relevant product, environmental and health protection

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90 Case C-9/00 *Palin Granit*, paragraph 36; Case C-114/01 AvestaPolarit, paragraph 41.

requirements for the specific use and will not lead to overall environmental or human health impacts."

Use of a residue as a fuel

G3.112 If a residue is used as a fuel in place of normal fuel that will be evidence that the residue is waste. In a sense this is not specific to residues though the fact that the substance is a residue and is subject to a common form of waste recovery appears to combine to create a strong impression that the substance is waste. This is why it was significant in the *Saetti* case[91] that the petcoke was considered to be a product and not a production residue. It is more difficult to envisage circumstances where a residue which is burnt without prior processing is not waste.

Residue can only be disposed of

G3.113 Similarly if the proposed uses of a residue all involve its destruction or disappearance in some way then that too is evidence that anyone acquiring it is simply acquiring it in order to discard it. So a residue that can be used in some other production process (e.g. in construction) is less likely to be considered waste than one which can only be burned.

Fitness for purpose

G3.114 If the residue is put to a use for which it is not suited, that may create the impression that it is in reality being discarded. This might be the case for a production residue which is spread on land. There may be agricultural benefit from the spreading but it would be difficult to conclude that it is equivalent to traditional or proprietary fertilisers. It may also present a risk due to the presence of contaminants.

Special precautions due to environmental hazards

G3.115 Many products present environmental risks and require special handling without being made subject to regulation as waste. The point about residues is that their provenance may often give rise to contamination of the type the WFD seeks to control. A residue which automatically arises from a production process will often present risks which are quite different to a product designed to meet a particular specification and to be used for a particular purpose. If special precautions need to be taken in relation to the use of a residue then that is an indicator that it should be regarded as waste and subject to control.

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91 Case C-235/02.

Section Four: End of waste

When waste ceases to be waste

(a) Article 6(1) and (2) of the WFD

G3.116 The effect of Article 6(1) and (2) of the WFD is to enable measures to be adopted, under a procedure known as "comitology with scrutiny", providing end-of-waste criteria for specified waste streams. Article 6(1) provides that the specified waste ceases to be waste within the meaning of Article 3(1) when it has undergone a recovery operation, including recycling, and complies with end-of-waste criteria adopted under the terms of Article 6(2). The criteria must be adopted in accordance with the conditions set out in Article 6(1)(a)-(d) which are that:-

(a) the substance or object is commonly used for specific purposes;
(b) a market or demand exists for such a substance or object;
(c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
(d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.

G3.117 Following adoption of Directive 2008/98/EC, the European Commission published information about its Article 6 end-of-waste project on its website[92] which confirmed that it "intends to prepare end-of-waste criteria for ferrous scrap metal, aluminium scrap metal, copper scrap metal, paper and glass." Since then the end-of-waste criteria for ferrous scrap metal and glass have been adopted and paper, copper, biodegradable waste (compost and digestate) and waste plastics are in train[93].

G3.118 At the date of publication of this guidance, end-of-waste criteria have been adopted for ferrous and aluminium scrap metal and glass. The criteria are set out in Council Regulation (EU) No 333/2011[94] which applied from 9 October 2011. The Council Regulation on Glass was adopted on 9th July 2012. The Regulations have direct effect – which means that they apply throughout the EU and do not have to be transposed by Member States into their national legislation.

When waste ceases to be waste

(b) Article 6(4) of the WFD

G3.119 The effect of Article 6(4) of the WFD is to provide that, where end-of-waste criteria have not been set at EU-level under Article 6(1) and (2), Member States may decide on a case-by-case basis whether certain waste has ceased to be waste taking account of applicable case law. The remainder of this Section of the guidance addresses the circumstances in which decisions are taken under the terms of Article 6(4) of the WFD.

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92 At: http://ec.europa.eu/environment/waste/framework/end_of_waste.htm.
93 The technical development work is carried out under the auspices of the Commission's Joint Research Centre (JRC) and information about this work is available at http://susproc.jrc.ec.europa.eu/activities/waste/.
94 Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:094:0002:0011:EN:PDF.

G3.120 Once a substance or object becomes waste, something usually needs to be done to it in order for it to cease to be waste. Depending on the circumstances, this can vary from something relatively minor to quite extensive processing. The processing will often comprise one or more recovery operations.

G3.121 As explained below, submission to a recovery operation will not necessarily result in waste ceasing to be waste. This means that an assessment of the discard test needs to be applied to any substance or object that results from a recovery operation.

G3.122 Sometimes the assessment will be clear. Once a waste is suitable for re-use for the purpose for which it was used before it became waste, it will no longer be waste. Therefore, an operation which prepares a waste so that it is re-used for its original purpose will result in that object ceasing to be waste.

G3.123 However, in other cases it will not be obvious. The European Court has though provided some guidance as to the stage at which the objectives of the WFD (or indeed other Directives if specific legislation also applies) are achieved and substances or objects cease to be waste.

General principles - complete recovery operations

G3.124 The European Court has considered the issue generally with reference to the concept of a complete recovery operation. As noted in the *OSS* case[95] (see paragraph G3.147 below), this has not resulted in a clear distinction and much is left to national authorities to assess in relation to the cases that come before them.

G3.125 A complete recovery operation is one which has the effect of transforming waste into a distinct product with characteristics that are the same as or analogous to a raw material, so that it may replace that raw material. The waste has not undergone a complete recovery operation if, after the operation has been carried out, the waste substance remains contaminated – for example because of its provenance. Waste controls are still needed where this is the case.

G3.126 The European Court has only been prepared to say that when waste has undergone a complete recovery operation, it does not necessarily lose its classification as waste[96] - it is only one factor to be taken into consideration in assessing the discard test. However, the European Court has not expressed what the other factors may be.

G3.127 Whilst in theory this can be a difficult issue, practical approaches are possible and in this regard the UK has already developed some examples of complete recovery operations. These are reflected in the national end-of-waste protocols which have or are being developed by the Environment Agency and WRAP(see paragraphs G1.21-G1.23 above).

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95 *R (on the application of OSS Group Ltd)* v *Environment Agency and others* ([2007] EWCA Civ 611).

96 Joined Cases C-418/97 and C-419/97 *Arco*, paragraphs 94 and 95.

Examples of recovery operations that will not result in "end-of-waste"

G3.128 There have been some examples of recovery operations which have not resulted in waste ceasing to be waste. These are often referred to as "pre-treatment" or "pre-processing" operations.

G3.129 In the *Arco Chemie* case[97], waste in the form of wood chips which were impregnated with toxic substances was ground into wood powder so that it could be burned in a power station. The European Court found that the waste was being subjected to pre-processing since these operations did not purge the wood of its toxic qualities or have the effect of transforming the waste into a product analogous to a raw material. The processing resulted in making the waste suitable for burning in a power station. This was therefore an example of pre-processing prior to recovery.

G3.130 Similarly, in the *Castle Cement* case[98], fuel produced by mixing waste solvents and, in the *Scottish Power* case[99] (Longannet), fuel produced by drying and pelletising sewage sludge, were classified by the Courts as waste throughout their recovery and final use since:-

- the relevant operations did not alter the nature of the wastes from which they were derived;
- the fuels retained their environmentally threatening nature;
- the processes were therefore pre-treatment processes; and
- the objectives of the WFD were achieved only when the fuels had been safely burned and the energy generated had been utilised.

G3.131 Operations which merely dry, chip or grind a waste to be used as fuel are unlikely to rid a substance of its waste status before its final use. They will not address any contaminants present in the substance. They will not produce a product which is distinct from the waste. As the resulting substance is to be used in a manner which is a common form of recovery operation (i.e. recovering energy by burning) the suggestion will be that this is mere pre-treatment.

Examples of recovery operations that will result in "end of waste"

G3.132 This guidance has already given examples of two types of recovery operations that will result in substances and objects losing their waste status. The first is a recycling operation (see paragraphs G3.76-G3.79 above) and the second is an operation which prepares discarded substances and objects for re-use (see paragraph G3.82 above).

G3.133 Recovery operations which make the waste suitable for re-use are often very minor operations. A substance or object which becomes waste may not need very much to be done to it in order to rid it of its waste status (e.g. a sorting operation may identify those substances and objects which can still be used for their original purpose). So even though less is done to the waste than in some of the examples cited in the previous section, it will still be consistent with the WFD not to regulate

97 Joined Cases C-418/97 and C-419/97.
98 Castle Cement v. Environment Agency (22nd March 2001) Case No: CO/2635/2000.
99 Scottish Power Generation Ltd v Scottish Environment Protection Agency 2005 SLT 641.

the substance or object as waste – provided there is certainty that the substance or object can be used in the same way it was used before it became waste, it will have been recovered and should not be regarded as waste.

G3.134 In the case of *Environment Agency* v *Thorn International UK Ltd*[100], the Divisional Court considered the case of electrical equipment collected by distributors of electrical equipment under new-for-old schemes, where the collected old equipment was then bought and refurbished for resale by a repair company. The Court held that the items bought by the repair company were not waste even though they needed repair before resale. The judgment turned on an assessment of the particular facts of the case and the Environment Agency does not propose to derive a broad principle from it; rather, the Agency intends to restrict the application of this judgment to cases where it can be shown that, where discarded electrical and electronic equipment is obtained for refurbishment, there is a very high degree of probability that all the items selected will be repaired and reused. The Agency's position is as follows:-

- Waste electrical and electronic equipment (WEEE) remains waste until it has been completely recovered. Recovery will commonly involve recycling of materials or dismantling items to obtain parts, but can also occur, in limited circumstances, where WEEE is subject to a competent assessment and segregated for immediate reuse or for reuse following repair. If WEEE is segregated for reuse, the reusable WEEE will only cease to be waste at the time of segregation if the holders have an auditable system that ensures that almost all of the items will in fact be reused (following repair if needed).

- If an overseas refurbisher is contracted the home contractor must be able to clearly identify the refurbisher and have a mechanism for ensuring that the equipment will be refurbished and reused. In assessing whether repair is probable, the Agency will take account of the type and condition of equipment, the way it is contained and transported, and the basis for considering that there is a very high probability that almost all the segregated equipment will in fact be repaired and reused.

G3.135 Further information on how WEEE is regulated can be found on the Environment Agency's website[101].

G3.136 A recovery operation can also occur when a substance is recycled. "Recycling" is defined in Article 3(17) of the WFD (see paragraph G3.76 above). A similar definition is used in the Packaging Waste Directive as follows:-

> "the reprocessing in a production process of the waste materials for the original purpose or for other purposes including organic recycling but excluding energy recovery".

G3.137 The Packaging Waste Directive definition was analysed in some detail in the *Mayer Parry* case[102]. Although this case pre-dates the definition of recycling in Article

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100 [2008] WLR (D) 219.
101 At: http://www.environment-agency.gov.uk/business/topics/waste/32084.aspx.

3(17) of the WFD and the provisions in Article 6(1) and (2) enabling the adoption of EU-wide end of waste criteria, the similarities between the two recycling definitions means that it is still of some use in considering what may be considered recycling. The reprocessing of the waste involves a transformation of the waste into a new material or product which possesses characteristics comparable to those of the material from which the waste was derived. Therefore, recycling is seen as a process which does more than merely change the nature or composition of the substance – it results in an entirely new material or product which can no longer be regarded as waste. The environmental risks presented have been dealt with and the substance has been brought back into the productive cycle.

G3.138 In the *Niselli* case[103], the Court made clear that it is only in exceptional circumstances that recycled substances, like products, will be waste. It is not possible to distinguish products derived from recycled material from those made from primary raw materials:-

> "subject to the case where the products obtained are in their turn abandoned, the point at which the materials in question cease to be classified as 'waste' cannot be fixed at an industrial or commercial stage subsequent to their reprocessing into steel products, because, from that point, they can hardly be distinguished from other steel products made from primary raw materials."

G3.139 It is therefore important to determine the point at which waste streams are considered to be recycled. In *Niselli*, the Court held that secondary raw materials derived from scrap metal and used in steel making continued to be classified as waste until they had actually been recycled into steel products:-

> "In the earlier phases, they cannot yet be regarded as recycled, since the reprocessing has not yet been concluded."

G3.140 Paragraphs G3.144-G3.163 below discuss the specific question, "Can waste derived fuel cease to be waste prior to use as a fuel?". In this context, reference is made to the three part test set by the Court of Appeal in the *OSS* case[104]. In that case the Court was asked whether it was possible for waste lubricating oil which is to be used as fuel to cease to be waste before it is burnt. The Court concluded that waste lubricating oil was no different from any other waste: it might cease to be waste if it had been completely recovered. Accordingly, the Court discussed at what point complete recovery will have occurred. The Court discussed the difficulties inherent in the European Court jurisprudence and proposed the following three-part test:-

> "It should be enough that the holder has converted the waste material into a distinct, marketable product, which can be used in exactly the same way as an ordinary fuel and with no worse environmental effects."

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102 Case C-444/00.
103 Case C-457/02.

104 R (on the application of OSS Group Ltd) v Environment Agency and others ([2007] EWCA Civ 611).

G3.141 The competent authorities do not consider that they have the necessary authority from the Courts to apply the three-part test set in the *OSS* judgment as a general end-of-waste test i.e. a test that applies to determine the complete recovery of wastes other than wastes processed for the purpose of producing waste derived fuels. However, the competent authorities consider that where other non-fuel products comply with the three-part test set in the *OSS* judgment then it is likely that they will also cease to be waste.

G3.142 To address the circumstances in which neither **(i)** EU-wide end-of-waste under Article 6(1) or (2) of the WFD (see paragraphs G3.116-G3.118 above) nor **(ii)** national end-of-waste protocols adopted under Article 6(4) of the WFD apply (see paragraphs -G1.144 below), the Environment Agency has set up a system under which businesses and other organisations may make end-of-waste submissions for specific types of waste.

National end-of-waste protocols

G3.143 The Waste Protocols Project, now closed, was jointly run by the Environment Agency (EA) and the Waste and Resources Action Programme (WRAP) using funding made available by the Government and contributions from other organisations (e.g. Northern Ireland EA). The main aim of the project was to develop national Quality Protocols (QP) to help determine when specified wastes can be considered to have been fully recovered and no longer waste for the purposes of the WFD. The EA is committed to reviewing the existing QPs. The EA is now running EQual, a part funded LIFE+ programme that will encourage the use of products made from waste. The initiative started in September 2011 and will run until 2015. Through EQual the EA aims to fulfil the potential of the waste protocols concept and enable it to achieve the goal of self sustainability, for the benefit of the waste industry, waste policy makers and regulators in Europe. The project is co-funded and supported by industry. Further information about the EQual project is available on the EA's website[105]

G3.144 The national end-of-waste protocols developed by the Environment Agency are essentially "modes of proof" for certain specified waste streams – taking account of European Court case law. As such, the protocols are recognised in the "End-of-waste status" provision in Article 6(4) of the WFD (see paragraph G3.119 above).

G3.145 Further information about the Waste Protocols Project, and the waste streams for which end-of-waste protocols have been developed, is available on the Environment Agency's website[106] (England and Wales); and on the NIEA website (Northern Ireland)[107].

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105 At: http://www.environment-agency.gov.uk/aboutus/wfo/134219.aspx
106 At: http://www.environment-agency.gov.uk/business/topics/waste/32154.aspx.
107 At: http://www.doeni.gov.uk/niea/index/about-niea/better_regulation/waste_quality_protocols.htm.

Can waste derived fuel cease to be waste prior to use as fuel?

G3.146 In the UK, the end-of-waste question that has been raised more than any other is whether a particular waste derived fuel has ceased to be waste before it is used as a fuel. The main reason why this is a particular issue is that the requirements of the Waste Incineration Directive (WID) mean that waste which is used as fuel is subject to stringent technical standards which have financial implications for the businesses burning them. This affects not only those businesses that burn substances which are waste but those that market waste derived fuels. If it is possible to process a waste in some way so that it is no longer subject to control under the WID, the economic value of the substance will be enhanced. Processing waste so that it loses its waste status therefore offers the prospect of a much cheaper option for those intending to recover energy from waste.

G3.147 The question is whether this is consistent with the objectives of the WFD. The Directive ensures disposal and recovery operations are carried out safely by subjecting them to controls and it also seeks to ensure better use of resources by encouraging use of waste. If controls are dispensed with too easily, it is clear the Directive will be undermined.

G3.148 There is also the risk that this would favour one disposal route over others which may bring greater environmental benefits. The controls of the WID will result in benefits to the environment as emissions are strictly controlled. For waste streams that are well suited for use as a fuel, if it is possible to avoid those controls too easily, there will be less impetus to invest in WID-compliant plant. The overall environmental outcome will therefore be worse. If incineration is unregulated, energy recovery may be prioritised over alternative uses for the waste. Again this would undermine the WFD.

G3.149 This is not to say that waste derived fuel will never cease to be waste before its use, but it is clear that something more than pre-treatment is needed to be certain that the aims of the WFD are not undermined if waste controls are allowed to be dispensed with before the substance is used.

G3.150 The Court in the *OSS* case suggested that the Government and the Environment Agency should provide practical guidance for those affected by this question. In response to the Court's suggestion, the Environment Agency developed a national end-of-waste protocol for ""the production and use of processed fuel oil from waste lubricating oils". The protocol, which was notified to the European Commission in compliance with Article 6(4) of the WFD and the Technical Standards Directive (98/34/EC), is available on the Environment Agency's website[108]. However, this guidance is also part of the exercise to fulfil the Court's suggestion.

G3.151 Although the *OSS* case was about waste lubricating oil being used as a fuel, the competent authorities consider that the three-part test it sets out can be used to determine whether other wastes have ceased to be waste before being burned as fuel.

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108 At: http://www.environment-agency.gov.uk/business/topics/waste/116133.aspx.

G3.152 As to the application of the test, the first practical question is how to distinguish a distinct marketable product from a marketable waste. Many waste fuels are marketed as such - no-one would set out to produce them from primary materials and in that sense they are not regarded as products. They are burnt subject to waste legislation but are not subject to certain other legislation, for example, the REACH Regulation[109] (see paragraph G1.18 above).

G3.153 If the recovery process which is carried out is mere pre-treatment (so that the tests in paragraphs G3.128-G3.131 above are met), it will be clear that the substance remains waste. If the recovery process is not mere pre-treatment, the process must produce a distinct substance for which there is a market for use as a fuel. A distinct substance needs to be reclaimed from the waste to escape the suggestion that the recovery process is only completed when the energy is actually recovered by burning.

G3.154 The next questions for practical application are to ensure that the fuel is capable of being used in the same way as ordinary fuel and with the same environmental consequences. Perhaps one starting point in applying these rules is to describe some of the different factors at play when something becomes waste and when something ceases to be waste.

G3.155 In the *Saetti* case[110], it was noted that various factors were not relevant in assessing whether petcoke was waste because the petcoke was an intended product of the production process. One such factor was that special measures were necessary to protect the environment when petcoke was used as a fuel. This is a reflection of the general principle that the environmental impact of a substance does not itself determine waste status (see paragraphs G3.40-G3.41 above).

G3.156 However, where you start with a substance that has been discarded, the WFD requirement is to ensure that the waste is recovered in a manner which ensures protection of the environment and human health. The factors which apply to residues but not to intended products, also apply to substances that result from recovery processes.

G3.157 In the *Total France* case[111], it was argued that heavy fuel oil should be considered waste by virtue of the environmental risks its use presents. The Advocate General rejected this argument, explaining that environmental risks are indicative of an intention to discard but that other factors could take precedence where you have a “wanted product” like heavy fuel oil[112]. In its judgment the Court concluded that “heavy fuel oil sold as a combustible fuel, does not constitute waste within the meaning [of the WFD], where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring further processing.” It is important that end-of-waste criteria recognise the

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109 Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).
110 Case C-235/02.
111 Case C-188/07 – Commune de Mesquer (Municipality of Mesquer) v Total France SA, Total International Ltd.
112 Case C-188/07, paragraph 53 of the Advocate General’s Opinion.

need to show that, aside from its environmental characteristics, the fuel genuinely constitutes a “wanted product” in the same way as any comparator.

G3.158 Generally of course, comparisons by themselves do not provide a means to distinguish waste from non-waste fuels. As the European Court stated in the *Arco Chemie* case[113]:-

> “An ordinary fuel may be burnt without regard to environmental standards without thereby becoming waste, whereas substances which are discarded may be recovered as fuel in an environmentally responsible manner and without substantial treatment yet still be classified as waste.”

G3.159 Comparators need to be appropriate and relevant so they provide good evidence that the submission to a common form of treatment is not evidence of waste recovery.

G3.160 For example, where a substance is returned to its original state, the relevant comparator is clear. It is usually a matter of removing contamination from the waste so that it is returned to its original state. In this situation, it is usually quite straightforward to decide whether the substance has been processed sufficiently to be regarded as an ordinary fuel. There will not be any features which distinguish it from primary resources. It would not make sense to compare it to another less environmentally friendly fuel as a means to avoid having to process the waste to deal with the contaminants.

G3.161 Another situation where the relevant comparator is clear is where a waste is transformed into an ordinary fuel such as gasoil. This may occur in the context of a regeneration process. Or it may be possible to generate biodiesel from animal by-products or waste cooking oil.

G3.162 Another possibility is that the product of a recovery process can be used for several different purposes, including use as a fuel. If it is not considered waste when used for some other purpose, can it at the same time be considered waste when used as a fuel? It may seem surprising that something may be regarded as waste depending on how it is used, but this reflects the approach of the European Court (see paragraph G3.104 above for an example). This is because sometimes substances may be used in circumstances where it is clear they are being discarded. If you produce an excess of a substance that burns well, a decision to burn that substance may reflect a wish to simply get rid of it.

G3.163 In other cases, it may be more difficult to determine the correct comparator and so industry and regulators[114] should work together. Industry will be seeking to demonstrate why the substance should be considered a marketable product. This will involve comparison with the alternatives used in the intended market - in terms of price, performance and environmental impact. Some fuels are not used in practice because of the damage they cause to industrial plant and it would not make sense to attempt to use those fuels as comparators. The substance must of

113 Joined Cases C-418/97 and C-419/97.
114 The Environment Agency (England and Wales) and the Northern Ireland Environment Agency.

course meet the regulatory controls that apply to the use of primary fuels – for instance the air quality legislation applying to the plant used.

G3.164 Finding a comparator should be more straightforward if the market is well defined and there is a particular type of fuel which is generally used. For example, if it were to be established that roadstone coating plants generally use gasoil, the comparison for waste derived fuel intended to be used as a replacement in that market would be with gasoil. There may also be a regulatory indication if use of a particular fuel is specified as the best available technique (BAT). It is possible that the waste derived fuel may be capable of use in more than one market - and in some of those markets the waste derived fuel may present a higher environmental risk than the primary fuel which is normally used. In such circumstances the question that needs to be addressed remains the same - can the waste derived fuel be used in that particular market in exactly the same way as an ordinary fuel and with no worse environmental effects? This question must be addressed on a market-by-market-basis.

G3.165 The key test remains whether the holder of waste discards or intends to discard the waste. This is to be inferred from all the circumstances – not just the fact that the recovered substance is being burned. The key question is whether the substance in question is commonly used as a fuel in that particular context. If so, that might suggest that the use as a fuel does not amount to evidence that the substance is being discarded. Otherwise, its use as a fuel would be evidence that the substance is being discarded and is waste.

Annex 1

The definition of waste

Summary of European Court of Justice judgments

Zanetti – Federal Republic Of Germany

1. On 28 March 1990 European Court delivered the following judgments in Joined Cases C-206/88 and C-207/88 (***Vessoso and Zanetti*** [1990] 2 LMELR 133) and C-359/88 (***Zanetti and Others***):-

    (a) "The concept of waste, within the meaning of Article 1 of Directive 75/442/EEC and Article 1 of Directive 78/319/EEC[115], is not to be understood as excluding substances and objects which are capable of economic re-utilization. The concept does not presume that the holder disposing of a substance or object intends to exclude all economic re-utilization of the substance or object by others."

    (b) "National legislation which defines waste as excluding substances and objects which are capable of economic re-utilization is not compatible with Council Directives 75/442 and 78/319."

2. In a judgment delivered on 10 May 1995 the European Court held that their finding on ***Zanetti*** was not affected by the amendments made to Directive 75/442/EEC by Council Directive 91/156/EEC (Case C-422/92 ***Commission of the European Communities*** v ***Federal Republic of Germany***, paragraphs 22-23).

Tombesi – Savini

3. On 25 June 1997 the European Court delivered its judgment on Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 (Criminal proceedings against ***Euro Tombesi and Others***). In doing so, the European Court held that:-

    "The concept of 'waste' in Article 1 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, referred to in Article 1(3) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste and Article 2(a) of Council Directive Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, is not to be understood as excluding substances and objects which are capable of economic reutilization, even if the materials in question may be the subject of a transaction or quoted on public or private commercial lists. In particular, a deactivation process intended merely to render waste harmless,

[115] On toxic and dangerous waste.

landfill tipping in hollows or embankments and waste incineration constitute disposal or recovery operations falling within the scope of the above mentioned Community rules. The fact that a substance is classified as a re-usable residue without its characteristics or purpose being defined is irrelevant in that regard. The same applies to the grinding of a waste substance."

Wallonie

4. On 18 December 1997 the European Court delivered its judgment on Case C-129/96 (***Inter-Environnement Wallonie* v *Région Wallonne***). In doing so, the European Court held that in relation to the question on the definition of waste:-

   "A substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442, as amended, by the mere fact that it directly or indirectly forms an integral part of an industrial production process".

ARCO Chemie

5. On 15 June 2000 the European Court delivered its judgment on Joined Cases C-418/97 and C-419/97 (***ARCO Chemie Nederland Ltd etc***). In doing so, the European Court held that in relation to the question on the definition of waste:-

   Case C-418/97

   "1. It may not be inferred from the mere fact that a substance such as LUWA-bottoms undergoes an operation listed in Annex IIB to Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of that Directive.

   2. For the purpose of determining whether the use of a substance such as LUWA-bottoms as a fuel is to be regarded as constituting discarding, it is irrelevant that that substance may be recovered in an environmentally responsible manner for use as fuel without substantial treatment.

   3. The fact that that use as fuel is a common method of recovering waste and the fact that that substance is commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.

   4. The fact that a substance used as fuel is the residue of the manufacturing process of another substance, that no use for that substance other than disposal can be envisaged, that the composition of the substance is not suitable for the use made of it or that special environmental precautions must be taken when it is used may be regarded as evidence that the holder has

discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of that Directive. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined."

Case C-419/97

"1. It may not be inferred from the mere fact that a substance such as wood chips undergoes an operation listed in Annex IIB to Directive 75/442, as amended by Directive 91/156, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of the Directive.

2. The fact that a substance is the result of a recovery operation within the meaning of Annex IIB to that Directive is only one of the factors which must be taken into consideration for the purpose of determining whether that substance is still waste, and does not as such permit a definitive conclusion to be drawn in that regard. Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of Directive 75/442, as amended by Directive 91/156, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the Directive and the need to ensure that its effectiveness is not undermined.

3. For the purpose of determining whether the use of a substance such as wood chips as a fuel is to be regarded as constituting discarding, it is irrelevant that that substance may be recovered in an environmentally responsible manner for use as fuel without substantial treatment.

4. The fact that that use as fuel is a common method of recovering waste and the fact that that substance is commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of that Directive must be determined in the light of all the circumstances, regard being had to the aim of the Directive and the need to ensure that its effectiveness is not undermined."

Palin Granit Oy

6. On 18 April 2002 the European Court delivered its judgment on Case C-9/00 (***Palin Granit Oy and Vehmassalon kansanterveystyőn kuntayhtymän hallitus***). In doing so, the European Court held that:-

"1. The holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste.

2. The place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the

environment are not relevant criteria for determining whether the stone is to be regarded as waste."

Mayer Parry Recycling Ltd

7. On 19 June 2003 the European Court delivered its judgment on Case C-444/00 (***Mayer Parry Recycling Ltd***). In doing so, the European Court held that:-

   "1. 'Recycling' within the meaning of Article 3(7) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste is to be interpreted as not including the reprocessing of metal packaging waste when it is transformed into a secondary raw material such as material meeting the specifications of Grade 3B, but as covering the reprocessing of such waste when it is used to produce ingots, sheets or coils of steel.

   2. That interpretation would be no different if the concepts of 'recycling' and 'waste' referred to by Council Directive 75/442/EEC of 15 July 1975 on waste were taken into account."

AvestaPolarit Chrome Oy

8. On 11 September 2003 the European Court delivered its judgment on Case C-114/01 (***AvestaPolarit Chrome Oy***). In doing so the European Court held that:-

   "1. In a situation such as that at issue in the main proceedings, the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine discards or intends to discard those substances, which must consequently be classified as waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, unless he uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose.

   2. In so far as it does not constitute a measure of application of Directive 75/442, as amended by Directive 91/156, and in particular Article 11 of that directive, national legislation must be regarded as other legislation within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force."

Mario Antonio Saetti and Andrea Frediani (Petroleum Coke)

9. On 14 January 2004 the European Court delivered its judgment on Case C-235/02 (***Mario Antonio Saetti and Andrea Frediani***). In doing so, the European Court held that:-

"Petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991."

Van de Walle (contaminated soil)

10. On 7 September 2004 the European Court delivered its judgment on Case C-1/03 (***Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA***). In doing so, the European Court held that:-

"Hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of Article 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking."

Antonio Niselli

11. On 11 November 2004 the European Court delivered its judgment on Case C-457/02 (***Antonio Niselli***). In doing so, the European Court held that:-

"1. The definition of 'waste' in the first subparagraph of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991 and by Commission Decision 96/350/EC of 24 May 1996, cannot be construed as covering exclusively substances or objects intended for, or subjected to, the disposal or recovery operations mentioned in Annexes IIA and IIB to that Directive or in the equivalent lists, or to which their holder intends or is required to subject them.

2. The meaning of 'waste' for the purposes of the first subparagraph of Article 1(a) of Directive 75/442, as amended by Directive 91/156 and by Decision 96/350, is not to be interpreted as excluding all production or consumption residues which can be or are reused in a cycle of production or consumption, either without prior treatment and without harm to the environment, or after undergoing prior treatment without, however, requiring a recovery operation within the meaning of Annex IIB to that Directive."

European Commission v Kingdom of Spain

12. On 8 September 2005 the European Court delivered its judgment on Case C-416/02 (***Commission of the European Communities*** v ***Kingdom of Spain***). In doing so, the European Court held that:-

Livestock Effluent (Manure/slurry)

“89. As the United Kingdom Government correctly maintains in its statement of intervention, livestock effluent may, on the same terms, fall outside classification as waste, if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations.”

“90. Contrary to the Commission’s submission, it is not appropriate to limit that analysis to livestock effluent uses as a fertiliser on land forming part of the same agricultural holding as that which generated the effluent. As the Court has already held, it is possible for a substance not to be regarded as waste within the meaning of Directive 75/442 if it is certain to be used to meet the needs of economic operators other than that which produced it (see, to that effect, *Saetti and Frediani*, cited above, paragraph 47).”

Animal carcases

“91 On the other hand, the analysis which allows, in certain situations, a production residue to be regarded not as waste but as a by-product or a raw material reusable within the continuing process of production cannot apply to carcases of animals being reared, where those animals died on the farm and were not slaughtered for human consumption.”

“92 Such carcases cannot, as a general rule, be reused for the purposes of human consumption. They are regarded by Community legislation, in particular by Council Directive 90/667/EEC of 27 November 1990 laying down the veterinary rules for the disposal and processing of animal waste, for its placing on the market and for the prevention of pathogens in feedstuffs of animal or fish origin and amending Directive 90/425/EEC (OJ 1990 L363, p.51; Directive 90/667 was repealed, after the date fixed by the reasoned opinion, by Article 37 of Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ 2002 L273, p.1)), as ‘animal waste’ and, furthermore, as waste within the category of ‘high-risk materials’, which must be processed in factories approved by the Member States or disposed of by incineration or burial. Directive 90/667 provides that such matter may be used in feedstuffs for animals which do not enter the human food chain, but only by virtue of authorisations issued by the Member States and under the veterinary supervision of the competent authorities.”

“93 In no case may carcases of animals which die on the farm in question therefore be used in conditions which would enable them not to be defined as waste within the meaning of Directive 75/442. The holder of those carcases is certainly obliged to discard them, with the result that that matter must be regarded as waste.”

KVZ retec GmBH

13. On 1 March 2007 the European Court delivered its judgment on Case C-176/05 (***KVZ retec GmBH* v *Republik Österreich***). In doing so, the European Court held that:

    "Under Article 1(3)(a) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Commission Regulation (EC) No 2557/2001 of 28 December 2001, the shipment of meat-and-bone meal classified as waste on account of a requirement or intention to discard it, which is destined for recovery only and listed in Annex II to that regulation, is excluded from the scope of the provisions of the regulation except as provided for in Article 1(3)(b) to (e), Article 11 and Article 17(1) to (3) thereof. However, it is for the national court to ensure that that shipment takes place in compliance with the requirements arising from the provisions of Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption, as amended by Commission Regulation (EC) No 808/2003 of 12 May 2003, amongst which those of Articles 7, 8 and 9 and of Annex II to the regulation may prove to be relevant."

Thames Water Utilities Limited

14. On 10 May 2007 the European Court delivered its judgment on Case C-252/05 (***Thames Water Utilities Limited***). In doing so, the European Court held that:-

    "1. Waste water which escapes from a sewerage network maintained by a statutory sewerage undertaker pursuant to Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment and the legislation enacted to transpose that directive constitutes waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991.

    2. Directive 91/271 is not 'other legislation' within the meaning of Article 2(1)(b) of Directive 75/442, as amended by Directive 91/156. It falls to the national court to ascertain whether, in accordance with the criteria set out in the present judgment, the national rules may be regarded as 'other legislation' within the meaning of that provision. Such is the case if those national rules contain precise provisions organising the management of the waste in question and if they are such as to ensure a level of protection of the environment equivalent to that guaranteed by Directive 75/442, as amended by Directive 91/156, and, more particularly, by Articles 4, 8 and 15.

    3. Directive 91/271 cannot be considered, as regards the management of waste water which escapes from sewerage network, to be special legislation (a *lex specialis*) vis-à-vis Directive 75/442, as amended by Directive 91/156, and cannot therefore be applied pursuant to Article 2(2) of Directive 75/442."

European Commission v Italian Republic

15. On 18 December 2007 the European Court delivered its judgment on Cases C-194/05, C-195/05 and C-263/05 (***Commission of the European Communities* v *Italian Republic***). The Court's declaration in each case was:-

Case C-194/05

"1….that, in so far as Article 10 of Law No 93 of 23 March 2001 concerning provisions on the environment and Article 1(17) and (19) of Law No 443 of 21 December 2001 delegating to the Government matters of infrastructure and strategic installations of production and of other action to boost production excluded from the scope of the national legislation relating to waste excavated earth and rocks intended for actual re-use for filling, backfilling, embanking, or as aggregates, with the exception of those from contaminated and decontaminated sites with a concentration of pollutants above the acceptable limits laid down by the regulations in force, the Italian Republic has failed to fulfil its obligations under Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991;"

Case C-195/05

"1….that the Italian Republic has failed to fulfil its obligations under Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste as amended by Council Directive 91/156/EEC of 18 March 1991, by:

- adopting operational instructions valid for the whole of the national territory, specified in particular in the circular of 28 June 1999 of the Minister for the Environment setting out explanatory guidance on the concept of waste and in the communication of the Ministry of Health of 22 July 2002 containing guidelines on the health and hygiene requirements relating to the use for animal feed of materials and by-products deriving from the production and commercial cycle of the agro-food industry, the purpose of which was to exclude, from the scope of the legislation on waste, food scraps from the agro-food industry intended for the production of animal feed; and

- excluding, by means of Article 23 of Law No 179 of 31 July 2002 laying down provisions on environmental matters, from the scope of the legislation on waste leftovers from the kitchen preparation of all types of solid food, cooked and uncooked, which have not entered the distribution system and are intended for shelters for pet animals."

Case C-263/05

"1….that the Italian Republic has failed to fulfil its obligations under Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 19/156/EEC of 18 March 1991 and Commission Decision 96/350/EC of 24 May 1996, by adopting and maintaining in force Article 14 of

Decree-Law No 138 of 8 July 2002 laying down urgent measures concerning taxation, privatisation and control of pharmaceutical expenditure and economic support in disadvantaged areas, now, after amendment, Law No 178 of 8 August 2002, which excludes from the scope of Legislative Decree No 22 of 5 February 1997 implementing Directives 91/156/EEC on waste, 91/689/EEC on hazardous waste and 94/62/EC on packaging and packaging waste the following: (i) substances, objects or goods intended for waste disposal or recovery operations not expressly listed in Annexes B or C to Legislative Decree No 22/97; and (ii) substances or objects forming production residue which the holder intends or is required to discard, where they may be and are re-used in a production or consumption cycle without undergoing prior treatment and without harming the environment, or, if they have undergone prior treatment, provided that that treatment is not one of the recovery operations listed in Annex C to Legislative Decree No 22/97."

Commune de Mesquer (Municipality of Mesquer) v Total France SA, Total International Ltd

16. On 24 June 2008 the European Court delivered its judgment on Case C-188/07 (***Commune de Mesquer v Total France SA, Total international Ltd***). In doing so the European Court held that:-

"1. A substance such as that at issue in the main proceedings, namely heavy fuel oil sold as a combustible fuel, does not constitute waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Commission Decision 96/350/EC of 24 May 1996, where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing.

2. Hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of Article 1(a) of Directive 75/442, as amended by Decision 96/350, where they are no longer capable of being exploited or marketed without prior processing.

3. For the purposes of applying Article 15 of Directive 75/442, as amended by Decision 96/350, to the accidental spillage of hydrocarbons at sea causing pollution of the coastline of a Member State:

- The national court may regard the seller of those hydrocarbons and charterer of the ship carrying them as a producer of that waste within the meaning of Article 1(b) of Directive 75/442, as amended by Decision 96/350, and as a 'previous holder' for the purposes of applying the first part of the second indent of Article 15 of that Directive, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular

if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship;

– If it happens that the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by the International Oil Pollution Compensation Fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the ship-owner and/or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1(c) of Directive 75/442, as amended by Decision 96/350, such a national law will then, in order to ensure that Article 15 of that Directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur."

European Commission v Italian Republic

17. On 22 December 2008 the European Court delivered its judgment on Case C-283/07 (***Commission of the European Communities* v *Italian Republic***). The Court's declaration was:-

"1) The Italian Republic, by adopting and maintaining in force provisions such as:

Article 1(25) to (27) and (29)(b) of Law No 308 of 15 December 2004, delegating the Government to reform, co-ordinate and complement the environmental legislation and measures of direct application, and

Article 1(29)(b) of Law No. 308 of 15 December 2004 and Articles 183(1)(s) and 229(2) of Legislative Decree No 152 of 3 April 2006, establishing rules for the environment,

in accordance with which, respectively, certain scrap intended for use in iron and steel and metallurgical activities and high-quality refuse derived fuel (RDF Q) are completely excluded from the Italian legislation transposing Council Directive 75/442/EEC 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, the Italian Republic has failed to fulfil its obligations under Article 1(a) of that directive."