

Dutch proposal for further clarification of the definition of "waste" under the WFD

Introduction

In a circular economy, materials remain part of economic value chains for as long as this is safe from a human health and environmental perspective. When this is no longer possible, discarding of the material should be subject to rules as, among others, laid down in the Waste Framework Directive (WFD) and the Waste Shipment Regulation (WSR). Considering whether discarding of the material is necessary boils down to answering the question; should a material be classified as 'waste' or not? Classification as 'waste', as such activating waste law, triggers certain requirements – such as permits, financial and information requirements – which are often perceived as a barrier to circular economy initiatives. Therefore, waste law should not be applicable to materials originating from environmentally sound and well-established industrial practices or, for example, second-hand materials fulfilling a similar purpose as during their 'first economic life'. However, due to the present structure of articles 3 (waste) and 5 (by-product) WFD, practices with such materials risk being unnecessarily classified as acts of discarding and recovery of waste materials. Therefore, this proposal further clarifies the definition of waste by adding a description of the circumstances under which certain practices would not be considered "to discard" waste, as such preserving a material for the circular economy and contribute to reduction of the use of primary resources.

Lack of a generally applicable definition of the element "to discard"

Article 3 WFD provides that "waste is any substance or object which the holder discards, intends or is required to discard". Remarkably, the WFD does not hold a definition of the key element "to discard". However, Article 5 and 6 WFD provide elements of an implicit definition of 'to discard' (or more specifically: 'not to discard').

Article 5(1) WFD provides four (cumulative) conditions that, if met, indicate that a by-product (described as "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 by-product, and as such not as 'waste', when:

- 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 a 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.

Similarly, article 6(1) WFD provides that certain specified waste shall cease to be waste, when:

- a) the substance or object is to be 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

As such, the WFD does not provide a general set of conditions explaining when the waste status does not apply for substances or objects other than by-products (such as residues from processes that are not 'production') or end-of-waste-materials (such as second-hand goods, reused goods, goods returned to the provider/producer, etc). This can be considered a missed opportunity to provide clarity on the status of these categories of products, therewith hampering potential economic activity surrounding these material streams.

Proposed solution

First and foremost, The Netherlands does not propagate an amendment to the definition of waste itself. However, it believes that the two-fold objective of the WFD (i.e. (i) to minimize the negative effects of the generation and management of waste on human health and the environment and (ii) to reduce the use of resources) is better served by adding further clarity on the concept of 'waste' and, more specifically, on when a material can be considered 'not waste'. This could be achieved

by introducing a generally applicable description of the circumstances in which certain practices would not be considered "discarding of waste".

Suggested new section 1bis of Article 3 WFD:

A holder does not discard any substance or object within the meaning of point (1) of Article 3, when the following conditions are met:

- I. *Further use of the substance or object is certain;*
- II. *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;*
- III. *Further use of the substance or object reduces overall impacts of resource use and improves the efficiency of such use.*

By introducing this general explanation of 'discard', the WFD gets the appropriate focus on its two-fold objective referred to above. Whether a material should be regarded as waste or not depends on the arrangement made for its further use. For example, if contracts or other appropriate documents demonstrate that further use of the material is certain, compliant to the applicable standards and legislation (in particular, chemicals and product legislation), and improving resource efficiency, there is no need to submit such use to waste legislation. Hence, the material can be qualified as a product. The wording of proposed conditions (i) and (ii) is borrowed from Article 5(1) WFD; the wording of condition (iii) has been derived from Article 1 WFD. Thus, the *acquis* of the WFD is fully preserved.

Dutch jurisprudence already confirms that the proposed solution is capable of complying with the WFD. For example, the Dutch Council of State, the supreme administrative court, has confirmed the lawfulness of considering practices pertaining to selectively collecting second-hand clothing for the purpose of reuse as '*not discarding of waste*'. In doing so, the judges effectively offered a third route to non-waste status, next to the by-product and end-of-waste route laid down in the WFD, though still in line with the objectives of the WFD, along the lines of the suggested new section 1bis of article 3 WFD.