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Scrap Metal Intended for Metal Production: The Thin Line between Waste and Products

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Abstract

The authorities regularly have to cross swords with businesses on the issue as to whether a given substance has been completely recovered in order to escape the Caudine Forks of waste law. So far, it has been settled case law that national lawmakers could not adopt a definition of the notion of waste that would exclude objects and substances capable of commercial re-use. However, economic operators consider that the relatively broad definition of waste under Union law does not embrace all of the special features of their economic activities. By adopting the new Waste Framework Directive 2008/98/EC, the EU lawmaker sought to tailor the Directive's scope in the best possible manner, in particular in providing for new arrangements under which certain classes of waste cease to be classified as such. In effect, in virtue of its Article 6 (1) and (2), certain specified waste shall cease to be waste when it has undergone a recovery operation and complies with specific criteria. Such criteria should be set for specific materials by the Commission in comitology. In this connection, the Council adopted Regulation (EU) No. 333/2011 on certain types of scrap metal which sets forth the criteria which make it possible to determine the time when certain types of scrap metal—iron, steel and aluminium—cease to be waste within the meaning of Directive 2008/98/EC where such scrap is intended for the metal production in steelworks, foundries and aluminium refiners. It is the aim of this article to explore some of the questions that the first regulation to implement Article 6 of the Directive is likely to raise.

Keywords

waste management, definition of waste, waste capable of commercial re-use, scrap metal, recovery, recycling, declassification of discarded scrap metals as waste, comitology

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1. Introduction

Although environmental protection is not a recent concern, over the past years it has become increasingly acute, and is characterised by the need to find solutions to the depletion of natural resources. Indeed, the continual increase in the consumption of goods and services within the Union is exercising a growing pressure on resources exploited elsewhere, which are becoming ever more scarce.[1] In particular, the recycling of scrap iron, steel and aluminium is not only an environmental issue but also raises issues as to the Union's economic independence as regard a number of key raw materials. This article takes stock of Regulation (EU) No 333/2011 establishing criteria determining when certain types of scrap metal cease to be waste, which was adopted by the Council on 31 March 2011, the objective of which is precisely to facilitate recovery operations for scrap metal in steelworks, foundries and aluminium refiners.[2]

The discussion within this article will be structured in the following manner. Having exposed in section 2 the differences opposing the law on products and the law on waste, sections 3 and 4 provide an in-depth analysis of the definition of waste in general and in particular of waste undergoing recovery operations. Section 5 describes the new arrangements laid down in the 2008 waste Framework Directive (hereinafter WFD) under which certain classes of waste cease to be classified as such whereas section 6 examines the first implementation of these arrangements as regards crap metal intended for metal production. Moreover, section 6 addresses the issue of whether the crap metals ceasing to be classified as waste are likely to escape the rules regulating the transfrontier movement of waste.

2. Products and Waste

Adopted in accordance with Article 6 WFD, Regulation (EU) No 333/2011 straddles the law on products and waste. It requires us to probe further in the way in which these two legal approaches are conceived.

Although a specific chapter containing Articles 191 to 193 TFEU has been dedicated to the environment since 1987, due to its cross-cutting

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1) European Environment Agency, *The European Environment 2010. State and Outlook* (Copenhagen: EEA, 2010) 69.

2) OJ [2011] L 94/2.

nature, this issue is distinctly broader than one might imagine. Indeed, in addition to the need to recognise sustainable development,[3] it is necessary to de-compartmentalise the various policies pursued by the Union with a view to integrating environmental considerations more effectively into them. The obligation laid down by Article 11 TFEU to incorporate these requirements into the 'the definition and implementation of Union policies and activities'[4] means it is recognised as applying across the board.[5] It follows that environmental questions also arise out of the harmonisation of legislation with the purpose of facilitating the establishment and the functioning of the internal market, especially under Article 114(3) TFEU. Due to the exploitation of natural resources and energy, and their shipment and use, numerous products that we consume cause damage to the environment on various counts, ranging from the destruction of the ozone layer to water pollution. Once they are discarded, products become waste. Accordingly, environmental law is likely to

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3) Sustainable development is currently enshrined in Article 3(3) and (5) TEU, Article 21(2)(d) -(f) TEU, Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the EU. The third paragraph of Article 3(3) TEU runs as follows: 'The Union … shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.' Moreover, pursuant to paragraph 5 of that provision as well as Article 21(2)(d) TEU, sustainable development is one of the corner stone of the EU external policy. Given that sustainable development has been coined both as an objective and a principle in these various Treaty provisions, there was obviously no clear concept of what sustainable development meant from a legal point of view when these various provisions were drafted. In addition, this concept is characterized by a strong degree of indeterminacy.

4) Article 11 TFEU provides that: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. By the same token, in virtue of Article 37 of the Charter 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. A minor difference must be stressed: the Charter mentions 'policies' and not 'activities'.

5) Also known as the principle of integration, the environmental integration clause is called upon to play a greater role, not only due to the fact that it makes it possible to avoid interferences and contradictions between competing policies, but also because it may enhance sustainable development in favouring the implementation of more global, more coherent and more effective policies. In other words, environmental policy should now reach beyond the restricted area to which it is generally confined (listed installations, emission and quality standards, waste management, ecosystem management). Furthermore, integration calls in any case for the abandonment of a vertical organisational model, according to which each policy is confined to a very specific field of action, in favour of a more cross-cutting approach.

apply both to the placing of certain goods on the market as well as the resulting waste. Typical in this respect are Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators[6] and Regulation (EC) No 842/2006 on certain fluorinated greenhouse gases,[7] both of which straddle the law on products and waste. It is worth briefly recalling this twin track approach in order to better understand the stakes underlying the adoption of Regulation (EU) No 333/2011.

The law on products covers on the one hand substances, preparations and the articles or objects resulting from a manufacturing process, and on the other hand substances and their preparations if produced intentionally for the purposes of production or consumption. Due to their added value on the market, these substances and preparations are intended for use both in other manufacturing processes as well as for consumption. Their economic value is in principle positive. The Union does not yet have a body of rules intended to reduce the impact of goods on health and the environment in a systematic and coherent manner. This problem was certainly not central to the establishment of the internal market starting from 1985, and if the question has been taken into account, it has been more with a view to removing potential barriers to intra-Community trade.[8] It follows that only a limited number of directives and regulations concerning certain product categories (GMOs, pesticides, biocides, etc.) attempt—at times well and at times badly—to reduce their impact on health and the environment.[9] Their main intention is to establish identical conditions governing their placement on the market for all importers and producers. Since these relate to products, such legislation falls more under the establishment and functioning of the internal market (Article 114 TFEU) rather than environmental policy (Articles 191 to 193 TFEU) or health policy (Article 168 TFEU).

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6) Directive 2006/66/EC of the European Parliament and the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, OJ [2006] L 266/1.

7) Regulation (EC) No 842/2006 of the European Parliament and the Council of 17 May 2006 on certain fluorinated greenhouse gases, OJ [2006] L 161/1.

8) M. Onida, 'Products and the Environment', *in* R. Macrory (ed.), *Reflections on 30 Years of EU Environmental Law. A High Level of Protection?* (Groeningen: Europa Law publishing, 2005) 248.

9) M. Pallemaerts (ed.), *EU and WTO Law: How tight is the Legal Straitjacket for Environmental Product Regulation?* (Brussels: VUB University Press, 2006); L. Krämer, *EC Environmental Law* (London: Thomson-Sweet & Maxwell, 2007) 224-272; M. Onida, 'Products and the Environment', above, 235-269; N. de Sadeleer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels: éd. de l'Université libre de Bruxelles, 2010) 207-263.

On the other hand, when substances or articles are discarded by their holders, they become waste. Regardless of their form—waste water, atmospheric emissions, solid waste, liquid waste, cars, light vehicles, etc.—they must be recovered or disposed of in accordance with the specific rules adopted pursuant to Article 192 TFEU. Where it is not possible for it to be marketed as recycled material, waste takes on a negative value.

Though much emphasis has been placed on waste prevention during several decades, waste is still at the centre of ecological, social, economic and political considerations. Sad to say, due to increases in the production and consumption of goods and services, waste is constantly on the increase.[10] As was seen with the mountains of rubbish in Naples in 2007,[11] a situation which is still acute, waste remains a highly topical issue, as if it were never possible to get rid of it.

Just like Janus, waste is two-faced. Whilst it causes pollution or environmental risks, it also offers a considerable source of secondary raw materials and energy resources for a Union that is short of both. Accordingly, waste is no longer a matter for rag-and-bone men, scrap merchants and other small businesses, but rather for large corporations. Whilst early waste management regulations were initially informed by hygiene and public health concerns, their objective is now just as much environmental protection as the preservation of natural resources, and place the emphasis on recycling and energy recovery.[12] Accordingly, the economic value of these goods is constantly fluctuating in accordance with the law of supply and demand.

As waste results from a product or substance whose holder has discarded it, the dividing line drawn between the two bodies of legal rules appears to be somewhat artificial. Nonetheless, the establishment of new intermediate legal categories, such as by-products,[13] which lie on the border between the law on waste and the law on products, is testament to the difficulty in tracing a clear dividing line between these two legal regimes. Council Regulation No 333/2011 in fact straddles these two categories of rule.

The following table highlights the extent to which the law on waste is intertwined with the law on products.

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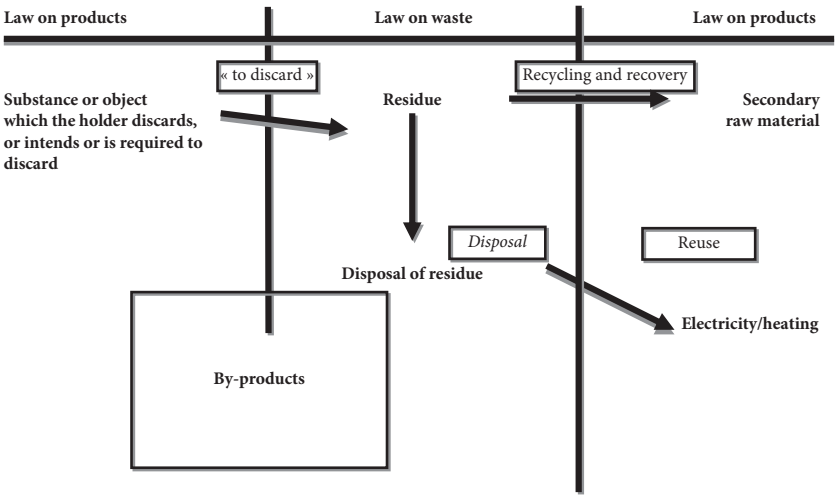
[10] In spite of all regulatory efforts, municipal waste, sewage sludge, as well as waste from construction and demolition activities have increased significantly. See European Environmental Agency, *The European environment. State and outlook 2010* (Copenhague, 2010) 73.

[11] Case C-297/08 *Commission v. Italy* [2010] ECR I-1749.

[12] E. Scotford, 'Trash or Treasure: Policy Tensions in EC Waste Regulation' *JEL* 19:3 (2007) 367-388.

[13] Article 5 WFD.



3. The Concept of Waste: Residues with an Economic Value are not Excluded

The law on waste, which is comprised of around twenty directives and one regulation on cross-border shipments, has since 19 November 2008 been focused around Framework Directive 2008/98/EC[14] repealing Directive 2006/12/EC of 5 April 2006 on waste, which in turn codified Directive 75/442/EEC of 15 July 1975, the latter having itself been substantially amended on various occasions.[15]

Framework Directive 2008/98/EC imposes a series of obligations on the holders of waste, requiring them to eliminate or recycle it.

To the present day, lawyers' attention has crystallised on the scope of the Framework Directive, which is centred on the concept of waste.[16] Whilst it is

14) OJ [2008] L312/3.

15) N. de Sadeleer, *Le droit communautaire et les déchets* (Brussels, Paris, Bruylant, LGDJ, 1995) 230-233.

16) For commentary on the definition of the notion of waste: E.g. among others Ph. Billet, Droit des déchets: notions générales, *Jurisclasseurs Environnement* (2003) 810, 1-38; I. Cheyne and M. Purdue, Fitting Definition to Purpose : the Search for a Satisfactory Definition of Waste, *JEL* 7 : 2 (1995)149; I. Cheyne, The Definition of Waste in EC Law, *JEL* 14:1 (2002) 61-73; T. Demoor-Dirick, De begrippen 'afvalstof' en 'secundaire grondstof' vanuit Europees en Belgisch perspectief, *MER* 11-12 (1999) 346; N. de Sadeleer, Rifiuti, Residui e Sottoprodotti: una trilogia

central, this concept is difficult to understand in technical terms for the following reasons.

There are first of all various types of waste. In one way or another, all sectors of our consumer society produce waste, and the numerous regulations which define it reflect this diversity. National regulations refer, often not in a coordinated manner, to "industrial waste", "household waste", "hospital waste", "agricultural waste", "mineral waste" and "special waste." Since some of them are more dangerous than others, legislators have also come to distinguish between "dangerous and toxic waste" and "ordinary waste."

Furthermore, the concept of waste is variable because the development of different types of waste is far from homogeneous. Resulting always from a dynamic and non-static process, the time factor is in this respect crucial: household waste quickly disappears because it is biodegradable; by contrast the life span of other wastes—in particular nuclear waste—stretches into the millennia. Recovery and disposal processes can also, where appropriate, play a decisive role. The various ways in which waste both manifests itself and is disposed of differ markedly. Solid wastes are incinerated and thereby dispersed into the atmosphere in the form of polluting particles; liquid waste dissolved into a water body is discharged in the form of polluting effluents; they could all however easily take the place of raw materials through recycling and further integration into production processes. It goes

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ambigua, *Rivista Giuridica dell'Ambiente* (2005); N. de Sadeleer, Residuos, restos y subproductos. Una trilogia ambigua, *IeZ Ingurugiroa eta Zuzenbidea-Ambiente y Derecho* (2005) 11-50; N. de Sadeleer, New Perspective on the Definition of Waste in EC Law, *JEEPL* 1:4 (2005) 46-58; N. de Sadeleer, EC Waste Law or How to Juggle with Legal Concepts. Drawing the Line between Waste, Residues, Secondary Materials, By-products, Disposal and Recovery Operation, 2 :6 *JEEPL* (2005) 458-477; F. Ermarcora, *Der europaische Abfallbegriff und seine nationale Umsetzund am Beispiel des österreischischen Rechts* (Vienna, 1999); F. Jurgen, The Term 'Waste' in EU Law, *Eur Environ LR* 3 (1994) 79 and Zum EG-Abfallrecht und seiner Umsetzung in deutsches Recht, *EuR* 1 (1994) 71; L. Krämer, The Distinction between Product and Waste in Community Law, *Environmental Liability* II: 1 (2003) 3-14; P. Picheral, L'ambivalence de la notion de déchet dans la jurisprudence de la C.J.C.E., *RJE* 4 (1995) 559 ; J. Pike, Waste Not Want Not: An (Even) Wider Definition of 'Waste, *JEL* 14: 2 (2002) 197-208 ; D. Pocklington, UK Perspectives on the Definition of "Waste" in EU Legislation, *Eur.Env.L.R.* (1999) 104; M. Purdue and A. Van Rossem, The Distinction between Using Secondary Raw Materials and the Recovery of Waste: The Directive Definition of Waste, *JEL* (1998) 116-145; A.-S. Renson and C. Verdure, Déchets et sous-produits à l'aune de la directive 2008/98/CE, *RDUE* 4 (2009) 733-756; St. Tromans, «EC Waste Law-A Complete Mess?" *JEL* 13: 2 (2001)133-156; G. Van Calster, "The E.C. Definition of Waste : the Euro Tombesi Bypass and Basel Relief Routes", *European Business Law Review* (1997) 137.

without saying that the choice of medium here has important consequences for the protection of the environment. The dispersal of waste into the air, water and soil can alter the affected ecosystems—atmospheric pollution, contamination of soil and aquifers, water eutrophication, etc.—whereas their reclamation for the production of secondary raw materials proves to be less damaging for the environment and, moreover, allows for savings on raw materials.

Finally, waste is characterised by its relativity. An object that may appear "unusable" at any given time, in a particular place and for a particular person, is not necessarily so in another place, at another time and for another person. This can be illustrated by example: an old jacket no longer satisfies its owner who is happy to discard it. Were the jacket to be retained by a third party who continued to wear it, it would not be a waste product. On the other hand, if no new wearer could be found, its owner would have to get rid of it as a piece of rubbish. Using analogous reasoning, a substance can at different stages in its life cycle be qualified alternatively as a product, by-product, waste or secondary raw material according to use that is made of it or under the applicable law. Thus for a given company, a residue can within the space of one year, or even several months, cease to be classified as waste due to technical advancements or for economic reasons where the increase in price of raw materials renders secondary raw materials more competitive.

Since the concept of waste fluctuates according to place, time, circumstances and the people involved, it would at first sight appear to escape any uniform legal qualification.

Restating practically all of Article 1(a) of Directive 2006/12/EC, Article 3(1) WFD defines waste as 'any substance or object which the holder discards or intends or is required to discard'. This definition is the cornerstone of all regulation applicable to waste, including the rules on cross-border shipments of waste. In effect, the definition determines the scope of the directive as well as its daughter directives. In fact, a substance or object that is discarded but which, due to the particular circumstances of the case, does not fall under this definition, will not be subject to the administrative requirements governing collection, sorting, maintenance, transport, international shipments and treatment methods applicable to waste.

Attention should be drawn to the fact that the term 'discard' is central to the definition although it is undefined. Against the background of the former definition of Directive 2006/12/EC, the Court of Justice has been for a number of years trying to elaborate this definition according to clear and concrete

criteria.[17] In particular, the Court of Justice has emphasised that the application of the key concept of "discarding" implies that all the "circumstances" indicating whether the holder has the intention or obligation to discard be taken into consideration;[18] in other words, in the light of a number of criteria. In particular, the Court has stressed that, in the assessment as to whether a substance or an object falls under the definition of waste, it is necessary to take into consideration whether:

- the object becomes subject to a disposal or recovery operation under the annexes of the directive, or an analogous operation, even where it is destined for re-use;[19]
- the holder of the object uses a type of treatment which is commonly used to get rid of waste;[20]
- the object retains any economic benefit,[21] in particular where the holder has to pay a specialist company which takes care of collection, transportation and the final treatment of the waste;
- the method of production indicates that the object is unwanted;[22]
- the used substance is a production residue;[23]
- the object is a residue whose composition is not suitable for the use made of it, or where special precautions for the environment must be taken when it is used;[24]

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17) A familiarity with this jurisprudence is of great benefit for national lawyers, because any clarification made by the Court of Justice in a case brought against a Member State is of *a priori* theoretical interest for all other Member States of the EU.

18) Joined Cases C-418/97 & C-419/97 *Arco Chemie* ECR [2000] I-4475, paras. 73, 88 & 97; C-9/00, *Palin Granit Oy* [2002] ECR I-3533, para. 24. A complete discussion of all the relevant criteria is impossible in the space available here.

19) Joined cases C-304/94, C-330/94, C-342/94 & C-224/95 *Tombesi* [1997] ECR I-3561; C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paras. 25 & 26.

20) Joined Cases C-418/97 & C-419/97 *ARCO Chemie*, seen above, paras. 69 & 73. However, the fact that the burning of a residue—petroleum coke—is a standard waste recovery method is not relevant since the purpose of a refinery producing this residue is precisely to produce different types of fuel (C-1/03, *Saetti* Order, 15th January 2004, para. 46).

21) Joined cases C-304/94, C-330/94, C-342/94 & C-224/95 *Tombesi* , seen above, paras. 47, 48 & 52 ; Case C- 9/00 *Palin Granit Oy* [2002] ECR I-3533, para. 38.

22) Joined Cases C-418/97 & C-419/97 *ARCO Chemie* , seen above , paras. 83-87; Case C- 9/00 *Palin Granit Oy*, seen above, para. 33; C-457/02, *Niselli*, order of 11th November 2004, para. 43.

23) Joined Cases C-418/97 & C-419/97 *ARCO Chemie*, paragraph 84; Case C- 9/00 *Palin Granit Oy*, seen above, paras. 32-37 ; *Niselli*, paragraph 42 ; *Saetti*, para. 34.

24) Joined Cases C-418/97 & C-419/97 *ARCO Chemie*, seen above, para. 87; Case C- 9/00 *Palin Granit Oy*, para. 44.

- any use other than disposal can be envisaged for the substance (burial, incineration without energy reclamation);[25]
- the object is included in Appendix I of the waste Framework Directive or in the European Waste Catalogue;[26]
- where the company holding the object has accepted that it is waste.[27]

Of course, no *a priori* preference can be given to any one criterion over another, but rather the criteria must be applied on a case-by-case basis in the light of the particular circumstances. In addition, in outlining these factors it is necessary to bear in mind the objective of the WFD, ensuring that its efficacy not be compromised. In particular, the term waste must be interpreted in the light of the objectives of the directive,[28] which refers to Article 192 (2) TFEU guaranteeing "a high level of protection" of the environment,[29] corresponding with the obligation set out in Article 13 WFD.[30] Accordingly, the verb 'to discard' cannot be interpreted restrictively.[31]

That being said, confusion over the meaning of the term 'discard' is likely to stem from the fact that residue might be either disposed of or recovered, since there are two permissible waste management approaches. In fact, any waste produced must be managed: it must be either disposed of, either

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25) Joined Cases C-418/97 & C-419/97 *ARCO Chemie*, seen above, para. 86.

26) It should be noted that Annex I was abrogated by the new Waste Framework Directive.

27) Joined Cases C-418/97 & C-419/97 *ARCO Chemie*, seen above, para. 73. Considered in isolation, this criterion is not relevant (*Saetti* Order, para. 46).

28) Joined Cases C-206/88 & C-207/88, *Vessoso & Zanetti* [1990] ECR I-1461, para. 12; *ARCO Chemie*, para. 37; *Palin Granit Oy*, seen above, para. 25.

29) Pursuant to Article 3(3) EU and 191(2) TFEU, EU policies shall aim at attaining a high level of environmental protection. However, nothing is said as to the ways in which the EU should achieve such a high level of protection. What is more, the wording of the obligation to seek a high level of environmental protection is perplexing. For instance, a measure proposed by the Commission may appear at the same time draconian in the eyes of the States where environmental policy is more lenient, and yet insufficient for other Member states. There is a question as to whether the EU should strive for maximal protection. Does it follow from these Treaty provisions that the level of protection must be calculated at the highest conceivable level? Or should lawmakers make do with an intermediate level of protection? The uncertainty within the scope of this obligation does not however mean that the EU institutions enjoy absolute discretion in this regard. It is beyond question that a non-existent or low level of protection would violate this treaty law obligation.

30) Formerly Article 4 of Directive 2006/12/EC. See Joined Cases C-418/97 & C-419/97 *ARCO Chemie*, seen above, para. 40; C-9/00, *Palin Granit Oy*, seen above, para. 23.

31) Joined Cases C-418/97 & C-419/97 *ARCO Chemie*, seen above paras. 36-40; Case C-1/03 *Van de Walle* [1997] ECR I-7613, para. 45.

recovered. In contrast to disposal operations (landfill, incineration, deposit into land, land treatment, etc.), the waste subject to a recovery operation might have a positive value. In fact, though waste often has a negative economic value for its producers who seek to rid themselves of it with the least possible expense, at the same time, it represents a positive worth for its purchaser, to the extent to which the latter is able to use it as a product or a raw material. Does it mean that waste deemed to be recovered is likely to escape the scope of ambit of the directive? The answer is rather straightforward: whatever the future might have in store for a residue has no bearing on its present classification as waste. This means that national regulations may not restrict the scope of the concept of waste by excluding from it any objects and substances that can be commercially re-used.[32] The value of waste, whether it be positive or negative, has no influence upon its categorisation as such.[33]

A striking example is the Court of Justice judgment in *Vessoso and Zanetti*. In response to two preliminary references from Italian courts, the Court of Justice confirmed that even those substances capable of being economically re-used could be regarded as waste. In these cases, the operators of a transport business were prosecuted for illegally having transported substances defined by the Italian law as waste. The defence argued that the substances in question escaped the terms of the definition in the Italian law because they were capable of being re-used and, as such, were neither abandoned nor destined to be abandoned. The references before the Court of Justice involved, *inter alia*, the question of whether the notion of waste, as defined in the former waste Framework Directive 75/442/EEC also included objects capable of being commercially re-used.

In his conjoint opinions on the questions put to the Court, Advocate General F.G. Jacobs decided that 'neither definition contains any suggestion that the intention of the holder is relevant. … the question whether a substance or object poses a threat to human health or the environment is an objective, not a subjective, one. It has nothing to do with the intention of the person disposing of the substance. Nor is the possibility of such a threat affected by whether or not the product can be recycled or reused'.[34] The Court followed the Advocate General opinion in the first judgment, holding that under the terms of Directive 75/442/EEC it appeared that 'a substance of

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32) C-359/88 *Zanetti* [1990] ECR 1509.

33) Case 2/90 *Commission v. Belgium* [1992] ECR I-1.

34) Opinion AG F.G. Jacobs in Joined Cases C-206/88, C-207/88 & C-359/88 *Vessoso & Zanetti* [1990] ECR 1470, para. 22.

which its holder disposes may constitute waste … even when it is capable of economic reutilization'.[35]

The Court replied to the second part of the question that the notion of waste in the first articles of Directive 75/442/EEC did not presuppose, on the part of the management of the waste-holding company, an intention to exclude all commercial recycling of the substance or object by other persons.

In its second judgment, the Court replied that national legislation could not adopt a definition of the notion of waste which would exclude objects and substances capable of commercial re-use.[36]

Accordingly, any intention of the holder to find a commercial opening for its substances is not therefore relevant, because the determination as to whether a substance or object constitutes a threat either for human health or for the environment is made on objective rather than subjective grounds. The fact that the materials discarded may be subject to a transaction or quoted in public or private commercial lists is irrelevant.[37] This reasoning can be illustrated taking the example of a jeweller who is left with residues of gold or silver when preparing jewellery. Due to their value, these residues will be recovered and melted down. He does not under any circumstances intend to produce them. If he could, the goldsmith would avoid producing these residues, as far as possible. Despite the presence of precious metals, these production residues will be classified as waste. For this reason, both OECD and EU rules include precious metals in the lists setting out different types of waste. The Administrative Appeal Court of Paris has been endorsing that interpretation: it held that residues containing precious metals were deemed to be waste.[38] By contrast, where it is marketed on economically advantageous terms,[39] heavy fuel oil transported by sea will be a product and not waste.

Against this background, different residues that are likely to be economically re-used have been classified as waste either by the EU lawmaker or by the Court of Justice: electrical and electronic equipment,[40] used cars,[41] marble

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35) Cases C-206/88 and 207/88, *Vessoso and Zanetti* [1990] ECR 1461.

36) Case C-359/88 *Zanetti* [1990] ECR 1509. As we see, this means that control and monitoring regimes may not be differently arranged depending upon the end envisaged for the waste being eliminated.

37) Case C-304/94 *Euro Tombesi* [1997] ECR I-3561, paras. 47-52.

38) See CA Paris, 23 September 1999, *Société Actimétal*, *Recueil* n° PA01156.

39) Case C-188/07 *Commune de Mesquer* [1997] ECR I-4501, para. 48.

40) Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), OJ [2003] L 37/24.

41) Directive 2000/53/CE on end-of life vehicles, OJ [2000] L 269/34.

rubble,[42] wood chips,[43] and certain iron and non-iron scrap intended for use in iron and steel and metallurgical activities.[44] This last case should be considered in greater detail. The Italian Parliament had enacted legislation creating an exemption from the national regulation implementing the former waste Framework Directive 75/442/EEC for iron and non-iron scrap intended for use in iron and steel and metallurgical activities. This exemption had the effect of setting aside the Community legislation on the protection of the environment in these areas, including in particular with regard to their management, storage and transportation. The European Commission considered that this scrap should be classified not as a secondary raw material, but rather as a simple production and consumption residue which remained in the form of a residue until the conclusion of the complete recovery process resulting from its transformation into iron, steel or metallurgical products. Following the initiation of infringement proceedings, the Court of Justice endorsed the Commission's position, holding that it amounted to a 'production or consumption residue not sought for as such'.[45]

It is frequently asked whether it is appropriate to impose a relatively stringent control on waste management, let alone on waste capable of being commercially re-used, whilst the use of numerous hazardous substances is in the end only loosely regulated. It is useful to answer this question by highlighting the nature of the risks that waste brings with it. These risks do not result solely from its physical or chemical properties, but also from the fact that its holders do not discard it in accordance with applicable administrative rules. Since it no longer has its initial function, waste thus presents special risks, depending upon its location—for example, near to a residential area—its accumulation as well as the length of time in storage. The following examples are good illustrations of this point. Whilst garden waste does not represent any danger for aquifers, its abandonment on classified chalk grassland within a nature sanctuary will constitute a threat for wild flora which requires soil low in nutrients. Similarly, even where there is no risk of pollution, the uncontrolled deposit of leftover stone from a quarry is liable to create an eyesore.[46] Consequently, the

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42) Case C-304/94 *Euro Tombesi* [1997] ECR I-3561.

43) Case C-418/97 *ARCO Chemie* [2000], seen above.

44) Case C-283/07 *Commission v. Italy* [2008].

45) Case C-283/07 *Commission v. Italy*, seen above, para. 45. See. C. Verdure, 'Les débris ferreux et non ferreux destinés à des activités sidérurgiques et métallurgiques constituent-ils des déchets?', *Environnement* 3 (2009).

46) Opinion AG Jacobs in Case *Palin Granit Oy*, seen above, para. 33.

law on waste aims both to prevent pollution and the risks created by waste due to its physico-chemical composition—for example, PCBs and PCTs are hazardous waste—as well as to ensure that both hazardous and non-hazardous materials that are no longer of any use for their holders are processed in accordance with administrative law requirements.[47]

Accordingly, one can only approve of this case law of the Court of Justice. Excluding those wastes capable of commercial recycling from the concept of waste would, in effect, make all controls practically impossible, as holders could escape liability to waste treatment and/or handling obligations by simply pointing to a potential commercial re-use. Reinforced environmental protection, the fundamental objective of the waste Framework Directive,[48] inexorably leads to a broad interpretation of the concept of waste. This is not however to say that national enforcement and inspection regimes may not be managed along different lines on the basis of the destination of the waste for either recovery or disposal.

4. De-classification as Waste

As discussed above, whenever a substance is subject to a recovery or disposal operation falling under Annexes I and II of the WFD or to an analogous operation, there is a presumption that it is waste. In effect, it is only upon conclusion of its disposal or recovery that the waste will no longer be classified as such. Administrative controls will be continued until the time when the waste has been definitively disposed of or recovered through an operation falling under one of these two annexes.[49]

The concept of recovery is a key concept under waste law. It is defined in Article 3(15) 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 fulfil a particular function… in the plant or in the wider economy'.

This concept therefore covers processes whereby substances are returned to their original state or transformed into a usable state, or again through which certain usable elements are extracted or produced from these substances.

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47) St. Tromans, EC Waste Law-A Complete Mess?, *JEL* 13: 2 (2001) 135-136.

48) Article 1 and Recital 6 WFD.

49) Article 3 (5) and (19). These annexes are intended to list non exhaustively recovery and disposal operations as they occur in practice. They are not binding.

Consequently, recovery is capable of covering an extremely broad range of operations ranging from recycling to the recovery of different materials, and Annex II provides only certain examples of these operations.[50] In *Tombesi*, Advocate General M.F.G. Jacobs pointed out that recovery operations provide an essential criterion in order to distinguish between waste and products. In his view, recovery could be conceptualised as a 'a process by which goods are restored to their previous state or transformed into a useable state or by which certain usable components are extracted or produced'.[51] Nonetheless, the concept of recovery is not necessarily synonymous with activities that do not entail any danger for environmental protection. Accordingly, steelworks that recycle scrap are regarded as listed installations due to their impact on the climate.[52]

Several operations listed under Annex II of the WFD are listed as recycling (R3, R4, and R5). Accordingly, recycling is a more narrow concept than recovery. In virtue of Article 3(17) WFD, recycling is defined as a recovery operation that entails the reprocessing of waste into 'products, materials or substances' but not energy.[53] That said, according to the waste hierarchy as set out under Article 4 of the waste Framework Directive, recycling is to be preferred to other recovery operations, such as energy recovery.[54]

Accordingly, in order for a residue no longer to be classified as waste, it is necessary for the recovery or the recycling operation to be complete. Needless to say that prior to recovery or recycling, most residues must first be collected,

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50) Article 3(15) stresses that Annex II sets out a non-exhaustive list of recovery operations.

51) Opinion AG Jacobs in Case *Tombesi*, seen above, para. 52.

52) As regard the review by the EU Courts of decisions adopted by the European Commission concerning the implementation of the European Union Emissions Trading Scheme embodied in Directive 2003/87, account must be taken of the number of cases lodged by undertakings operating steel mills. See Case T-27/07 *US Steel Koice* [2007] ECR II-128; Case T-13/07 *Cemex UK Cement* [2007] ECR II-146; Case T-196/07 *Dyckerhoff Polska* [2008] ECR II-189; Case T-197/07 *Grupa OSarow* [2008] ECR II-190; Case T-199/07 *Cementownia Odra* [2008] ECR II-194; Case T-203/07 *Cemex Polska* [2008] ECR II-194; Case T-241/07 *Buzzi Unicem* [2008] ECR II-234; Case C-6/08 *US Steel Košice* [2008] ECR I-96. However, it must be noted that energy use in the processing of ferrous scrap is much lower in comparison with the production of metal from ore. Accordingly, the use of metal scrap reduces the amount of GHG being emitted by steelworks.

53) It must be noted that this definition is different from that of the Waste Packaging Directive, the End of Life Vehicles Directive, and the Electrical and Electronic Equipment Waste Directive. That being said, all these definitions exclude the reclamation of energy from the recycling of materials. This is consistent with the waste hierarchy as set out under Article 4 WFD in which recycling is preferred to other recovery operations, such as energy recovery.

54) Recital 7 WFD.

socked, sorted, washed and purified. By way of illustration, iron and steel scrap recycling involves a swathe of techniques encompassing 'collection, sorting, baling, cutting, shearing, shredding and/or sizing, possibly also cryogenic processes, and final melting at the steelworks'.[55] Given that these operations may therefore entail several stages, it is therefore essential to know when and how a waste either 'fulfil a particular function' (recovery operation pursuant to Article 3(15)), either are reprocessed waste into 'products, materials or substances' (recycling operation pursuant to Article 3(17)).

So far, the Court of Justice has exercised extreme caution. It is settled case law that waste cannot be placed beyond the reach of EU and national waste law alike on the sole grounds that it has been treated, without its features having been in any way modified.[56] The grinding into powder of wood impregnated with toxic substances is not an operation of such a nature as to 'have the effect of transforming those objects into a product analogous to a raw material, with the same characteristics as that raw material and capable of being used in the same conditions of environmental protection', because it does not eliminate the toxicity.[57] This only occurs when it 'has the consequence that the substance in question has acquired the same properties and characteristics as a raw material' and it is 'capable of being used in the same conditions of environmental protection'.[58] As long as the residue has not been entirely transformed into a secondary raw material, it must be regarded as waste until recovery has been completed. Applying the same reasoning, the English High Court held that the mere mixing of different wastes in order to produce fuel did not amount to a recovery operation. Accordingly, the mixed residues remained subject to the waste regulations up until the incineration intended to produce the energy.[59]

If this view were not adopted, waste would no longer be classified as such solely on the grounds that it had undergone a certain transformation in order to enable it to be recovered as a substance. Needless to say that this would entail a risk of fraud.

Last but not least, in the Court of Justice eyes, even when waste has been subject to a complete recovery operation with the consequences that the

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55) L. Muchová and P. Eder, *End-of-waste Criteria for Iron and Steel Scrap: Technical Proposals*, JRC Scientific and Technical Reports (Sevilla IPTS, 2010) 10.

56) Joined cases C-304/94, C-330/94, C-342/94 & C-224/95 *Tombesi*, seen above, paras. 53 and 54.

57) Cases *ARCO Chemie*, para. 96.

58) Cases *ARCO Chemie*, above, paras. 94 et 96; *Palin Granit Oy*, seen above, para. 46.

59) *Castle Cement v The Environment Agency*, 22 March 2001.

substance concerned acquires the same properties and characteristics as a raw material, it nonetheless remains possible that this substance may be regarded as waste if—in accordance with the definition of this concept—its holder has discarded it or intends or is obliged to do so.[60] In our opinion, this hypothesis is an exceptional case since the complete recovery operation will have precisely the objective of extracting secondary raw materials from the recovered waste, the value of which must be greater than the recovery process. It is only where it is impossible to sell these secondary raw materials (for example, due to a fall in their market price) that their holders would be likely to discard or eliminate them or to recover them according to other methods.

5. The New WFD Arrangements on the De-classification of Waste

In addition to the scrupulous regulations to be complied with and the taxes to be paid, economic operators consider that the relatively broad definition of waste under Union law does not embrace all of the special features of their economic activities. In their view, if waste has been profitably used as a replacement for raw materials, production residues have not thereby been discarded. It is also considered preferable to limit the scope of waste regulation solely to substances intended for disposal and substances that must be subject to physico-chemical processing prior to recovery. That fact that a substance is no longer legally considered to be waste has undeniable benefits for its holder ranging from unlimited freedom of movement to the absence of environmental taxes and a reduction in administrative costs. By adopting the new Framework Directive in 2008, the EU lawmaker sought to tailor the Directive's scope in the best possible manner.[61]

Accordingly, provided that a series of conditions are complied with, Article 6 WFD lays down provisions in order to determine as precisely as possible the time when certain waste ceases to be classified as such. Since it is no longer waste, it then becomes a product. Specific criteria adopted on national or Union level must then specify the scope of these conditions for certain classes of waste such as aggregates, paper, glass, metal, textiles and rubber tyres. The status as waste of an object or substance falling under that regime is therefore only temporary.

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60) Cases *Arco Chemie*, seen above, paras 94 et 96; *Palin Granit Oy*, seen above, para. 46.

61) A.-S. Renson and C. Verdure, 'Déchets et sous-produits à l'aune de la directive 2008/98/CE', 4 *RMUE* (2009) 747.

The following conditions must be complied with.

First, by virtue of Article 6(1), de-classification as waste is dependent upon a recovery operation, that might include as the above discussion has evidenced a recycling operation.

Thereafter, the WFD requires that four conditions all be met:

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

In addition, Article 6 stresses that the criteria may include limit values for pollutants 'where necessary and shall take into account any possible adverse environmental effects of the substance or object'.

These requirements, which are very general, are not even compulsory. Nonetheles, they must be clarified through executive regulations adopted in accordance with the "regulatory procedure with scrutiny", as required under Article 39 of the Framework Directive. The "regulatory procedure with scrutiny" is enshrined in the 1999/468/EC "Comitology" decision.[62] Particular attention should be drawn to the fact that the adoption of the "Comitology" Regulation No. 182/2011 on 16 February 2011[63] did not have the effect of departing from this particular procedure. Although this regulation introduced considerable changes to existing comitology mechanisms, nonetheless the effects of the regulatory procedure with scrutiny 'shall be maintained for the purposes of existing basic acts making reference thereto',[64] which is precisely the case for Directive 2008/98/EC.

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[62] Article 5 bis of Decision 1999/468/EC of the Council of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ [1999] L184/4; modified by Decision 2006/512/EC, OJ [2006] L 255/4. See recital No 7 of Regulation 333/2011.

[63] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ [2011] L 55/13. See P. Craig, Delegated Acts, Implementing Acts and the New Comitology Regulation (2011) 36 *E.L.Rev.* 671-687.

[64] Article 12(2) and recital No 21 of Regulation (UE) No 182/2011.

As confirmed by Article 4(2)(d) TFEU, competence over environmental policy is shared.[65] This means that until the Union intervenes, the Member States retain their competence over compliance with the obligations resulting from treaty law.[66] During this period, Article 6(4) of the Framework Directive on waste provides that where criteria have not been set at EU level, Member States 'may decide case by case whether certain waste has ceased to be waste taking into account the applicable case law'. If the Member States adopt specific criteria for certain classes of waste, they must notify the Commission of such decisions in accordance with Directive 98/34/EC on technical standards.[67] As a result, the case law commented upon above in sections 3 and 4 is still relevant.

6. Council Regulation (EU) No. 333/2011 on Scrap Metal

6.1. Introductory Comments

Council Regulation (EU) No. 333/2011 of 31 March 2011 establishing criteria determining when certain types of scrap metal cease to be waste under

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[65] N. de Sadeleer, Principle of Subsidiarity and the EU Environmental Policy, *JEEPL* 9.1 (2012) 63-70.

[66] Insofar as the EU has not taken action, the Member States maintain their competences, provided that they respect the obligations contained in Treaty law. Conversely, where the subject matter has been harmonized under secondary law, EU law does not allow the Member States to pursue an environmental policy as they understand it. In such case, the Member States must simply implement secondary law. If they do not do so, infringement proceedings may be commenced against them before the Court of justice for failure to fulfil their EU obligations. However, though a field may be subject to harmonization, Member States still retain much leeway. For instance, the Court of Justice took the view that though the EU has been exercising its competence in adopting Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, it did not preclude any further action from the Member States. Given Directive 2005/35/EC lays down minimal obligations, Member States are empowered to enact more stringent measures in accordance with international law. See Opinion AG Kokott in Case C-308/06 *Intertanko* [2008] ECR I-4057, para. 42.

[67] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ [1998] L204/37; as modified by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ [1998] L217/18. See N. de Sadeleer, Internal Market Preventive

Directive 2008/98/EC of the European Parliament and of the Council[68] is the first regulation to implement Article 6 of the Directive. Since the committee in the regulatory procedure with scrutiny had not issued its opinion on the measures proposed by the Commission, the Council adopted the regulation concerned under the 1999 "Comitology" decision. The European Parliament did not object to the measures proposed.

This regulation sets forth the criteria which make it possible to determine the time when certain types of scrap metal—iron, steel and aluminium—cease to be waste within the meaning of Directive 2008/98/EC where such scrap is intended for the metal production in steelworks, foundries and aluminium refiners.

Where there is strong demand for re-use, in particular within the metallurgy sector, scrap metal is suited for this regime. Scrap is generated when a metallic product reaches its end of life or during product fabrication. Scrap metal can originate from various sources: it comes both from the steel industry as well as industries for the transformation and recycling of iron waste resulting from the manufacture of capital and consumer goods (vehicles, ships and aeroplanes, metal products for construction, machinery, cables, electrical and electronic equipment and packaging, household appliances, etc.). Moreover, after mineral waste and household waste, scrap metal is the third most important source of waste in France.[69] Whilst the metals industry generates a significant share of industrial waste—residues from the processing of slag and dross—it is also a key player in the recovery chain. For example, a converter within the integrated process will require a contribution of between 10 and 25% of scrap metal in order to transform cast iron into steel. Electric arc furnaces have a load which may be comprised of around 95% scrap.[70]

In addition, the recovery of metal residues offers numerous advantages. Given the chemical and physical properties of metal, steel can be reused indefinitely without thereby losing any of its qualities. In becoming secondary raw material, scrap can in almost all applications compete with raw material. Furthermore, the recasting of steel requires less energy than its production

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Controls of National Technical Standards and Their Impact on Environmental Measures, *JEEPL* 8:3 (2011) 252-272.

[68] OJ [2011] L 94/2.

[69] Commissariat général au développement durable, « Chiffres et statistiques », 179 (2010) 2, available on http://www.developpement-durable.gouv.fr/.

[70] Service public de Wallonie, 'La métallurgie', in *L'Etat de l'environnement wallon* (Namur, Ministère de la Région wallonne, 2011).

from scratch. Accordingly, the total scrap consumption in the EU is impressive: in 2008 it amounted to approximately 112 million tonnes. Given economic growth, the demand for scrap is expected to rise.

6.2. *Fulfilment of Article 6 WFD Conditions*

As stressed above, in virtue of Article 6 (1) WFD, scrap waste shall cease to be qualified as waste when several conditions are met.

The two first conditions set out by Article 6 WFD are fulfilled. Given that iron and steel scrap is commonly used as a feedstock for the production of new iron and steel, it comes as no surprise that a structured market exists. Indeed, being traded across the EU and worldwide, iron and steel scrap represents one of the major material recycling flows. Moreover, available volumes of scrap metal are so far not sufficient in order to meet current demand. Furthermore, the steel and foundry industry requires that metal scrap comply with specifications such as the 'European Steel Scrap Specification'.

In virtue of the third condition, the scrap must fulfil the technical requirements for the specific purpose it is going to be used (steel production) 'and meets the existing legislation and standards applicable to products'. According to the JRC Report, this means that at the stage at which the residue ceases to be a waste, 'the scrap should fulfil specifications that iron and steel producers use for the scrap that they buy'.[71]

Finally, the fourth condition appears to be fulfilled on the account that the use of scrap metal is not causing 'overall adverse environmental or human health impacts'.[72] Nonetheless, although scrap metal in itself does not pose any risk to the environment, it may be contaminated with oil or mixed with other waste. By way of illustration, oil or paint attached to scrap metal, when exposed to rain, may cause contamination to its surrounding environment. In accordance with the fourth condition set out in Article 6 WFD, the Council Regulation requires that iron and steel scrap should not benefit of the end-of-waste status provided that it has any of the hazardous properties listed in Annex III of the WFD.[73] It follows that asbestos is not to be included in end-of-waste scrap.

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71) L. Muchová and P. Eder, above, 21.

72) Air emission from the iron and steel production in the EU are not expected to increase. See 37.

73) Annex I, 2.2.

It must also be noted that during the mechanical separation of old waste it is often impossible to remove all the impurities (rubber, plastic, fabric, wood, chemical or organic substances, dust, grinder dust, sludge, etc.). Accordingly, Regulation (EU) No. 333/2011 requires that the total amount of impurities shall be ≤ 2% by weight.[74] By the same token, old scrap should be free of visible oil.[75] As regard the fulfilment of the fourth condition laid down under Article 6 WFD, the report of the Joint Research Centre of the European Commission has shown that the proposed criteria should result in the production of iron, steel and aluminium scrap devoid of hazardous properties and sufficiently free of non-metallic compounds.[76]

Last but not least, given that the European steel recovery industry (at the treatment stage) is fairly concentrated, with seven companies providing some 40 % of the total steel scrap delivered to the steel mills, the risks of fraud is to some extent belittled.[77]

6.3. *Requirements for End-of-life Scrap*

Under the former 75/442/EEC Directive, iron and steel scrap was qualified as waste until it was melted in a furnace for the production of new metal. In virtue of Article 6 (1) and (2) WFD, scrap waste ceases to be qualified as waste when it has undergone a recovery operation and complies with the different environmental requirements laid down under Regulation No. 333/2011. However, in order to benefit from the end-of-waste status, the scrap has to go through all necessary treatment processes that make it suitable as direct input material for the final users (steel mills) and allow for transporting, handling, trading and using the scrap without increased environmental and health impact or risks.[78]

Where metallic scrap does not fulfil the end-of-waste criteria, it will be treated as waste. Nonetheless, such scrap may still be recycled for the production of iron and steel. In line with the Court of Justice case law commented on above, the scrap will cease to be qualified as waste when the recycling or recovery is completed. In other words, the scrap has to be melted in a furnace and new metal has to be produced in order to avoid the implementation of waste management regulations.

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74) Annex I, 1.1.

75) Annex I, 1.4.

76) Recital 3 of Regulation No 333/2011.

77) L. Muchová and P. Eder, above, 12.

78) L. Muchová and P. Eder, above, 31.

Given this diversity of source, the quality of the scrap is likely to differ significantly. The ways in which scrap can be recycled highly depends on the cleanness of the metallic elements, which is determined by separate collection and specific treatment methods. Admittedly, one must distinguish scrap from the steel processing (new scrap), and scrap from products after their use (old scrap).

New scrap is generated during the initial manufacturing processes. Given that it has not been mixed with other substances, new scrap does not require any pre-treatment process before it is re-melted, although cutting and shredding might be necessary. It follows that new scrap can be directly used as a material in the furnace.

In contrast, old scrap is collected after that a product has been discarded. Old scrap contains unintended constituents which have no function for the recovered material. What is more, it is likely that old scrap is contaminated by a number of impurities.

The distinction made between new and old scrap implies that the end-of-waste criteria may apply at different stages.

Pursuant to Articles 3 and 4 of the Regulation iron, steel and aluminium scrap shall cease to be waste where, upon transfer from the producer to another holder, all of the following conditions laid down in the annexes are fulfilled. Just as their producers or importers must ensure that scrap metal does not display hazardous properties and that it has a relatively low level of non-metallic compounds, such scrap must meet the different technical requirements specified in Annexes I and II of Regulation No 333/2011. Accordingly, holders must ensure that that scrap metal does not contain a whole series of foreign bodies, such as oily emulsions, radioactive particles, hazardous waste, etc. Recital 22 to WFD specifies in this regard that 'a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria'.

Moreover, pursuant to Articles 5 and 6 of the Regulation, producers or importers are to apply a "quality management system" and certify that the waste complies with the criteria by accompanying each lot of scrap metal with a compliance certificate. In effect, producers or importers must control compliance with these technical rules themselves through the requirements set forth in the annexes to the Regulation. This self-control procedure must be verified by an accredited body every three years.[79] Accordingly, the regime

[79] Article 6(5).

implemented by Regulation (EU) No. 333/2011 is in line with other environmental regulations, which are based on a whole range of control procedures.

6.4. *When and With Reference to Which Operation End-of-Life Scrap Ceases to be Waste?*

Before it can be recovered in order to produce metal, scrap must be collected, stored, sorted and purified. Given the sheer number of these treatment operations, the scrap recycling industry consists of scrap collection and sorting, distribution, treatment and processing. The processing techniques of end-of-life vehicles (ELVs) and beverage cans provide the most striking evidence of the diversity of treatment a discarded product must undergo in order to be used as a secondary raw material.

As far as ELVs are concerned, their metallic parts are separated by physical processes and recovered as ferrous scrap (iron and steel, comprising 70 % of the total vehicle waste) and non-ferrous metals (5 per cent), all of which are recycled.[80] However, most of the 25 % remaining residues, which are composed mainly of plastics, contaminated with metallic parts are not likely to be recycled. These residues have to be disposed of in landfills or incinerated in accordance with waste management regulations. In contrast, the recovered ferrous scrap would be qualified as product falling outside the scope of ambit of waste management regulations.

Beverage cans are often made of aluminium. When the cans are discarded, local authorities collect them as part of the municipal solid waste. Later on, they can be separated for bailing. On arrival at the refinery, the bailed aluminium can is first shredded into small-size pieces, and then passed through a magnet field to remove any remaining steel contaminants. Next, the shreds need to be removed off paint, ink, and coating. After this operation, the shreds are fed into melting furnaces. At this stage, salt is usually added to remove the impurities and to improve the quality of the products. The molten aluminium is then cast into ingots.

A question thus arises as to when and with reference to which operation the scrap falls within the reach of Article 6, and therefore when the regulation governing waste no longer applies. It will be noted that a pre-treatment is required under heading 3 of the two annexes to the Regulation (sorting at source or during collection, separation, or the prior removal of toxic

80) L. Muchová and P. Eder, above, 7.

substances). Any processing necessary in order to prepare the scrap metal for its final use in foundries—cutting, milling, cleaning or de-pollution, etc.—must therefore be completed in order for the scrap metal to cease to be waste. If this does not occur, the pre-treatment will amount to a waste recovery operation. This conclusion is in line with the case law commented upon in section 4.

6.5. *Consequences on Environmental Law of the De-classification of Scrap*

The de-classification of scrap under the arrangements set out by Regulation (EU) No. 333/2011 impinges on waste management obligations as well as on REACH.

i. Storage as well as transport within a Member State
Storage as well as transport within a Member State of end-of-waste scrap are no longer subject to waste regulatory controls.

ii. REACH
Pursuant to Article 2(2) of the REACH Regulation, waste is not a substance, mixture or article. Accordingly, when metallic scrap if falling under the WFD waste definition, it cannot be qualified as substance, a mixture or an article. It follows that when the scrap fulfils the end-of-waste conditions and as a result ceases to be a waste, the exemption under Article 2(2) of the REACH Regulation is not applicable. It follows that the substances in end-of-waste scrap are becoming subject to the registration procedure and to the obligations to provide safety information to downstream users.[81]

iii. Waste Shipment Regulation
Last but not least, there is a question as to whether scrap aluminium, iron and steel that are de-classified as waste in accordance with Regulation (EU) No. 333/2011 are still subject to Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (hereafter the Waste Shipment Regulation).[82]

Account must be made of the fact that most metal scrap is listed under the List B of Part 1 of Annex V of the Waste Shipment Regulation (also referred to

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81) Articles 6 and 7 REACH. See in particular JRC Report, 40-46.
82) OJ [2006] L 190/1.

as the 'green list'). Given that green waste is not covered by Article 1(1)(a) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, it is not subject of an export prohibition. One must distinguish between exports of green waste within the OECD countries and to non-OECD countries.

Firstly, exports of green waste within the OECD countries are not subject to notification and consent procedure. Nevertheless, this waste may not be shipped without authorisation if it is contaminated by other material on a scale that has the effect of increasing environmental risks.[83] Moreover, all shipments of waste included in the green list must be accompanied by an appropriate shipping document, as specified in Annex VII to the Regulation (EC) No. 1013/2006 on shipments of waste. Furthermore, economic operators must be able to submit the contract regulating shipment from the exporter to the disposal undertaking if requested by the competent authority.

Secondly, as far as green waste exports to non-OECD countries are concerned, the Waste Shipment Regulation calls on the Commission to obtain a declaration from the importing country as to whether it will accept the imports. Where the non-OECD country has failed to respond to the Commission, it has to be regarded as having chosen the stricter procedure of prior written notification and consent. Generally speaking, this procedure entails both the payment of administrative fees and the establishment of financial guarantees.[84]

It will also be noted that pursuant to OECD Decision C(2001)107/FINAL, scrap aluminium, iron and steel are included in the "green list" under Regulation (EC) No. 1013/2006. This procedure applies to non-hazardous waste intended for recovery. The legal regime governing their international shipment is more favourable than the regime applicable to waste included in the "orange list" (Annex IV) since their cross-border shipments are not subject to a notification procedure with the competent authorities.

It is certain that neither the WFD nor Regulation (EU) No. 333/2011 on scrap metal regulate the question concerning the linkage between the new regime and the international and EU law applicable to cross-border shipments of metal residues. Should it be inferred that Regulation (EC) No. 1013/2006 no longer applies to extra and intra-Community shipments of de-classified metal residues?

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83) Article 18(1) Regulation (EC) No 1013/2006.

84) L. Muchová and P. Eder, above, 18.

Provided that the end-of-waste criteria are fulfilled in accordance with the Annexes of Regulation (EU) No. 333/2011, the scrap metal is qualified as a product/secondary material. As a result, end-of-life metal scrap falls outside the scope of ambit of the Waste Shipment Regulation. Considering that scrap is not deemed to be waste under US law, many European waste management undertakings considered that too broad an interpretation of the concept of scrap waste was prejudicial to their activities. These operators did not consider scrap as having been abandoned when it was fully re-integrated as replacements for other virgin metallic compounds. It follows that undertakings exporting end-of-waste scrap to non-OECD countries are likely to avoid the costs incurred by the Waste Shipment Regulation compliance. In particular, these undertakings won't have to obtain the consent of the importing countries.

In addition, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal—a mixed agreement to which the EU is a party—does not apply to metal residues imported into the EU or exported to third countries.

7. Conclusion

The regime implemented by Regulation (EU) No. 333/2011 governing demonstrations that scrap metal complies with the requirements for de-classification as waste goes in the same direction as the environmental regulations, which are based on a whole range of control procedures. Where residues comply with these criteria, they do not fall under the law on waste. The status as waste of an object or substance falling under that regime is therefore only temporary. It shall cease to be a waste when it has undergone the recovery operation according to the specific criteria laid down by the executive regulation. The end-of-waste statute differs from the by-product arrangements set out in Article 5 WFD.[85] Whereas a by-product has never been qualified as waste, the

[85] Article 5 WFD introduces a distinction between by-products which undertakings do not wish to discard within the meaning of Article 3 WFD and residues covered by the provisions of the Directive. This approach is consistent with the Court of Justice case law according to which: 'there is no reason to hold that the provisions of Directive 75/442 which are intended to regulate the disposal or recovery of waste apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products'. See Case C-9/00 *Palin Granit Oy* [2009] ECR I-3533, para. 35.

end-of-life scrap were formerly regarded as being waste. The regime is original in nature due to the fact that it seeks to stimulate the recycling market for metal residues, and therefore progressively to replace primary materials with secondary materials. In enhancing a specific waste stream, this regime should indeed contribute to one of the objective pursued by the EU lawmaker, resource efficiency.[86]

Finally, other regulations concerning flows of different forms of waste that are of particular importance for the European recycling markets—copper, paper, glass and compost—are currently being prepared by the European Commission.

86) Article 1 WFD.