

Editorial

DID END OF WASTE BRING THE END OF WASTE?

Imagine that you are driving on a highway, and you are looking for the nearest exit to your destination. It is often quite easy to find, marked with a sign and only requires a single turn. In the same vein it is easy for an object, according to EU law, to end up as waste as the only requirement is that (a) the holder discards it, (b) the holder has the intention to discard it, or (c) the holder must discard it (article 3(1) of Directive 2008/98/EC (hereafter WFD)). Now imagine that you are deep in a big city center and are trying to get back to the same highway. It is often not as easy as it was to get off and involves many possible twists and turns. In similar fashion, for a waste to cease to be waste according to EU law is complicated. EU waste law is often critiqued for its complexity and vagueness (see *inter alia* Tromans, 2001). The following text is about the transformation between waste and product, in particular the concept of 'End of Waste' adopted within the European Union (EU) through the 2008 WFD, from a legal perspective.

What constitutes waste is fairly intuitive. Tossing a cup in a garbage bin clearly indicates that the cup is waste, while selling or gifting the same cup indicates that it is not. However, if the cup is retrieved from the garbage bin, and cleaned, this indicates that it has transformed into something other than waste. Whether an object in practice "constitute waste", is thus intuitive. Capturing this transformation in an appropriate, and useful, legal definition has proved to be a challenge. It is however a very important distinction. The intersection between waste and product does not only formally create implications for waste holders regarding *inter alia*: marketability, transboundary shipments, storage, and liability, but also informally through public perception. Waste status can serve as a stigma, and to paraphrase the European Joint Research Centre (JRC) (2009), waste-based fertilizers such as compost are often undervalued by farmers due to their origin. This results in otherwise identical compost inheriting different values depending on its origin and label (Delgado et al, 2009:90).

Ideally, an object should only be considered as waste, i.e., make the waste legislation applicable, when required to protect human health and the environment. *A contrario*, objects that can be utilized in a safe manner without governance in the form of waste legislation should be considered something else. Fundamentally, it is that simple. Yet, to legally determine what constitutes waste is like walking a tightrope. An extensive interpretation of 'waste' can result in redundant regulation of 'materials' that are harmless and consequently hamper the fulfillment of a circular econ-

omy. A too restrictive interpretation of 'waste' may, on the other hand, result in environmentally hazardous materials freely circulating the market.

To harmonize the concept of waste on union level and clarify the line between waste and product, the concept of 'End of Waste' was introduced in the 2008 WFD. The question addressed here is thus: Did 'End of Waste' bring the end of waste?

The answer is of course that it did not, that would be impossible. Nor was the objective to bring the end of all waste. But did 'End of Waste' achieve its purpose? Namely to create clear legal boundary between waste and waste that has been adequately treated and thus 'transformed' into something else.

In order to create a simple pathway out of the waste box, a criteria-based 'End of Waste' assessment procedure was introduced through the 2008 WFD. Following article 6(1), technical criteria was to be adopted for specific waste streams in accordance with the following conditions: (a) the substance or object is commonly (the requirement of 'commonly' has been removed through Directive 2018/851/EC) 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 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. While (a) and (b) primarily guarantee that there is an actual use for the 'waste' after End-of-Waste, (c) and (d) assure that the use is lawful and environmentally justifiable (Turunen, 2018:88 et seq.). It is important to emphasize that these four conditions were meant to serve as a foundation for the adoption of criteria for specific waste streams. This criteria-based approach was subsequently amended (directive 2018/851/EC) and the current provision requires member states to instead "take appropriate measures" to ensure that waste that complies with all above-mentioned conditions ceases to be waste. At the present time, 'End of Waste' is thus applicable for all types of waste without adoption of specific criteria. Even so, the conditions stated in article 6(1) are cumulative, meaning that for a waste to cease to be waste all conditions must be fulfilled (see preamble 17 of Directive 2018/851). The rationale behind an object's inclusion into the 'waste box', as stated by the Court of Justice of the European Union - CJEU in *inter alia* Tronex (case C-624/17), is to guarantee the effectiveness of the waste legislation and ensure that it is not undermined. In view of this, the necessity of the

cumulative nature of the conditions stated in article 6(1) can be questioned.

While it can often be assumed that, for an object, for which there is an individual use, there is also a market, this is not true for all objects. According to the JRC the market for compost and digestate is for example often supply driven and prices are often zero or close to zero (Saveyn & Eder, 2014:121). Another example is the use of sewage sludge as fertilizer. In Sweden, it is not unusual that farmers are paid to receive such sludge-based fertilizer, implying that the price is, in fact, negative. The question is therefore whether it is at all possible to fulfill the market-condition if the price is zero or negative, and if this requirement, as a result, can be considered necessary? It seems unnecessary to require of the waste holder to prove that there is a market demand for an object for which he or she already has an individual use. The mere fact that it is the waste holder that must prove that the conditions are met also implies a risk. Assessments are to a degree always subjective, and will vary between member states and between different authorities in member states. The risk is further amplified if waste holders cannot apply for a decision on whether certain treatment processes will result in 'End-of-Waste' from the authorities in advance, which, for example, is the case in Sweden.

Redefining End of Waste: KISS – Keep It Simple Stupid

The existence of a market, a demand, or the previous requirement that the use is common, can help determining if there is a legitimate use of the 'waste'. The fact that there must be a demand or a market for the 'waste' however undermines the underlying idea of 'End of Waste', i.e., to simplify the assessment of the transition from waste to product. A more reasonable approach, where unnecessary

subjective assessments and complexity are avoided, could be to shift the focus towards legal and technical requirements, including the environmental impacts of the 'waste'. If the 'waste' meets these requirements, and thus the requirements for a high level of environmental protection – the primary goal of the waste legislation - there will almost certainly be a use and consequently a market or demand for that particular 'waste'. The 'waste' will, in this situation, not be something that the holder intends to discard. In conclusion, some of the original and current requirements for 'End of Waste' can therefore be considered excessive by imposing unnecessary subjective assessments upon the waste holders. In response to the initial question, it is highly questionable if the purpose with 'End of Waste' has been achieved. In its current form, 'End of Waste' is rather an overly complicated process to achieve something that with the current legislation can be achieved anyway.

Oskar Johannson
Luleå University of Technology, Sweden
oskar.johansson@ltu.se

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