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## The (legal) concept of waste

### An obstacle for circular economy activities (in the Brussels Capital Region)?

*“Waste doesn’t need to be waste:  
it can be the beginning of a new product’s life cycle!”<sup>1</sup>*

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<sup>1</sup> Directorate-General for Environment, “Factsheet: From waste to resources”, 8 June 2018, <https://op.europa.eu/en/publication-detail/-/publication/2d986694-736a-11e8-9483-01aa75ed71a1>, (Hereafter referred to as “Factsheet: From waste to resources”).

*Abstract*

This contribution examines whether and how the legal framework regarding waste, as applicable, is an obstacle to the development of the circular economy or if on the contrary it is conducive to exnovate the linear economy.

After providing an overview of the applicable legal framework (section II) the contribution dives into the concept of waste (section III) and examines the criteria that are to be fulfilled to qualify a product as waste. Once qualified as waste, a substance or good can also lose again this status if it complies with the conditions of the so-called “end-of-waste status”. This contribution examines how these criteria impact a circular economy.

The conclusions of the assessment are bundled in section IV.

This contribution is part of the interdisciplinary ULB/VUB research project Gosete, financed by Innoviris Brussels (Belgium). Gosete examines the governance issues related to the transition to a sustainable economy and in that context different case studies focused on the Brussels Capital Region have been performed. This contribution thus also focuses on the legal framework as applicable to the Brussels Capital Region. However, to the extent this legal framework derives from EU legislation this contribution includes a more general assessment.

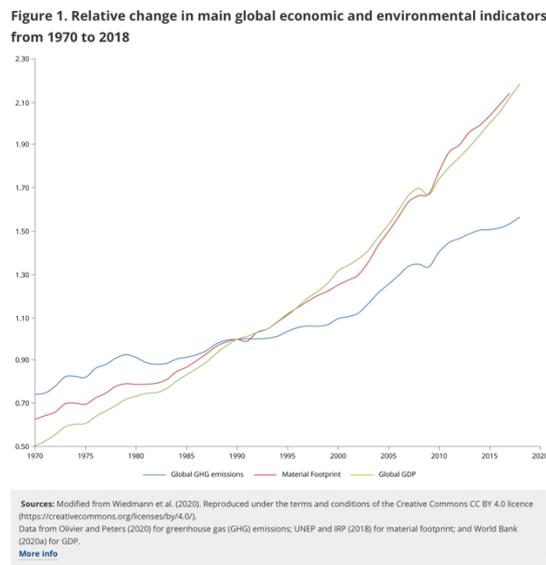
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## I.- Introduction

1. Our production and consumption patterns are putting increasingly pressure on natural resources, the climate and biodiversity, and cause an ecological breakdown of such a scope that survival on and of our planet is seriously jeopardized. Sustainable production and consumption (SCP) patterns, which are taken up as goal 12 of the sustainable development goals (SDG), has already been called for by the international community since 2002.<sup>2</sup> However instead of decreasing, material use seems to be increasing at a hallucinating pace and along with it also our waste footprint.

The following figure compares Global GDP and global material footprint between 1970-2018 and shows indeed the continuous steady increase of material use.<sup>3</sup>



The material footprint per capita (worldwide) has increased at an alarming rate in the past 30 years. In 1990, about 8.1 metric tons of natural resources were used to satisfy the needs of an individual.<sup>4</sup> In 2017, this material footprint per individual had risen to 12.2 metric tons.<sup>5</sup> This means a global material footprint rising from 43 billion metric tons in 1990 to 54 billion in 2000, and 92 billion in 2017. This is an increase of 70 per cent since 2000, and 113 per cent since 1990.<sup>6</sup> Each year the European Union produces 2.5 billion tons of waste, or 0,5 tons per capita per year.<sup>7</sup>

<sup>2</sup> A. HOBALLAH and S. AVEROUS, Goal 12- Ensuring Sustainable Consumption and production patterns; an essential requirement for sustainable development, 2015, available at <https://www.un.org/en/chronicle/article/goal-12-ensuring-sustainable-consumption-and-production-patterns-essential-requirement-sustainable>.

<sup>3</sup> See European Environment Agency, Growth without economic growth, 2021, available at <http://www.eea.europa.eu/publications/growth-without-economic-growth>. See also T. WIEDMANN, M. LENZEN, L.T. KEYSER and J. K. STEINBERGER, "Scientists' warning on affluence", Nature Communications, 2020, [www.nature.com/articles/s41467-020-16941-y.pdf](http://www.nature.com/articles/s41467-020-16941-y.pdf).

<sup>4</sup> <https://unstats.un.org/sdgs/report/2019/goal-12/>.

<sup>5</sup> <https://unstats.un.org/sdgs/report/2019/goal-12/>.

<sup>6</sup> <https://unstats.un.org/sdgs/report/2019/goal-12/>.

<sup>7</sup> See: <http://www.health.belgium.be/nl/circulaire-economie>. Also see Factsheet: "From waste to resources".

2. A fundamental reshaping of the production and consumption patterns is urgently required if we want to reassure sustainability. Such reshaping may entail that certain of those patterns are “exnovated”<sup>8</sup>, i.e. abandoned.

One of the patterns requiring a fundamental reshaping is the linear use of resources. The linear use of resources generates an unsustainable amount of waste for the environment.<sup>9</sup> It is based on the continued expansion of production and consumption, driven by the growthism inherent to a capitalist system<sup>10</sup>. This is unsustainable in a world resource-constrained world<sup>11</sup>, and the transition to a circular economy is urgently called for worldwide.<sup>12</sup>

There are many different definitions of the notion of circular economy<sup>13</sup>. It follows from these definitions contribution that , a circular economy mainly seeks to i) maximize the value of the materials that circulate within the economy; ii) minimize material consumption, paying particular attention to virgin materials, hazardous substances, and waste streams that raise specific concerns (such as plastics, food, electric and electronic goods); iii) prevent waste from being generated and reduce hazardous components in waste and products.<sup>14</sup> Hence with a circular economy the value of products, materials and resources is preserved and kept in the economy for as long as possible and resources can be regenerated at the end of a products’ life cycle.<sup>15</sup> As a result, waste generation should be kept to a minimum, at least reduced, and the pressure on the environment should be limited.<sup>16</sup>

A circular economy requires a shift in mindset right from the start of the production process, which is referred to as ‘eco-design’.<sup>17</sup> It implies that at the conception stage the way a product is produced and used is rethought with a view to extend, as much as possible its life-cycle, and allowing it to be repaired, upgraded, remanufactured and/or prepared for re-use.<sup>18</sup> This also means rethinking the way products should be designed with a view focused on reducing waste,

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<sup>8</sup> Exnovation is a generic term that refers to: the “other side” of innovation. It concerns processes relating to the destabilization, decline and phasing-out, etc., of unsustainable practices that raise systemic sustainability issues. See: <https://exnovation.brussels/en/concept-exnovation/>.

<sup>9</sup> See: <http://www.health.belgium.be/nl/circulaire-economie>.

<sup>10</sup> For a clear and simple explanation how capitalism functions and how growth is inherent to it see J. HICKEL, *Less is More. How Degrowth will save the world*, Cornerstone, 2021, 336 p.

<sup>11</sup> <http://www.health.belgium.be/nl/circulaire-economie>.

<sup>12</sup> Statistics show that “policies must be embraced to improve resource efficiency, reduce waste and mainstream sustainability practices across all sectors of the economy” <https://unstats.un.org/sdgs/report/2019/goal-12/>.

<sup>13</sup> J. KIRCHHERR, D. REIKE, M. HEKKERT, “Conceptualizing the circular economy: An analysis of 114 definitions”, in *Resources, Conservation and Recycling*, Vol. 127, 2017, p. 221-232, <https://doi.org/10.1016/j.resconrec.2017.09.005>.

<sup>14</sup> See OECD, OECD (2021), *Environment at a Glance Indicators*, OECD Publishing, 2021, Paris, <https://doi.org/10.1787/ac4b8b89-en>.

<sup>15</sup> See: Factsheet: “From waste to resources” and Directorate-General for Environment: “Factsheet Investing in the circular economy: a blueprint for a green recovery”, 3 November 2020, <https://op.europa.eu/en/publication-detail/-/publication/550056cc-1e4e-11eb-b57e-01aa75ed71a1>.

<sup>16</sup> <http://www.circulareconomy.brussels/over/circulaire-economie/?lang=nl>.

<sup>17</sup> Communication of the European Commission, “Towards a Circular Economy: A Zero Waste programme for Europe”, 2004, COM(2014) 398, (2) and <http://www.europarl.europa.eu/news/nl/press-room/20150702IPR73644/circulaire-economie-grondstoffschaarste-aanpakken-met-systeemverandering>.

<sup>18</sup> Communication of the European Commission, “Towards a Circular Economy: A Zero Waste programme for Europe”, 2004, COM(2014) 398, (2.1).

harmful substances and pollution, and protecting human health.<sup>19</sup> In this system the permanent disposal of a product would be the last resort.

3. As regards circular economy in the Brussels Capital Region (BCR), the CiReDe, the instance created to identify the technical and administrative barriers to the development of circular economy in the BCR, produced in 2019 a first report listing a first set of barriers for a circular economy and proposals of working programs, which was approved by the Brussels government on 2 May 2019.<sup>20</sup>

One of the identified barriers concerned the legal framework applicable to waste. In particular, the lack of interregional harmonization of such rules as well as the rules concerning the status of waste (and especially the end of that status in light of the commercialization of remanufactured or recycled goods) and regarding the storage, collection, the sorting, the transport and the preparation for re-use of waste were identified as a barrier to the development of a circular economy.<sup>21</sup>

One of the priority action points of the CiReDe in this context was to make a catalogue of products, materials, equipments for reuse and methods of valorization and preparation in light of re-use, which do not fall within the status of waste and under which conditions.<sup>22</sup>

4. In the context of the Gosete research project<sup>23</sup> the question raised if and how the notion of waste is an obstacle to the development of a circular economy and whether this notion can and should be adapted or taken out of the current regulatory framework without violating the fundamental principle of “non-regression” or “stand-still” in environmental matters<sup>24</sup> so that every product could be re-used, recycled and / or purposefully employed in a different manner.

In the report of the Circular Regulation Deal it was also stressed that if waste would increasingly become part of economic and ecological resources, the legal framework applicable to waste is not sufficiently appropriate to enhance the transport, collection and preparation for new use of waste, since the actors of the circular economy, who should perform these activities are not necessarily operators in the waste sector.<sup>25</sup>

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<sup>19</sup> Press release of the European Parliament: “MEPs call for binding 2030 targets for materials use and consumption footprint”, 27 January 2021. [www.europarl.europa.eu/news/en/press-room/20210122IPR96214/meps-call-for-binding-2030-targets-for-materials-use-and-consumption-footprint](http://www.europarl.europa.eu/news/en/press-room/20210122IPR96214/meps-call-for-binding-2030-targets-for-materials-use-and-consumption-footprint).

<sup>20</sup> See for the report: Circular Regulation Deal, “Collaborate to overcome legal barriers to circular economy”, Report to the Government, 4 April 2019, p. 6, [www.circulareconomy.brussels/cirede-des-resultats-sur-le-fond-et-sur-la-forme/?lang=nl](http://www.circulareconomy.brussels/cirede-des-resultats-sur-le-fond-et-sur-la-forme/?lang=nl). See also Circular Regulation Deal, “Samenwerken om juridische belemmeringen voor circulaire economie te overwinnen”, Draft report 2020 to the Government, p. 4, <http://www.circulareconomy.brussels/cirede-rapport2020-final-nl-2-2/?lang=nl>.

<sup>21</sup> Circular Regulation Deal, Collaborate to overcome legal barriers to circular economy, Report to the Government, 4 April 2019, p. 6, [www.circulareconomy.brussels/cirede-des-resultats-sur-le-fond-et-sur-la-forme/?lang=nl](http://www.circulareconomy.brussels/cirede-des-resultats-sur-le-fond-et-sur-la-forme/?lang=nl), also see: [www.circulareconomy.brussels/de-cirede-eeen-waardevolle-publiek-private-samenwerking-voor-eeen-bloeiende-circulaire-economie/?lang=nl](http://www.circulareconomy.brussels/de-cirede-eeen-waardevolle-publiek-private-samenwerking-voor-eeen-bloeiende-circulaire-economie/?lang=nl).

<sup>22</sup> Circular Regulation Deal, “Collaborate to overcome legal barriers to circular economy”, Report to the Government, 4 April 2019, p. 35 and p. 44.

<sup>23</sup> <https://exnovation.brussels/>.

<sup>24</sup> Art. 23 Belgian Constitution. This principle implies that a regression of the environmental situation should be avoided. Environmental policy may thus not lead to a worsening of the environmental situation by decreasing the level of protection.

<sup>25</sup> Circular Regulation Deal, “Samenwerken om juridische belemmeringen voor circulaire economie te overwinnen”, Draft report 2020 to the Government, p. 4, <http://www.circulareconomy.brussels/cirede-rapport2020-final-nl-2-2/?lang=nl>.

The above listed activities are regulated by the specific legal framework applicable to waste and are indeed generally performed by waste operators. The specific legal framework only applies to the extent that the concerned good is considered as waste. Hence whether this framework applies depends on the definition of waste. The current concept of waste is considered too broadly defined. As a result, keeping in (economic) circulation products or materials for as long as possible is hampered.<sup>26</sup>

5. The aim of this contribution is to further investigate whether and how the concept of waste, is indeed an obstacle to the development of the circular economy in particular in the Brussels Capital Region.

After having provided an overview of the applicable legal framework (section II) we will further dive into the concept of waste (section III) and examine the criteria that are to be fulfilled to qualify a product as waste. Our conclusions as to whether the current qualification of waste is an obstacle for circular economy will be formulated in section IV. Since this contribution is focused on the situation in the Brussels Capital Region, we specifically address that legal framework.

## II.- Legal Framework on waste: a combination of EU and national laws

### A.- General considerations regarding competence to enact regulation on waste

6. As explained in our contribution on *“Exnovation in the Brussels Capital Region – What Effective Governance Power Does the Brussels Capital Region Have?”*<sup>27</sup>, when looking at the legal framework on waste in Belgium, due account is to be given to the existence of EU legislation, which may limit the power of member states to enact national measures as well as to the institutional divide in Belgium.<sup>28</sup> This is why hereafter we address both levels of legal framework.

7. Due to the fundamental principle of conferral<sup>29</sup>, the EU may only act within the limits of the competences conferred upon it by the EU member states in the treaties to attain the objectives provided therein.<sup>30</sup> The Treaty of Lisbon clarifies the division of competences between the EU and EU member states.<sup>31</sup> Depending on the subject matter, a distinction is to be made between i) *exclusive* competences (areas in which the EU is the sole entity to enact legislation), ii) *shared* competences (areas in which the EU and the EU member states are both allowed to enact

<sup>26</sup> M. GHARFALKAR et al, “Analysis of waste hierarchy in the European waste directive 2008/98/EC” in *Waste Management 39 (2015)*, 305-313. (Hereafter referred to as M., GHARFALKAR et al. / *Waste Management 39 (2015)*).

<sup>27</sup> A. DOOTALIEVA and R. FELTKAMP, *Exnovation in the Brussels Capital Region – What Effective Governance Power Does the Brussels Capital Region Have?*, 2021, [http://www.researchgate.net/publication/349476883\\_Exnovation\\_in\\_the\\_Brussels\\_Capital\\_Region\\_-\\_What\\_Effective\\_Governance\\_Power\\_Does\\_the\\_Brussels\\_Capital\\_Region\\_Have](http://www.researchgate.net/publication/349476883_Exnovation_in_the_Brussels_Capital_Region_-_What_Effective_Governance_Power_Does_the_Brussels_Capital_Region_Have). (Hereafter referred to as: Powers BCR Paper).

<sup>28</sup> Powers BCR Paper, p 5.

<sup>29</sup> Art. 5 of the Treaty on European Union (TEU).

<sup>30</sup> See ‘Division of competences within the European Union’: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ai0020>.

<sup>31</sup> See ‘Division of competences within the European Union’: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ai0020>.

legislation, it being understood that the EU member states are only allowed to do so where the EU did not, or does not want to, exercise its competence) and iii) *supporting* competences (areas in which the EU can only intervene to support, coordinate or complement the policies and actions of the EU member states).<sup>32</sup>

As such “waste” has not been mentioned explicitly in the areas of competence the TFEU provides. It can be considered closely linked to the area “environment” mentioned under the shared competences. But depending on the type of waste it could also be connected to other areas (e.g. energy, agriculture, both also a shared competence). As explained further, the EU legislator used this shared competence to issue legislation regarding waste.

To the extent the EU legislator has enacted legislation, due regard is to be given to the type of legislation that has been enacted. Whereas regulations apply directly, directives require to be transposed by the Member states into their domestic legislation.

8. To the extent the Belgian legislator is competent to enact legislation on the matter, e.g. because the EU legislator enacted a directive, the division of powers in Belgium is to be taken into account. According to the Belgian national institutional framework, waste is in principle a policy matter attributed to the different regions, it being understood that the federal state remains competent for setting product standards/norms and the protection from ionizing radiation, including radioactive waste (see further below nr. 23).<sup>33</sup>

9. Currently waste has been regulated both at EU level and member state level. Section B and C hereafter provide a general overview of the EU legal framework and the legal framework determined by the Brussels Capital Regions.

## **B.- EU legal framework regarding waste**

10. The EU legal framework regarding waste consists of a general and a specific framework:

### **1.- General Framework**

11. The general framework consists of the following Directives:

- 1) The Waste Framework Directive 2008/98/EC (“WFD”)<sup>34</sup>; and
- 2) The Directive 2008/99/EC on the protection of the environment through criminal law.<sup>35</sup>

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<sup>32</sup> Articles 2–6 of the Treaty on the Functioning of the EU (TFEU). (Also see: Powers BCR paper, p 5). It is to be noted that the TFEU lists per type of competence the area’s that fall under such category. Any competence the TFEU confers competence on the European Union that does not concern the areas listed as exclusive or as supporting competence, is considered a shared competence.

<sup>33</sup> Art. 6, 1, II, 2° Bijzondere wet van 8 augustus 1980 tot hervorming der instellingen / Loi spéciale de réformes institutionnelles. (Specific Law of 8 August 1980 on the Reform of the Institutions), *Belgian State Gazette* 15 August 1980, 9434. (Hereafter referred to as “BWHI”).

<sup>34</sup> Directive of the European Parliament and of the Council (EG) nr. 2008/98, 19 November 2008 on waste and repealing certain Directives, *OJ.L.* 22 November 2008, episode 312, 3 (Hereafter referred to as “WFD”).

<sup>35</sup> Directive of 19 November 2008 of the European Parliament and of the Council (EG) nr. 2008/99, on the protection of the environment through criminal law, *OJ.L.* 6 December 2008, episode 328, 28-37 (Hereafter referred to as “Directive 2008/99”).

### a.- Waste Framework Directive 2008/98/EC (“WFD”)

12. Initially, Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste<sup>36</sup> established the legislative framework within the European Union for the handling of waste.

This directive was taken on the bases of article 174 TEC, now article 191 TFEU. The main aim of the directive is to control waste management in order to protect human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste<sup>37</sup>.

Directive 2006/12/EC defined key concepts such as waste, recovery and disposal and put in place the essential requirements for the management of waste, notably an obligation for an establishment or undertaking carrying out waste management operations to have a permit or to be registered and an obligation for the member states to draw up waste management plans. It also established major principles such as an obligation to handle waste in a way that does not have a negative impact on the environment or human health, an encouragement to apply the waste hierarchy and, in accordance with the polluter-pays principle, a requirement that the costs of disposing of waste must be borne by the holder of waste, by previous holders or by the producers of the product from which the waste came.

13. The legal framework implemented in 2006 was reviewed in 2008 with a view to take into account in the protection of the environment and human health, also the objective of preventing or reducing the adverse impacts of the generation waste and of reducing the overall impacts of resource use and improving the efficiency of such use, in addition to the management of waste. With this aim key concepts were clarified, such as the definitions of waste, recovery and disposal, the measures that must be taken in regard to waste prevention have been strengthened, an approach was introduced that takes into account the whole life-cycle of products and materials and not only the waste phase, and focus was put on reducing the environmental impacts of waste generation and waste management, thereby strengthening the economic value of waste.<sup>38</sup> Furthermore, the review aimed at encouraging the recovery of waste and the use of recovered

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<sup>36</sup> Directive 5 April 2006 of the European Parliament and of the Council nr. 2006/12, on waste, *OJ.L.* 27 April 2006, episode 114, p. 9-27 (hereafter referred to as “Directive 2006/12/EC”).

<sup>37</sup> Recital 2) Directive 2006/12/EC.

<sup>38</sup> Although recital 6 of the WFD (initial version) provides that “*The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources, and favour the practical application of the waste hierarchy.*” Recital 7 WFD (initial versions) clarifies that “*(...) waste prevention should be the first priority of waste management, and that re-use and material recycling should be preferred to energy recovery from waste, where and insofar as they are the best ecological options*”. The WFD was thus motivated based on the consideration that “*It is therefore necessary to revise Directive 2006/12/EC in order to clarify key concepts such as the definitions of waste, recovery and disposal, to strengthen the measures that must be taken in regard to waste prevention, to introduce an approach that takes into account the whole life-cycle of products and materials and not only the waste phase, and to focus on reducing the environmental impacts of waste generation and waste management, thereby strengthening the economic value of waste. Furthermore, the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources. In the interests of clarity and readability, Directive 2006/12/EC should be repealed and replaced by a new directive.*” (recital 8 WFD (initial version).

materials in order to conserve natural resources.<sup>39</sup> For readability reasons Directive 2006/12/EC was repealed and a new directive, the WFD, was recasted.

**14.** Since 2008 the WFD was amended several times and for the last time in 2018.<sup>40</sup> This last amendment was motivated by the concern to ensure that waste management is transformed into a more sustainable material management:

*“(1) Waste management in the Union should be improved and transformed into sustainable material management, with a view to protecting, preserving and improving the quality of the environment, protecting human health, ensuring prudent, efficient and rational utilisation of natural resources, promoting the principles of the circular economy, enhancing the use of renewable energy, increasing energy efficiency, reducing the dependence of the Union on imported resources, providing new economic opportunities and contributing to long-term competitiveness. In order to make the economy truly circular, it is necessary to take additional measures on sustainable production and consumption, by focusing on the whole life cycle of products in a way that preserves resources and closes the loop. The more efficient use of resources would also bring substantial net savings for Union businesses, public authorities and consumers, while reducing total annual greenhouse gas emissions.”*

*“(2) Improving the efficiency of resource use and ensuring that waste is valued as a resource can contribute to reducing the Union’s dependence on the import of raw materials and facilitate the transition to more sustainable material management and to a circular economy model. That transition should contribute to the smart, sustainable and inclusive growth goals set out in the Europe 2020 strategy and create important opportunities for local economies and stakeholders, while helping to increase synergies between the circular economy and energy, climate, agriculture, industry and research policies as well as bringing benefits to the environment in terms of greenhouse gas emission savings and to the economy.”<sup>41</sup>*

**15.** In line with the above, article 1 of the WFD clarifies the scope and objective of the WFD. According to this article the WFD lays down measures to protect the environment and human health by preventing or reducing the generation of waste, the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use.<sup>42</sup>

**16.** To achieve the set goal, the WFD imposes first of all on the member states a principal approach in respect of their waste policy. Member states must, when establishing their legislation and policy, respect the waste hierarchy set forth in in article 4 of the WFD. This hierarchy provides the following priority order to be followed in the context of waste prevention and management:

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<sup>39</sup> Recital 8 WFD.

<sup>40</sup> Directive of the European Parliament and of the Council nr. (EU) 2018/851, 30 May 2018 amending Directive 2008/98/EC on waste, *OJ.L of 14 June 2018*, episode 150, p. 109-140. Hereafter referred to as the “WFD Amendment 2018”.

<sup>41</sup> See recitals 1 and 2 WFD Amendment 2018.

<sup>42</sup> Art. 1 WFD.

- 1) prevention;
- 2) preparing for re-use;
- 3) recycling;
- 4) other recovery, e.g. energy recovery; and
- 5) disposal.

Following this imposed hierarchy, member states' actions should in first instance be focused on prevention of waste and re-use of waste and in second instance on the management of waste.

The principle of a hierarchy regarding waste regulation is followed by a set of general requirements (principles regarding extended producer's liability, principles regarding prevention, recovery, preparation for re-use and recycling, disposal, costs (polluter-pays principle<sup>43</sup>)).

The WFD then sets forth provisions regarding waste management, permits and registration of waste treatment undertakings, waste plans and programs, inspections and records and enforcement. Waste must be managed in accordance with the following principles:

- without endangering human health and harming the environment
- without risk to water, air, soil, plants or animals
- without causing a nuisance through noise or odours
- and without adversely affecting the countryside or places of special interest

17. More central to this contribution is that the WFD provides the basic definition of waste which is crucial for our assessment.<sup>44</sup> In relation to this it also sets the criteria for a by-product, which is not considered waste, and determines when waste ceases to be waste ("end-of-waste" status) and becomes a secondary raw material.

The legal framework foreseen by the WFD is considered being a minimum harmonization. Member states are thus allowed to foresee stricter rules than what is foreseen by the WFD.<sup>45</sup>

#### **b.- Directive 2008/99/EC**

18. Directive 2008/99/EC supplements the WFD. Considering that administrative penalties or compensation mechanisms under civil law were insufficient to address the rising environmental offences, this directive implements a common framework for criminal penalties, addressing both active, intentional, behavior as failure to act (negligence).

The framework provided by Directive 2008/99/EC obliges Member States to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of

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<sup>43</sup> According to art. 14 WFD the cost of the waste management, including for the necessary infrastructure and its operation, should be borne by either original waste producer or by the current or previous waste holders. Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs.

<sup>44</sup> Art. 3 WFD.

<sup>45</sup> S. LEPRINCE, "La nouvelle directive 2009/89/CE relative aux déchets cherche à clarifier les notions applicables", *Aménagement-Environnement*, 2010/3, p. 88, n° 3.

Community law on the protection of the environment. It does not create any obligations regarding the application of such penalties, or any other available system of law enforcement, in individual cases. This applies without prejudice to other systems of liability for environmental damage under Community law or national law.

The rules provided by Directive 2008/99/EC are minimum rules.<sup>46</sup> Member States are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment, as long as such rules are compatible with the TFEU.

This directive refers to the notion of waste, without however separately defining it. Since this contribution is focused on the way waste is defined by the applicable framework, this directive is not relevant for our assessment, and it will not further be addressed.

## 2.- Specific legal framework for certain types of waste

19. Some types of waste are additionally regulated by specific legal texts.<sup>47</sup> This is amongst others the case for:

- batteries and accumulators.<sup>48</sup>
- biodegradable waste.<sup>49</sup>
- construction and demolition waste.<sup>50</sup>
- waste from vehicles once they come to their end-of-life.<sup>51</sup>
- landfill waste.<sup>52</sup>
- mining waste.<sup>53</sup>
- packaging and packaging waste, including recycling targets and recycled content.<sup>54</sup>
- PCBs and PCTs.<sup>55</sup>
- hazardous substances in electrical and electronic equipment (RoHS).<sup>56</sup>

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<sup>46</sup> See Recital 12 Directive 2008/99/EC.

<sup>47</sup> See art. 2, § 4 WFD. “*Specific rules for particular instances, or supplementing those of this Directive, on the management of particular categories of waste, may be laid down by means of individual Directives*”.

<sup>48</sup> Directive of the European Parliament and the Council nr. 2006/66, 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, *OJ.L.* episode 266, p. 1.

<sup>49</sup> Implemented in WFD. See definitions.

<sup>50</sup> Implemented in WFD. See definitions.

<sup>51</sup> Directive of the European Parliament and of the Council nr. 2000/53, 18 September 2000 on end-of life vehicles (ELV Directive), *OJ.L.* episode 269, p. 34.

<sup>52</sup> Directive of the Council nr. 1999/31, 26 April 1999 on the landfill of waste, *OJ.L.* episode 182, p. 1.

<sup>53</sup> Directive of the European Parliament and of the Council nr. 2006/21, 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, *OJ.L.* episode 102, p. 15.

<sup>54</sup> Directive of the European Parliament and of the Council nr. 94/62, 20 December 1994 on packaging and packaging waste, *OJ.L.* episode 365, p. 10.

<sup>55</sup> Directive of the Council nr. 96/59, 16 September 1996 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (PCB/PCT), *OJ.L.* episode 243, p. 31.

<sup>56</sup> Directive of the European Parliament and of the Council nr. 2011/65, 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, *OJ.L.* episode 174, p. 88.

- use of sewage sludge and promoting its use in agriculture.<sup>57</sup>
- ship recycling.<sup>58</sup>
- waste containing persistent organic pollutants (POPs).<sup>59</sup>
- waste oils.<sup>60</sup>
- EU rules on treating waste related to electrical and electronic equipment (WEEE).<sup>61</sup>

Specific rules also exist regarding transport of waste within and beyond EU borders.<sup>62</sup>

**20.** This contribution specifically addresses the notion of waste as defined under the WFD, as transposed into member state's legal systems. It does not address the above mentioned specific legal framework and does not investigate if the notion of waste has different meanings under these specific legal frameworks. One should thus always bear in mind that specific qualification and rules may apply as a result of aforementioned specific legal framework.

### **C.- Belgian legal framework regarding waste**

**21.** The WFD and Directive 2008/98/EC both being a directive, their content must be transposed into the laws of the member states. According to article 40 of the WFD, every member state is obligated to bring into force the laws, regulations and administrative provisions necessary to comply with the WFD at the latest by 12 December 2010.<sup>63</sup> Directive 2008/98/EC had to be transposed by the same date.

**22.** In Belgium, the Law on the reform of the institutions (BWHI)<sup>64</sup> confers the powers to decide on matters related to waste (management) policy to the Regions.<sup>65</sup> The transposal of the WFD is thus a competence of the Regions and not for the Federal State. The three Belgian Regions have transposed the WFD and for the Brussels Capital Region the main piece of legislation transposing the WFD is the Ordinance of 14 June 2012 on waste, transposing the WFD and

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<sup>57</sup> Directive of the Council 86/278, 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture, *O.J.L.* episode 181, p. 6.

<sup>58</sup> Regulation of the European Parliament and of the Council (EU) nr. 1257/2013, 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC, *O.J.L.* episode 330, p. 1.

<sup>59</sup> Regulation of the European Parliament and of the Council (EU) nr. 2019/1021, 20 June 2019 on persistent organic pollutants, *O.J.L.* episode 169, p. 45.

<sup>60</sup> Implemented in WFD.

<sup>61</sup> Directive of the European Parliament and of the Council 2012/19, 4 July 2012 on waste electrical and electronic equipment (WEEE), *O.J.L.* episode 197, p. 38.

<sup>62</sup> Regulation of the European Parliament and of the Council (EC) nr. 1013/2006, 14 June 2006 on shipments of waste, *O.J.L.* episode 190, p. 1.

<sup>63</sup> Art. 40 WFD.

<sup>64</sup> Bijzondere wet van 8 augustus 1980 tot hervorming der instellingen / Loi spéciale de réformes institutionnelles. (Specific Law of 8 August 1980 on the Reform of the Institutions), *Belgian State Gazette* 15 August 1980, 9434. (Hereafter referred to as BWHI). See for more information on the division of powers: A. DOOTALIEVA and R. FELTKAMP, "Exnovation in the Brussels Capital Region – What Effective Governance Power Does the Brussels Capital Region Have?", [https://www.researchgate.net/publication/349476883\\_Exnovation\\_in\\_the\\_Brussels\\_Capital\\_Region\\_-\\_What\\_Effective\\_Governance\\_Power\\_Does\\_the\\_Brussels\\_Capital\\_Region\\_Have](https://www.researchgate.net/publication/349476883_Exnovation_in_the_Brussels_Capital_Region_-_What_Effective_Governance_Power_Does_the_Brussels_Capital_Region_Have).

<sup>65</sup> See art. 6, 1, II, 2° BWHI.

Directive 2008/99/EC for the Brussels Capital Region<sup>66</sup> which has been modified several times and for the last time in 2021<sup>67</sup> to incorporate the amendments to the WFD of 2018.<sup>68</sup>

It has been further implemented by different implementing decrees amongst which the Decree of the Brussels Government of 1 December 2016 (BRUDALEX) regarding waste management.<sup>69</sup>

**23.** A nuance is to be made with respect to the powers of the Brussels Capital Region. According to the Belgian division of powers, the regions are competent for the protection of the environment and waste policy. However, the federal state remains competent to determine the product norms, it being understood that when they issue product norms, the regions should be involved.<sup>70</sup> Product norms are considered to concern the rules that determine amongst others, in a mandatory way, which requirements a product should comply with when it is introduced on the market in order to protect the environment. The essential element to qualify a rule as a product norm is thus that the conditions relate to the introduction of the products on the market.<sup>71</sup> These rules determine, in particular, the level of pollution or nuisance which may not be exceeded in the composition or by the emissions of a product and may contain specifications concerning the properties, test method, packaging and labeling. The foregoing implies that when the Brussels Capital Region wishes to enact rules to implement its waste policy, it can do so as long as such rules do not concern product norms. E.g., environmental requirements to be fulfilled by a product

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<sup>66</sup> *Ordonnantie betreffende afvalstoffen/ Ordonnance relative aux déchets, 14 June 2012, Belgian State Gazette, 27 June 2012* (Hereafter referred to as the “Waste Ordinance”).

<sup>67</sup> Ordonnantie van 6 mei 2021 houdende wijziging van de ordonnantie van 14 juni 2012 betreffende afvalstoffen, van het Wetboek van 25 maart 1999 van inspectie, preventie, vaststelling en bestraffing van milieumisdrijven, en milieuaansprakelijkheid, van de ordonnantie van 5 maart 2009 betreffende het beheer en de sanering van verontreinigde bodems, van het koninklijk besluit van 8 november 2007 betreffende de preventie en het herstel van milieuschade ten gevolge van het vervoer over de weg, per spoor, over de binnenwateren of in de lucht van: uitheemse plantensoorten evenals van uitheemse diersoorten en hun kregen, naar aanleiding van de in-, de uit- en de doorvoer ervan; alsook van afvalstoffen bij hun doorvoer en van de ordonnantie van 22 april 1999 tot vaststelling van de ingedeelde inrichtingen van klasse IA bedoeld in artikel 4 van de ordonnantie van 5 juni 1997 betreffende de milieuvergunningen, *BS* 12 mei 2021, 47659.

<sup>68</sup> Ontwerp van Ordonnantie houdende de wijziging van de ordonnantie van 14 juni 2012 betreffende afvalstoffen, van het Wetboek van 25 maart 1999 van inspectie, preventie, vaststelling en bestraffing van milieumisdrijven, en milieuaansprakelijkheid, van de ordonnantie van 5 maart 2009 betreffende het beheer en de sanering van verontreinigde bodems, van het koninklijk besluit van 8 november 2007 betreffende de preventie en het herstel van milieuschade ten gevolge van het vervoer over de weg, per spoor, over de binnenwateren of in de lucht van: uitheemse plantensoorten evenals van uitheemse diersoorten en hun kregen, naar aanleiding van de in-, de uit- en de doorvoer ervan; alsook van afvalstoffen bij hun doorvoer en van de ordonnantie van 22 april 1999 tot vaststelling van de ingedeelde inrichtingen van klasse IA bedoeld in artikel 4 van de ordonnantie van 5 juni 1997 betreffende de milieuvergunningen, *Parl.St. , Br.Parl.*, 2020-21, nr. 337/1, 6 e.v.

<sup>69</sup> See Art. 1.2, § 2, 3° of the Arrêté de 1 decembre 2016 du Gouvernement de la Région de Bruxelles-Capitale relatif à la gestion des déchets, *BS* 13 janvier 2017.

<sup>70</sup> Art. 6, §1, II, BWHI. See for more information A. DOOTALIEVA and R. FELTKAMP, *Exnovation in the Brussels Capital Region – What Effective Governance Power Does the Brussels Capital Region Have?*, 2021, p. 16. [http://www.researchgate.net/publication/349476883\\_Exnovation\\_in\\_the\\_Brussels\\_Capital\\_Region\\_-\\_What\\_Effective\\_Governance\\_Power\\_Does\\_the\\_Brussels\\_Capital\\_Region\\_Have](http://www.researchgate.net/publication/349476883_Exnovation_in_the_Brussels_Capital_Region_-_What_Effective_Governance_Power_Does_the_Brussels_Capital_Region_Have).

<sup>71</sup> V. DE SCHEPPER, “De bevoegdheidsoverdracht inzake leefmilieu en energie, in X. *Het federale België na de zesde staatsherforming, Brugge, Die Keure, 2014, p. 507 (“(...) de regels die op dwingende wijze bepalen aan welke eisen een product moet voldoen, bij het op de markt brengen, onder meer ter bescherming van het milieu. Zij bepalen met name welk niveau van verontreiniging of hinder niet mag worden overschreden in de samenstelling of bij de emissies van een product, en kunnen specificaties bevatten over de eigenschappen, de beproevingsmethoden, het verpakken, het merken en het etiketteren van producten. Het essentiële aspect hierbij is dat de voorwaarden betrekking hebben op het op de markt brengen van producten.”)*

to be reintroduced on market after having been considered waste, cannot be determined by the Brussels Capital Region.

24. Our contribution, which is part of the Gosete research project for the Brussels Capital Region, mainly assesses the concept of waste in light of the legal framework as transposed and implemented for the Brussels Capital Region.

### III.- The concept of waste: a layered qualification

#### A.- General

25. According to the Waste Ordinance the notion of “waste” is a defined term. This implies that in principle, anything that falls within the definition of waste as provided by the WFD, is to be considered waste and is subject to the specific rules regarding waste prevention, management and treatment.

Two additional provisions are however to be considered in the context of the qualification of waste, because they allow a disqualification as “waste”.<sup>72</sup>

First, something cannot be considered waste if it fulfils the criteria of a by-product.

Secondly, the legal framework foresees the possibility to take measures by which waste is turned into “non-waste”. To achieve this, the “end-of-waste” criteria must be fulfilled.

This contribution will therefore hereafter further examine under which conditions:

- 1) something is considered waste under the definition;
- 2) something which is waste according to the definition of waste, may nevertheless be considered a by-product;
- 3) waste can lose its status of waste because the end-of-waste criteria are fulfilled.

#### B.- Waste

##### 1.- General considerations

26. Article 3, 1° of the Waste Ordinance defines waste<sup>73</sup> by literally taking over the definition of waste from the WFD. Article 3 (1) of the WFD defines ‘waste’ as: “*Any substance or object which the holder discards or intends or is required to discard*”.<sup>74</sup> At first sight this definition seems straightforward and clear. In practice though, different interpretation issues have arisen, as a result of which a more narrow or more wide scope has been given to the notion on a case-by-case basis. On several occasions the European Court of Justice has provided further guidance on the

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<sup>72</sup> See also S. LEPRINCE, “La nouvelle directive 2009/89/CE relative aux déchets cherche à clarifier les notions applicables, *Aménagement-Environnement*, 2010/3, p. 91, n° 13.

<sup>73</sup> Art. 3 (1) Waste Ordinance: “*Déchets: toute substance ou tout objet dont le détenteur se défait ou dont il a l'intention ou l'obligation de se défaire*” / “*afvalstof: elke stof of elk voorwerp waarvan de houder zich ontdoet, voornemens is zich te ontdoen of zich moet ontdoen*”.

<sup>74</sup> Art. 3 WFD.

interpretation. With a view to ensuring legal clarity and a harmonized approach towards waste, the European Commission issued a “Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products, 21 February 2007”<sup>75</sup>, which clarifies the waste concept taking into account the binding criteria as further set forth by the European Court of Justice. Although this communication stems from before the WFD, it is still an important source of information to determine the concept of waste, which basically remains the same as under Directive 2006/12/EC.

Based on a literal reading of the text 3 elements can, according to us, be subtracted from the definition for something to qualify as waste:

- i) the existence of a “substance” or “object”;
- ii) in respect of which there is a “holder”;
- iii) the “discarding” of the substance or the intention or the obligation to discard (without there being already a discarding).

**27.** Most sources we have examined do not identify separately these three elements. They focus essentially on the third element, making the notion of “discarding”, together with the actions of the holder, the central criterion of the notion of waste.<sup>76</sup> We will nevertheless hereafter have a closer look at each of these elements. Before doing so, three general observations are to be made.

**28.** A first general observation is that in respect of the interpretation of this definition, two basic principles, determined by the Europe Court of Justice, can serve as guidance.

First, the European Court of Justice has repeatedly indicated that the notion of waste cannot be interpreted restrictively in order to be consistent with the directive and with Article 191(2) TFEU which stresses that the community policy on the environment aims at a high level of protection.<sup>77</sup> In relation to the WFD the European Court of Justice referred at different occasions to its aim as expressed by recital 6 of the WFD. The European Court of Justice thus considered the main goal of the WFD to be “to *minimise the negative effects of the generation and management*

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<sup>75</sup> Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products”, 27 February 2007, COM(2007) 59 final, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0059:FIN:EN:PDF>. Hereafter referred to as the “Interpretative Communication”.

<sup>76</sup> See in respect of the case-law of the court of justice: ECJ 14 October 2020, nr. C-629/19, ‘Sappi Austria Produktions-GmbH & Co. KG, Wasserverband ‘Region Gratkorn-Gratwein’ v Landeshauptmann von Steiermark’, ECLI:EU:C:2020:824, par. 42; ECJ 4 July 2019, nr. C-624/17, ‘Tronex’, ECLI:EU:C:2019:564, par. 17.; ECJ 12 December 2013, joined cases C-241/12 and C-242/12, ‘Shell’, ECLI:EU:C:2013:821, par. 37.

<sup>77</sup> Interpretative Communication, p. 6. Also see the following decisions of the European court of Justice: ECJ 14 October 2020, nr. C-629/19, ‘Sappi Austria Produktions-GmbH & Co. KG, Wasserverband ‘Region Gratkorn-Gratwein’ v Landeshauptmann von Steiermark’, ECLI:EU:C:2020:824, par. 43; ECJ 4 July 2019, nr. C-624/17, ‘Tronex’, ECLI:EU:C:2019:564, par. 18; ECJ 12 December 2013, joined cases C-241/12 and C-242/12, ‘Shell’, ECLI:EU:C:2013:821, par. 38; ECJ 18 April 2002, nr. C-9/00, ‘Palin Granit’, ECLI:EU:C:2002:232, par. 23; ECJ 15 June 2000, joined cases C-418/97 and C-419/97, ECLI:EU:C:2000:318, par. 36-40.; ECJ 18 December 1997, nr. C-129/96, ‘Inter-Environnement Wallonie ASBL v Région Wallonne’, ECLI:EU:C:1997:628, par. 26.; ECJ 28 March 1990, joined Cases C-206/88 and C-207/88, ‘Vessoso and Zanetti’, ECLI:EU:C:1990:145, par. 12.

of waste on human health and the environment”.<sup>78</sup> Notably, the European Court of Justice does, in its case-law regarding the WFD, not refer to the second part of recital 6 (“Waste policy should also aim at reducing the use of resources, and favour the practical application of the waste hierarchy.”) nor to recitals 7 and 8 of the WFD from which the objective of prioritizing prevention of waste and resource re-use can be deducted.

Secondly, the European Court of Justice also stressed on several occasions that the qualification as waste (or not) depends on the specific factual circumstances, which all need to be taken into account, and hence such qualification must be done on a case-by-case basis.<sup>79</sup>

29. The second observation is that certain types of waste are, according to article 2, specifically excluded from the scope of the WFD<sup>80</sup>, in some instances only to the extent they are regulated by other Union legislation. This means these types of waste should not be taken into account for the definition of waste in the sense of the WFD.

30. Finally, it is also to be noted that article 7 WFD empowers the European Commission to adopt delegated acts that establish a list of waste. Article 7 WFD explicitly clarifies that the inclusion of a substance or object in the list does not mean that it is waste in all circumstances and that a substance or object is only to be considered waste only where the definition of waste in the WFD is met. Hence, except for the determination of the waste which is to be considered as hazardous waste<sup>81</sup>, the list is not to be considered binding.

## 2.- The existence of a substance or object

31. According to the legal definition, the qualification of waste can only concern a “substance” or an “object”. It is noteworthy that the notions of “substance” or “object” are not defined in the Waste Ordinance (nor in the WFD). In absence of a legal definition in the WFD, and since no reference is made to terms which are defined in other EU directives (such as e.g. the notion of “product”<sup>82</sup>) these notions should receive the meaning generally given to them in spoken language.

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<sup>78</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 43; ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 17.

<sup>79</sup> Interpretative Communication, p. 6.; ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 45; ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 20; ECJ 12 December 2013, joined cases C-241/12 and C-242/12, *Shell*, ECLI:EU:C:2013:821, par. 40; ECJ 18 April 2002, nr. C-9/00, *Palin Granit*, ECLI:EU:C:2002:232, par. 24; ECJ 15 June 2000, joined cases C-418/97 and C-419/97, *ARCO Chemie Nederland and Others*, ECLI:EU:C:2000:318, par. 73, 88 and 97.

<sup>80</sup> Art. 2 WFD.

<sup>81</sup> Art. 7 WFD explicitly indicates that for that determination the list is binding.

<sup>82</sup> Art. 2 Council Directive nr. 85/374/EEC, 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ L* 25 July 1985, episode 210, p 29.; Directive of the European Parliament and of the Council nr. 2011/83/EU, 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ L* 22 November 2011, episode 304, p. 64.

32. Considering the general meaning given to them<sup>83</sup>, the notions of “substance” or “object” seem to refer to any item or thing, except humans, which are perceptible by the senses. Whether these items are moveable or immovable, liquid or illiquid, natural or artificial, is not relevant, as long as they are perceptible by one’s senses.

The Ordinance is neither defining these terms, however recently the term object received a legal description in article 3.38 of the New Belgian Civil Code according to which they should be distinguished from animals and persons. According to article 3.40 objects can be material (i.e. the are perceptible by the senses and measurable) or immaterial.

In order to be able to determine in a more unambiguous way whether a substance could possibly be classified as “waste” within the member states of the European Union, a list of waste materials has been adopted by the Commission of the European Communities. This European waste list (EURAL) contains about 840 different types of wastes, partly arranged by origin, industry or business activity in which the waste is generated or by type of waste. Each waste is assigned a six-digit code (euralcode).<sup>84</sup> As mentioned above (see n° 30).

Some substances fall out of the scope of the WFD, such as gaseous effluents emitted into the atmosphere, radioactive waste, or certain wastewater.<sup>85</sup> This does not mean that they cannot ever be considered as waste; it simply implies that they are not to be considered as waste for the application of the WFD.

### 3.- Holder

33. To qualify something as waste it is required that there is a “holder”, i.e. someone that “holds” it.<sup>86</sup> This term is not defined in the WFD.

Notably the waste definition does not refer to the term “waste producer”<sup>87</sup>, nor to the distributor owner or the person entitled to use the substance or object. It neither refers to “waste

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<sup>83</sup> According to the Cambridge English dictionary, a substance is: “a type of physical matter”; “a material”; “an element, compound or mixture”; while an object is: “a thing that is not living”; “a thing that can be seen and felt”. See: <https://dictionary.cambridge.org>; According to the ‘Van Daele’ dictionary, a substance (‘stof’) is: “that from which something can be manufactured: building material” (“datgene waarvan iets vervaardigd kan worden: bouwstof”); and an object (‘voorwerp’): “something that you perceive, apprehend, work on, love, hate, etc.” (“iets dat je waarneemt, aanvat, bewerkt, liefhebt, haat enz.”) See: <https://www.vandale.nl>; According to ‘le Petit Robert’ dictionary, a substance (“substance”) is a synonym for ‘matière (dont un corp est formé)’ which is a substance that can be known by the senses, whether or not it takes a certain form (“Substance que l’on peut connaître par les sens, qu’elle prenne ou non une forme déterminée”). Object (‘Objet’) also refers to ‘matière’.

<sup>84</sup> Commission Decision nr. 2014/955/EU, 18 December 2014, amending Decision 2000/532/EC on the list of waste pursuant to Directive 2008/98/EC of the European Parliament and of the Council, *OJ.L*, 30 December 2014, episode 370, p. 44-86.

<sup>85</sup> Art. 2 WFD.

<sup>86</sup> Legally speaking, one seems to be referring to “possessor”: “he who in his acts behaves as an owner.” This is important because, according to S., SNAET and W., NEVEN, the actual term “holder” should be distinguished from “possessor”. A “holder” is he who exercises power over a matter, while recognizing the ownership of another. For example, a renter, borrower, are not possessors as owners, but holders of the object, which they hold under them by virtue of their legal relationship to another, the owner. They have the “holdership” (houdershap). Possession is the actual exercise of a right as if one were the holder of this right, either directly or through a third party. Two components are required (corpus and animus possessionis): i) actual power: the fact of having the thing in one’s control (Art. 3.18 BW); ii) the will to exercise that power for himself (Art. 3.18 BW). Whoever has the ‘corpus’ and behaves as owner is presumed to have the ‘animus’. See: S. SNAET, W. NEVEN, “het bezit” in *BHPB*, Afl. 28 (september 2020), II. 3 – 2.

<sup>87</sup> Defined by art. 3, 5° WFD as: “anyone whose activities produce waste (original waste producer) or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste”.

holder”<sup>88</sup> as defined in art. 3, 6° of the WFD as ‘*the waste producer or the natural or legal person who is in possession of the waste*’ (which in Directive 2006/12/EC was the definition used to define the term “holder”).

The waste Ordinance does not clarify much on this term either.<sup>89</sup>

**34.** In absence of a legal definition or reference to other defined terms it seems that it should be understood in its general meaning as someone detaining something, regardless of whether this is based on any specific right or title. Whether such person holds on the basis of a title (ownership or the basis of another real or personal right of use), or merely on the basis of possession seems to be irrelevant in the context of the WFD<sup>90</sup>. It also seems to be irrelevant for the definition whether the holder was involved in the production, distribution process, or consumption process.

**35.** The broad scope of the term holder implies that the person regarded as “holder” in the sense of this definition can change during the lifetime of the concerned item. It follows from the jurisprudence of the European Court of Justice, that the court verifies the existence of an intention to discard or the discarding with regard to any of the subsequent holders in the production or consumption cycle, considering that once a material is waste, it remains in principle waste. Hence, if in a certain stage e.g. a consumer returns the material at hand to the producer, it is to be verified if this consumer had the intention to discard the product, regardless of the intention of the subsequent holder.<sup>91</sup>

#### **4.- The “discarding” of the substance or the intention or the obligation to discard**

**36.** The discarding of the substance or object by the holder is the key element of the definition of waste. According to the European Court of Justice, the notion of “discarding” covers, both the recovery and the disposal of an object within the meaning of articles 3, 15° and 3, 19° of the WFD.<sup>92</sup>

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<sup>88</sup> This definition of waste holder is also more restrictive. Indeed, reference is made to the legal term “possession”, which legally requires that both the intention (“animus”) to hold as an owner and the material detention (“corpus”) are present with one and the same person. Also, the definition of waste holder presupposes the concerned object already qualifies as waste.

<sup>89</sup> Art. 3, 8° *Ordonnantie betreffende afvalstoffen/ Ordonnance relative aux déchets, 14 June 2012, Belgian State Gazette, 27 June 2012* (Hereafter referred to as the “Waste Ordinance”) copied Art. 3.6 WFD; MvT Art. 3, 8°, p. 17.

<sup>90</sup> It might however be relevant in other contexts see e.g., the ‘muffin man case’. In this case it was decided that the removal of goods stored in a waste container by their owner with a view to being disposed of by a waste management company may, depending on the circumstances of the case, be fraudulent (theft), even if the holder wishes to dispose of said goods. In this case, a department store threw away bags filled with muffins in waste containers on its premises. Subsequently a person got hold of these bags. Although the intention to discard was clear, the court considered that the department store remained owner of the muffins and which could thus still be stolen from the department store. The person that took away the muffin bags was however not charged with theft because he had no fraudulent intention.. Court of appeal Ghent 8 February 2012, ‘Muffinman case’, *JLMB* 2017, nr. 39, 1852-1855.

<sup>91</sup> ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 27.

<sup>92</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 44; ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 19; ECJ 12 December 2013, joined cases C-241/12 and C-242/12, *Shell*, ECLI:EU:C:2013:821, par. 39.

**37.** For a substance or object to become waste, the holder should either i) discard it, ii) have the intention to do so or iii) have the obligation to do so. Thus, the discarding concerns either an action on the holder (active discarding or expression of intention to do so) or the mere legal obligation to discard a substance or object. This third condition is thus described in a very general manner, the aim being to avoid the abandoning of goods without anyone being responsible for its waste management.

**38.** Different case-law addresses further the qualification of waste based on intention. The following two sections examine the different types of discarding (based on the action of the holder or legal obligation).

#### Action of the holder

**39.** It follows from the definition of waste that the discarding by the holder can be based on an active action of discarding or on the mere intention to do so. The WFD does not set decisive criteria to determine fulfilment of this condition. It follows from the ECJ case law that the fulfilment of this condition is to be inferred primarily from the holder's actions and from the meaning of the term 'discard'.<sup>93</sup>

In both cases it is irrelevant whether the inherent and objective qualities of such substance or object have changed. A substance or object can be considered waste by a holder although it still has a use-value and is still perfectly functioning for its intended purpose or although somebody else then the holder would still want to use it. A substance or an object can also be waste for one person at a given time and place, but not for another person at another given time and place.

In both cases the intention of the holder to consider a substance or object as waste is required. In case of an active action, this intention is clearly expressed by the holder. An active action of discarding would e.g. be the case where the holder places the substance or object in waste recipient or transfers it to a waste management company. By doing so the holder explicitly indicates that it wishes to get rid of the substance or object by considering it as waste. In this case, such item will be considered waste and should be treated as waste, even if it would otherwise not be considered as waste (see in this respect n° 44 et. seq.). For certain active actions undertaken in respect of a substance or object, it is less clear they constitute a "discarding" in the sense of the waste definition. It has been discussed whether operations of disposal and recovery of a substance or an object, to the extent they qualify as methods of treatment of waste, can constitute a "discarding". According to the European Court of Justice the application of an operation listed by

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<sup>93</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband 'Region Gratkorn-Gratwein' v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 42; ECJ 2 December 2013, joined cases C-241/12 and C-242/12, *Shell Nederland* (and cited cases), ECLI:EU:C:2019:564, par. 37.

the legal framework as a method of waste treatment, does not justify in itself the classification of the concerned substance or object as waste.<sup>94</sup>

The explicit expression of the holder is not required by the definition of waste. The intention as such to discard is sufficient. That brings us to the question in which cases there is sufficient intention to conclude that the holder intended to qualify the substance or object as waste. This will depend on the factual circumstances of the concerned case at hand. What is relevant is that it appears from the factual circumstances that the holder does not want to use the item any longer as a product or as a raw material.<sup>95</sup> Such intent should be aimed at considering the substance or object as waste. In case of a transfer in the legal sense (i.e. a transfer of ownership), the holder also disposes of the good but most of the cases such transfer is intended for other reasons that qualifying the substance or object as waste (unless it is transferred to a waste management company). Disposing of the goods with a view to giving other persons the benefit of it (e.g. excessive food supplies) has been considered not being a discarding in the sense of the directive, especially where the WFD privileges in the hierarchy of waste management measures taken to avoid that something becomes waste through re-use or the prolongation of its lifecycle.<sup>96</sup> Placing the substance or object in another location, may be an expression of the intent to qualify it as waste but at the same time it can be an expression of the fact that the substance or object is momentarily not used by the holder, without the holder wishing to disregard it.<sup>97</sup>

**40.** All depends on the factual circumstances at hand, taking into consideration the fact that the substance or object can objectively still be reused or still has an economic or commercial value<sup>98</sup> is as such irrelevant for the subjective criterion of waste. The method of treatment reserved for a substance was neither conclusive to determine whether or not it is to be classified as waste<sup>99</sup>. According to the European Court of Justice a substance or object can still be waste even if it is recollected on a commercial basis for recycling, reclamation or re-use<sup>100</sup>.

**41.** Under application of the WFD, the European Court of Justice considered that certain circumstances may constitute evidence that a substance or object has been discarded or of an intention or requirement to discard. Rather than looking at the actual intention of the holder, the European Court of Justice seems to work with presumptions<sup>101</sup>. The following circumstances,

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<sup>94</sup> ECJ 18 April 2002, nr. C-9/00, *Palin Granit*, ECLI:EU:C:2002:232, par. 27; ECJ 15 June 2000, joined cases C-418/97 and C-419/97, *ARCO Chemie Nederland and Others*, ECLI:EU:C:2000:318, par. 82.

<sup>95</sup> E. BUYSEN and S. LEPRINCE, “Le régime juridique des invendus alimentaires des supermarchés”, *Amén.* 2016/3, p. 160. ECJ 18 April 2002, nr. C-9/00, *Palin Granit*, ECLI:EU:C:2002:232, par. 23.

<sup>96</sup> E. BUYSEN and S. LEPRINCE, “Le régime juridique des invendus alimentaires des supermarchés”, *Amén.* 2016/3, p. 160-161.

<sup>97</sup> ECJ 18 April 2002, nr. C-9/00, *Palin Granit*, ECLI:EU:C:2002:232, par. 26-27.

<sup>98</sup> ECJ 18 April 2002, nr. C-9/00, *Palin Granit*, ECLI:EU:C:2002:232, par. 29.

<sup>99</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 48.

<sup>100</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 48; ECJ 3 October 2013, nr. C-113/12, *Brady*, ECLI:EU:C:2013:627, paragraph 42 and the case-law cited; ECJ 24 June 2008, nr. C-188/07, *Commune de Mesquer*, ECLI:EU:C:2008:359, par. 40.

<sup>101</sup> Although in certain cases reference is made to the actual intention. See ECJ 12 December 2013, joined cases C-241/12 and C-242/12, *Shell*, ECLI:EU:C:2013:821, par. 49, where certain indications that refuted the qualification as waste were still not considered sufficient since they did not show Shell’s actual intention.

which had already also been retained in respect to Directive 2006/12, have been considered as evidence that the substance or object **qualifies as waste**:

- i) the fact that the substance is a production residue, i.e. a product not in itself sought for a subsequent use, taking into account that in its ordinary meaning waste is what falls away when one processes a material or an object and is not the end-product which the manufacturing process directly seeks to produce.<sup>102</sup>  
In the case *Saetti*<sup>103</sup> the European Court of Justice noted that where the production of the material concerned was “the result of a technical choice”<sup>104</sup> (to deliberately produce such a material) it could not be a production residue. This seems obvious because its production is deliberate. 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.<sup>105</sup>
- ii) the fact that the substance in question is a production residue for which special precautions must be taken if it is used owing to the environmentally hazardous nature of its composition<sup>106</sup>;
- iii) the fact that the object or substance in question is not or is no longer of any use to its holder, such that that object or substance constitutes a burden which that holder will seek to discard. If that is indeed the case, the court considers there is a risk that that holder will dispose of the object or substance in his or her possession in a way likely to cause harm to the environment, particularly by dumping it or disposing of it in an uncontrolled manner in<sup>107</sup>;
- iv) the degree of probability that goods, a substance or a product will be re-used without a prior processing operation: if, beyond the mere possibility of re-using the goods, substance or product in question, there is also a financial advantage for the holder in so doing, the likelihood of such re-use is high. In such circumstances, the goods, substance or product in question must no longer be

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<sup>102</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 46; ECJ 3 October 2013 nr. C-113/12, *Brady*, ECLI:EU:C:2013:627, par. 40, 41 and the case-law cited; ECJ 24 June 2008, nr. C-188/07, *Commune de Mesquer*, ECLI:EU:C:2008:359, par. 41; ECJ 18 April 2002, nr. C-9/00, *Palin Granit*, ECLI:EU:C:2002:232, par. 32 e.s.

<sup>103</sup> Order of the Court of 15 January 2004, *Saetti*, C-235/02, ECLI:EU:C:2004:26.

<sup>104</sup> Order of the Court of 15 January 2004, *Saetti*, C-235/02, ECLI:EU:C:2004:26, par. 45.

<sup>105</sup> Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products, 21 February, 2007, Brussels, COM(2007) 59 final. (further mentioned as COM(2007) 59 final.) (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52007DC0059>)

<sup>106</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 47;

<sup>107</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 49; ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 22.; ECJ 12 December 2013, joined cases C-241/12 and C-242/12, *Shell Nederland*, ECLI:EU:C:2013:821, par. 42.

regarded as a burden which its holder seeks to 'discard', but as a genuine product.<sup>108</sup>

The following elements are relevant according to the European Court of Justice to **disregard the qualification of waste**:

- whether the concerned goods, materials or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of those items, may be regarded not as a residue but as a by-product which the undertaking does not wish to 'discard', but intends to exploit or market on terms which are advantageous to it, in a subsequent process - including, as the case may be, in order to meet the needs of economic operators other than the producer of those substances without any further processing prior to reuse.<sup>109</sup> The reuse of the goods, materials or raw materials should in this case not be a mere possibility but a certainty, without any further processing prior to reuse (i.e. no use of the waste recovery processes foreseen by the WFD) and as an integral part of the production process.<sup>110</sup>

Base on the foregoing the following substances and objects have been qualified as waste:

- sewage sludge from wastewater from paper and pulp production was considered residue from wastewater treatment, regardless the fact that it was used, after mechanical dewatering in a waste incineration plant, for the purposes of energy recovery by generating steam in production process<sup>111</sup>;
- electric appliances which suffer defects that require repair, such that it cannot be used for its original purpose, because that appliance constitutes a burden for its holder and must thus be regarded as waste, in so far as there is no certainty that the holder will actually have it repaired because e.g. the holder sells or transfers those goods to a third party without first having ascertained their working condition. In order to prove that malfunctioning appliances do not constitute waste, the holder of the products in question

<sup>108</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 50; ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 23 - 24. The European Court of Justice takes this view considering that: "It would not be justified at all to make goods, substances or products which the holder intends to exploit or market on economically advantageous terms in a subsequent recovery process subject to the requirements of Directive 2008/98, which seek to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment. However, having regard to the requirement to interpret the concept of 'waste' widely, it is only situations in which the reuse of the goods or substance in question is not a mere possibility but a certainty that are envisaged".

<sup>109</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 51; ECJ 3 October 2013, nr. C-113/12, *Brady*, ECLI:EU:C:2013:627, par. 44 and the case-law cited; ECJ 18 April 2002, nr. C-9/00, *Palin Granit*, ECLI:EU:C:2002:232, par. 34.

<sup>110</sup> In this respect the European Court of Justice considered that if, in addition to the mere possibility of reusing the substance, there is also a financial advantage to the holder in doing so, the likelihood of reuse is high and that in such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to 'discard', but as a genuine product. ECJ 18 April 2002, Case C-9/00, *Palin Granit*, ECLI:EU:C:2002:232, par. 38. In the case at hand which conserved left over stones, the court came to the conclusion that the holder of left-over stone from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that left over stone, which is to be classified as waste.

<sup>111</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824.

should demonstrate not only that they can be reused, but that their reuse is certain, and to ensure that the prior inspections or repairs necessary to that end have been done.<sup>112</sup>

The qualification of waste was however not retained for the following substances / objects:

- redundant articles (in the case at hand electronic appliances) in the product range of the retailer, wholesaler or importer that were still in their unopened original packaging, because it may be considered that those are new products that were presumably in working condition and hence constitute market products amenable to normal trade which, in principle, do not represent a burden for their holder<sup>113</sup>;
- goods that have undergone a return transaction carried out in accordance with a contractual term and in return for the reimbursement of the purchase price, because they cannot be regarded as having been discarded. Where a consumer effects such a return of non-compliant goods with a view to obtaining a reimbursement of them under the guarantee associated with the sale contract of those goods, that consumer cannot according to the European Court of Justice be regarded as having wished to carry out a disposal or recovery operation of goods he had been intending to ‘discard’ within the meaning of the WFD and the risk that the consumer will discard those goods in a way likely to harm the environment is low according to the European Court of Justice<sup>114</sup>

It is to be noted that, in any event, even where a particular material satisfies the criteria set out by the European Court of Justice in order to be considered as non-waste, if it is in practice discarded, it must be considered and treated as a waste.<sup>115</sup>

#### Legal obligation on the holder to discard

**42.** According to the definition of waste, a substance or an object can be considered waste if the holder is “required” to discard it. This element refers to the existence of a mandatory legal obligation upon the holder to treat the substance or object as waste. Hence as soon as such legal obligation exist in respect of a substance or an object, it is to be considered as waste and the specific rules regarding waste management are to be taken into account. An example of the obligation to dispose of a given material or to treat it as waste is Directive 96/59 on PCBs/PCTs. If the material does not meet product legislation standards for its potential use, then it should be treated as a waste until it is ready to meet such standards.<sup>116</sup>

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<sup>112</sup> ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 36 e.v.

<sup>113</sup> ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 32.

<sup>114</sup> ECJ 4 July 2019, nr. C-624/17, *Tronex*, ECLI:EU:C:2019:564, par. 34.

<sup>115</sup> COM(2007) 59 final, p. 6.

<sup>116</sup> COM(2007) 59 final, p. 9.

**43.** This condition is also fulfilled if, according to the law, the substance or object cannot be used as such due to its impact on health or the environment.<sup>117</sup> In other words, the intended use of the substance or object must be lawful. If not, the substance or object is considered waste.<sup>118</sup> The European Court of Justice clarified that if a given material has no lawful intended use, that material should be considered waste from the moment of production<sup>119</sup>.

### **C.- By-product**

**44.** In the context of the production process, several materials can be created with different economic values or intended purposes. The interpretative communication in respect of Directive 2006/12/EC pointed out that although, according to the business vocabulary, these may be identified as by-products, co-products, intermediate products, non-core products or sub-products, none of these terms have any meaning in Community environmental law. Products and by-products have the same status: materials are simply waste or not.<sup>120</sup> As mentioned above the European Court of Justice deducted in certain cases from the certainty of the re-use of such materials that such material is not waste. This case-law was taken into account in the WFD which introduced the principle that by-products, should not be considered waste. According to article 5 of the WFD (as amended in 2018), member states should ensure under certain conditions (as listed in article 5) that a substance or object resulting from a production process, the primary aim of which is not the production of that substance or object, is considered not to be waste, but a by-product. In compliance with this provision article 8 of the Waste Ordinance (as amended in 2021) provides that a substance or object which results from a production process, that is not in first instance aimed at producing such substance or object, can qualify as a by-product and not as waste if the following conditions are met:

- i) further use of the substance or object is certain;
- ii) the substance or object can be used directly without any further processing other than normal industrial practice;
- iii) the substance or object is produced as an integral part of a production process; and
- iv) 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 (note that s, as previously explained in number 23, the federal government is competent to establish product norms.)

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<sup>117</sup> COM(2007) 59 final, p. 7.

<sup>118</sup> See infra Q1 of the decision tree.

<sup>119</sup> COM(2007) 59 final, p. 9.

<sup>120</sup> Interpretative Communication, p. 5.

Article 8 of the Waste Ordinance also requires the fulfilment of more detailed criteria, as the case may be, determined at European level or by the Brussels Government.<sup>121</sup> The Brussels Government was also granted the power to determine, if it wants to, more detailed criteria according to which a specific substance or object is considered a by-product.<sup>122</sup> The efficiency of the qualification as by-product thus depends on the existence of further implementing acts.

#### D.- End of waste criteria

45. The WFD introduced the principle that in certain cases waste can disqualify as waste. In 2018, article 6 WFD was amended in order to provide operators in markets for secondary raw materials with more certainty as to the waste or non-waste status of substances or objects.<sup>123</sup> Indeed, in the initial text of the WFD the end-of-waste status was linked to compliance with criteria to be developed Union level or in absence thereof at member-state level, taking into account the conditions of the end-of-waste status as set forth in article 6 WFD. These end-of-waste criteria related to all the requirements to be fulfilled to ensure that the substance or product, after recycling or recovery is not detrimental for human health or the environment.<sup>124</sup>

There was no obligation however on the member states to determine these criteria and each member state could decide on a case-by-case basis whether and under which criteria a certain type of waste, could after recycling or recovery, be considered fulfilling the end-of-waste criteria. The right to the determination by a member state of the end-of-waste status could thus not be derived from article 6 WFD and a member state's regulation could provide that in absence

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<sup>121</sup> According to article 5.2 WFD the Commission may adopt implementing acts in order to establish detailed criteria on the uniform application of the conditions regarding by-products laid down article 5.1 to specific substances or objects. Those detailed criteria must ensure a high level of protection of the environment and human health and facilitate the prudent and rational utilisation of natural resources. If such criteria have not been set at Union level, Member States may establish detailed criteria on the application of these conditions. Any adopted detailed criteria should be notified to the European Commission. Art. 8, §3 Waste Ordinance.

<sup>122</sup>

<sup>123</sup> The introduction of the amendments were as follows: *"In order to provide operators in markets for secondary raw materials with more certainty as to the waste or non-waste status of substances or objects and to promote a level playing field, it is important that Member States take appropriate measures to ensure that waste that has undergone a recovery operation is considered to have ceased to be waste if it complies with all the conditions laid down in Article 6(1) of Directive 2008/98/EC as amended by this Directive. Such measures may include the adoption of legislation transposing those conditions supported by procedures for their implementation, such as the establishment of material and application-specific end-of-waste criteria, guidance documents, case-by-case decisions and other procedures for the ad hoc application of the harmonised conditions established at Union level. Such measures should include enforcement provisions to verify that waste that is considered to have ceased to be waste as a result of a recovery operation complies with the law of the Union on waste, chemicals and products, in particular prioritising waste streams that pose a higher risk to human health and the environment due to the nature and volume of those waste streams, waste that is subject to innovative recovery processes or waste that is recovered for subsequent further use in other Member States. Measures may also include the setting of a requirement on the operators recovering waste or holders of recovered waste materials to demonstrate compliance with the conditions laid down in Article 6(1) of Directive 2008/98/EC as amended by this Directive. In order to prevent illegal shipments of waste and to raise awareness among Member States and economic operators, there should be greater transparency about Member State approaches to end-of-waste status, in particular with regard to their case-by-case decisions and the result of verification by competent authorities, as well as the specific concerns of Member States and competent authorities about certain waste streams. The final determination whether the conditions laid down in Article 5 or in Article 6 of Directive 2008/98/EC as amended by this Directive are fulfilled remains the exclusive responsibility of the Member State based on all relevant information provided by the holder of the material or waste."* See recital 17) of WFD Amendment 2018.

<sup>124</sup> L. DELGADO, A. S. CATARINO, P. EDER, D. LITTEN, Z. LUO and A. VILLANUEVA, "End-Of-Waste criteria" in *JRC scientific and technical reports*, 2009, p. 18. (Hereafter referred to as "End-Of-Waste criteria")

of determination of the criteria at union's level the end-of-waste status for a specific waste is dependent on the existence of a general legal measure setting forth the criteria for such waste<sup>125</sup>.

**46.** Article 6 WFD (as amended in 2018) obliges member states to take appropriate measures to ensure that waste which has undergone a recycling or other recovery operation is considered to have ceased to be waste if it complies with the conditions set forth in this article. The aim of these conditions is to ensure that a substance or object that qualifies as waste is subsequently only disqualified as waste if i) there is a clear re-use and ii) the recycling or recovery treatment was done in such a way that the protection of the environment and of human health is secured (i.e. free from dangerous substance, no adverse effect on environment and health)<sup>126</sup>.

The categories of waste potentially subject to end-of-waste criteria, that were envisaged by the WFD are in particular, construction and demolition waste, some ashes and slags, scrap metals, aggregates, tires, textiles, compost, waste paper and glass.<sup>127</sup>

The criteria which must be met according to article 6 WFD, as transposed by art. 9 of the Waste Ordinance, are the following:

- 1) the substance or object is to be used for specific purposes;
- 2) a market or demand exists for such a substance or object;
- 3) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products;
- 4) the use of the substance or object will not lead to overall adverse environmental or human health impacts.

**47.** The WFD introduces an obligation for the member states to ensure end-of waste status. It does this by requiring member states to take measures and to provide further criteria based on the conditions set forth in article 6 WFD. This entails the risk of differentiation between Member states or in Member states like Belgium, between the regions. Even though the main conditions of the end-of-waste status are set by the WFD, it may thus hamper the development of a circular economy since *“Some Member States have effectively introduced schemes under which waste ceases to be waste and is then used outwith the waste legislation”*<sup>128</sup> [...] and *some Member States allow the utilisation of similar material in specific applications, but it retains its waste status until the point of use and is subject to waste legislation until that point.* These differences can create legal issues where the product material is moved or traded between different administrative regions.<sup>129</sup>

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<sup>125</sup> ECJ 28 March 2019, nr. C-60/18, *Tallinna v. Keskkonnaamet*, ECLI:EU:C:2019:264, par. 32.

<sup>126</sup> ECJ 14 October 2020, nr. C-629/19, *Sappi Austria Produktions-GmbH & Co. KG, Wasserverband Region Gratkorn-Gratwein v Landeshauptmann von Steiermark*, ECLI:EU:C:2020:824, par. 64 e.s.

<sup>127</sup> Recital 23) WFD.

<sup>128</sup> JRC-IPTS, End-Of-Waste criteria, p. 15-16.

<sup>129</sup> End-Of-Waste criteria, p. 15-16.

To avoid too much differentiation, article 6.2 WFD provides that the European Commission must monitor the development of national end-of-waste criteria in Member States and assess the need to develop Union-wide criteria on this basis. To that end, and where appropriate, the European Commission must adopt implementing acts in order to establish detailed criteria on the uniform application of the end-of-waste conditions to certain types of waste. Those detailed criteria must ensure a high level of protection of the environment and human health and facilitate the prudent and rational utilization of natural resources. They must include:

- i) permissible waste input material for the recovery operation;
- ii) allowed treatment processes and techniques;
- iii) quality criteria for end-of-waste materials resulting from the recovery operation in line with the applicable product standards, including limit values for pollutants where necessary;
- iv) requirements for management systems to demonstrate compliance with the end-of-waste criteria, including for quality control and self-monitoring, and accreditation, where appropriate; and
- v) a requirement for a statement of conformity.

These criteria are material-specific and are to be further defined individually for different categories of waste and its potential secondary products and applications.<sup>130</sup> The focus of the criteria is the quality of the material candidate for end-of-waste.<sup>131</sup>

Where the criteria have not been set on Union level, the Member States may establish detailed criteria on the end-of-waste criteria, provided however they provide the elements mentioned above and provided they take into account any possible adverse environmental and human health impacts of the substance or object<sup>132</sup>.

**48.** Currently the European Commission has already determined further end-of-waste criteria for the following types of waste<sup>133</sup>:

- iron, steel and aluminium scrap (Council Regulation (EU) nr. 333/2011)<sup>134</sup>;
- glass cullet (Commission Regulation (EU) nr. 1179/2012)<sup>135</sup>;
- copper scrap (Commission Regulation (EU) nr. 715/2013)<sup>136</sup>.

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<sup>130</sup> JRC-IPTS, End-Of-Waste criteria, p. 18.

<sup>131</sup> JRC-IPTS, End-Of-Waste criteria, p. 18.

<sup>132</sup> Art. 6.3 WFD.

<sup>133</sup> [https://ec.europa.eu/environment/topics/waste-and-recycling/waste-framework-directive\\_en](https://ec.europa.eu/environment/topics/waste-and-recycling/waste-framework-directive_en)

<sup>134</sup> Council Regulation, 31 March 2011 nr. (EU) 333/2011, establishing criteria determining when certain types of scrap metal cease to be waste under Directive 2008/98/EC of the European Parliament and of the Council, *OJ.L* 8 April 2011, episode 94, p. 2–11.

<sup>135</sup> Commission Regulation, 10 December 2012 nr. (EU) 1179/2012, establishing criteria determining when glass cullet ceases to be waste under Directive 2008/98/EC of the European Parliament and of the Council, *OJ.L* 11 December 2012, episode 337, p. 31.

<sup>136</sup> Commission Regulation, 25 July 2013 nr. (EU) 715/2013 establishing criteria determining when copper scrap ceases to be waste under Directive 2008/98/EC of the European Parliament and of the Council, *OJ.L* 26 July 2013, episode 201, p. 14.

This implies that for other types of waste, the member states are entitled to determine the more detailed criteria for the end-of-waste conditions, as long as the European Commission has not issued further implementing acts. This can either be done through legislative acts with general scope or by individual decisions granted by the competent authorities.

49. Consistently with article 6 WFD, article 9 of the Waste Ordinance provides that:
- i) certain specific waste is no longer considered waste if it has undergone a recycling or other treatment for useful application and complies with the specific criteria set forth at European level.
  - ii) for waste for which no specific criteria have been set at European level, the Brussels Government must ensure that waste which has undergone a recycling or other treatment for useful application, is no longer considered as waste. The Brussels Government may only do so if the following conditions are fulfilled:
    - 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.

These conditions may be further detailed by the Brussels Government, to the extent they have not been further detailed at the European union level.<sup>137</sup> Again, in respect of these powers of the Brussels Government, one should be reminded that although the Brussels Capital Region may be competent to determine when recycled or recovered waste will no longer lead to adverse environmental or human health impact, the federal state remains competent to determine the norms with which the recycled or recovered item should comply before being put on the market again (so-called product norms). In other words, to the extent the forgoing conditions would relate to determining product standards or technical requirements, the federal state remains competent (albeit with the involvement of the regions (see *supra* n° 23)).<sup>138</sup> The achievement of end-of-waste status is thus dependent on criteria to be set by different competent authorities, which may hamper the effectiveness of the implementation end-of-waste regime.<sup>139</sup>

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<sup>137</sup> See art. 9, § 4 of the Waste Ordinance.

<sup>138</sup> Art. 6, §1, II BWHI. See for more information A. DOOTALIEVA and R. FELTKAMP, *Exnovation in the Brussels Capital Region – What Effective Governance Power Does the Brussels Capital Region Have?*, 2021, p. 16. [http://www.researchgate.net/publication/349476883\\_Exnovation\\_in\\_the\\_Brussels\\_Capital\\_Region\\_-\\_What\\_Effective\\_Governance\\_Power\\_Does\\_the\\_Brussels\\_Capital\\_Region\\_Have](http://www.researchgate.net/publication/349476883_Exnovation_in_the_Brussels_Capital_Region_-_What_Effective_Governance_Power_Does_the_Brussels_Capital_Region_Have).

<sup>139</sup> J. VOORTER, D. BIJNENS, “Naar een circulaire staats hervorming”, *Juristenkrant* 2020, afl. 413, 16-17.

A strong coordination between the different competent authorities may diminish the negative effects of this ‘competence split’, but an effective end-of-waste policy would benefit more from a centralization of these powers with one authority or from a mechanism of mutual “(non)-waste state” recognition.

**50.** To our knowledge, apart from the Brudalex-decree which modifies certain conditions relating to waste management, no other Government decree was taken with a general scope in respect of end-of-waste criteria.

Title III (“*provisions on Waste Management Operations and Operators*”), chapter 6 of the Brudalex includes some end-of-waste status provisions.

More specifically, article 3.6.1 stipulates that the end-of-waste status can only be obtained within a classified (accredited) waste treatment facility. The operator of such a facility has the obligation to report to the Brussels institute for environmental policy<sup>140</sup> if the end-of-waste phase for a stream is obtained. A list of currently recognized waste treatment facilities, where the end-of-waste phase is reached for a certain waste stream, according to European or Brussels regional requirements, is available on the website of the Institute.<sup>141</sup>

For several waste flows (end-of-life batteries<sup>142</sup>, worn-out tires<sup>143</sup>, waste oils<sup>144</sup>, end-of-life vehicles<sup>145</sup>, end-of-life electrical and electronic equipment<sup>146</sup>), the Brudalex also provides for (mandatory) cooperation between producers<sup>147</sup> (or holders) of waste materials and the aforementioned accredited waste management centers. Targets and processing methods are established and set for each of these streams.

An operator of a waste recovery facility who wants to obtain the end-of-waste phase for certain waste in accordance with article 9. § 3.3° of the Waste Ordinance, must fill in Annex 9 (an annex that needs to be added to the application form for an environmental permit for a waste collection and treatment facility) and must meet the requirements specifically mentioned, concerning end-of-waste, in point VI (delimitation of the waste phase).<sup>148</sup>

Finally, the BRUDALEX-Decree also foresees a simplified procedure for the recognition of end-of-waste status for waste which received an end-of-waste status according to the Flemish and Walloon regulations.<sup>149</sup>

**51.** As follows from article 6 WFD and article 9 of the Waste Ordinance, the end-of-of waste criteria can only apply to waste that has undergone a recycling operation or a recovery operation.

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<sup>140</sup> Het Brussels Instituut voor Milieubeheer – BIM.

<sup>141</sup> [https://app.leefmilieubrussel.be/lijsten/?nr\\_list=PE\\_COL\\_TRAIT\\_DECH\\_5](https://app.leefmilieubrussel.be/lijsten/?nr_list=PE_COL_TRAIT_DECH_5).

<sup>142</sup> Art. 2.4.2 – 2.4.12 Brudalex.

<sup>143</sup> Art. 2.4.13 – 2.4.21 Brudalex.

<sup>144</sup> Art. 2.4.22 – 2.4.32 Brudalex.

<sup>145</sup> Art. 2.4.33 – 2.4.45 Brudalex.

<sup>146</sup> Art. 2.4.46 – 2.4.67 Brudalex.

<sup>147</sup> A waste producer is required to cooperate with an approved facility. As part of the take-back obligation, waste produced is processed in licensed facilities at the expense of the producer in accordance with the rules imposed by or pursuant to the Waste Ordinance. See Art. 2.8.8 Brudalex.

<sup>148</sup> BRUDALEX-decree, *Belgian state Gazette* 13 January 2017.

<sup>149</sup> Art. 3.6.2. BRUDALEX-decree.

A recycling operation is 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<sup>150</sup>. A recovery operation is 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, or waste being prepared to fulfil that function, in the plant or in the wider economy<sup>151</sup>. According to the recitals of the WFD, for the purposes of reaching end-of-waste status, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria<sup>152</sup>.

#### **IV.- Conclusions regarding the notion of waste**

**52.** It follows from the foregoing that whether a material is to be considered as a waste, is to be determined based on the definition of waste, the conditions under which a material can be considered a by-product and the question on whether the end-of-waste criteria are fulfilled.

The introduction in 2008 of the legal qualification of by products as non-waste and of the possibility for Member states to foresee end-of-waste criteria constitute a step forward in delimiting waste from non-waste and enabling the re-use of resources in the context of a circular economy. However, all depends on the conditions to be taken into account for the qualification as byproduct and for the end-of-waste status. A too strict set of conditions risks narrowing down again the application of these mechanisms.

**53.** Where prior to 2009 there was either waste and non-waste; the qualification of which implied a stepwise approach by the European Court of Justice which included verifying whether the substance or object was a production residue, was a byproduct and whether the substance or object could be considered as a “burden” for the holder<sup>153</sup>, the following methodology should be applied based on the WFD: i) does the material qualify as byproduct or not; ii) if not, does it fall within the scope of waste?, iii) if so, can recovery operations be applied and are there any end-of-waste criteria that can apply?

It follows from this methodology that for materials falling outside the scope of the legal qualification as byproduct, the definition of waste remains determining. Here the broad interpretation applied by the European Court of Justice may still be an obstacle in the context of a circular economy. Indeed, the broader such interpretation is, the more materials are to be

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<sup>150</sup> See art. 3, 22° of the Waste Ordinance; article 3.17 WFD.

<sup>151</sup> See art. 3, 20° of the Waste Ordinance; article 3.15 WFD. Annex 2 of the Waste ordinance and annex II of the WFD set out a non-exhaustive list of recovery operations.

<sup>152</sup> Recital 22 WFD.

<sup>153</sup> European Commission, “Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products”, 28 February 2007 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0059:FIN:EN:PDF>.

qualified as waste, as a result of which the re-use as a resource is dependent on the fulfillment of the end-of waste criteria.

However, there might be some room for evolutive interpretation by the Court. The interpretation of the notion of waste is indeed based on an appreciation of factual circumstances from which the intention of the holder to discard is derived. Up to now the European Court of Justice has upheld a broad interpretation of the notion of waste arguing that it should be assessed considering the objectives of the WFD. However, the European Court of Justice mainly considers the initial objective of protection of health and environment. Emphasizing more the second objective of resource protection, albeit taking into account the protection of health and the environment, could lead to an interpretation that is more in favor of circularity and increases the possibility of saving resources. Such interpretation would allow to consider that there is no intention to discard if it is clear from the factual circumstances that the holder re-uses or intends to re-use lawfully the substance or object.

Also, in its case-law, the European Court of Justice assesses the circumstances to determine whether the holder discarded or intended to discard. Hence, a holder can avoid the qualification of waste by making sure that the factual circumstances show its intention not to consider a substance or object as waste, e.g. by explicitly making clear its intention to re-use the concerned substance and object. In such case, since the intention of the holder is unequivocal, only if such re-use would not be lawful (legal obligation to discard) or in case in a previous stage the substance or object is to be considered waste (without the end-of-waste criteria being fulfilled), the qualification of waste should be retained.

**54.** A revised approach to the interpretation of waste or to the end-of-waste status does not seem to violate the non-regression principle. The principle of non-regression aims at ensuring that levels of environmental protection are not weakened. Corollary to the principle of non-regression is the principle of progression or 'progressive realization' aimed at inducing states to take steps, with maximum use of their available resources, to gradually achieve the full realization of economic, social and cultural rights as well as to improve existing.<sup>154</sup> In terms of environmental rights, this would mean focusing on the creation and improvement of environmental legislation, by increasing the level of protection, based on the latest scientific knowledge.<sup>155</sup> Environmental protection requires however not only protection against disposal of goods in a way that can harm the environment, but also protection against detrimental excessive use of resources by ensuring

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<sup>154</sup> See: United Nations information portal on multilateral environmental agreements, *book – Principles and concepts of international environmental law (part II)*, p. 21.

*“According to the General Comment No.3 on Article 2(1) of the Covenant of the Committee on Economic, Social and Cultural Rights “It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.” In other words, the obligation of “taking steps” (Progressive realization) ingrains the obligation of not deliberately backtracking or adopting regressive measures that would decrease the level of protection the rights (non-regression).”*

<https://globalpact.informea.org/glossary/principle-non-regression>

<sup>155</sup> <https://globalpact.informea.org/report/ii-gaps-concerning-principles-international-environmental-lawb-status-principles/non>

re-use of resources. As stressed by the recitals of the directive amending the WFD in 2018, promoting circular economy is considered as a measure enhancing the level of environmental protection<sup>156</sup>. To the extent the re-use of resources that otherwise would be considered waste is enhanced albeit securing that such re-use does not damage the health and security of people and the environment, the revised approach of the notion of waste does not violate the principle of non-regression.

55. Even if a substance or object is qualified as waste, the granting of end-of-waste status allows for a more circular approach to resources use. However, the success of this status depends first of all on the establishment of end-of-waste criteria. Whereas initially the member states were granted the possibility to determine end-of-waste criteria, as a result of which member states could decide not foreseeing this status in their domestic legislation, the introduction in 2018 of an obligation to adopt end-of-waste criteria is a further step forward in securing the circular re-use of resources. However, as such the right to end-of-waste status is still not directly secured in the WFD because it is dependent on further implementing acts on European or member state level. Moreover, as long as no further implementing criteria have been set at European Union level, member states determine individually the applicable end-of-waste criteria, which may entail fragmentation in the applicable framework. For member states like Belgium, it even means that the framework can be fragmented amongst the regions<sup>157</sup>. As a result, materials may in one member state (or a region of that member state) not be considered as waste in that particular member state; however, if they are shipped to member states (or other regions within that member state) with a different regulatory approach, they might be considered wastes and require waste management control, specific transportation, packaging, registrations, licensing or other administrative formalities, etc. This hampers the functioning of the internal market and puts an unnecessary strain on the transition towards a more circular economy.<sup>158</sup> This fragmentation has recently been pointed out as the weak point of the end-of-waste regime<sup>159</sup>. The lack of harmonization creates legal uncertainty for waste management decisions and for the different actors dealing with specific waste streams, including producers and users of the recycled material.

The waste categories should be clearer and the ways in which the wastes can be used should be properly codified, to make it more likely that the valuable ‘resources’ contained in the waste can be recovered and used more effectively.<sup>160</sup>

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<sup>156</sup> See recital 1 of the WFD Amendment 2018: In this context the objectives supporting the amendment of the WFD in 2018 are particularly relevant: “Waste management in the Union should be improved and transformed into sustainable material management, with a view to protecting, preserving and improving the quality of the environment, protecting human health, ensuring prudent, efficient and rational utilisation of natural resources, promoting the principles of the circular economy, enhancing the use of renewable energy, increasing energy efficiency, reducing the dependence of the Union on imported resources, providing new economic opportunities and contributing to long-term competitiveness. In order to make the economy truly circular, it is necessary to take additional measures on sustainable production and consumption, by focusing on the whole life cycle of products in a way that preserves resources and closes the loop.”

<sup>157</sup> Circular Regulation Deal, “Samenwerken om juridische belemmeringen voor circulaire economie te overwinnen”, Draft report 2020 to the Government, p. 13, <http://www.circulareconomy.brussels/cirede-rapport2020-final-nl-2-2/?lang=nl>.

<sup>158</sup> JRC-IPTS, End-Of-Waste criteria, p. 15-16, 20.

<sup>159</sup> See e.g. N. JOHANSSON and C. FORSGREN, “Is this the end of end-of-waste? Uncovering the space between waste and products”, *Science direct* 2020, p. 1 -2; available at: <https://www.sciencedirect.com/science/article/pii/S0921344919305622>.

<sup>160</sup> M., GHARFALKAR et al. / *Waste Management* 39 (2015), p. 305–313

This issue could be solved by ensuring that the necessary implementing measures are taken at the European Union level. The end-of-waste status merit even to be better secured by foreseeing in the DWF itself the right to being granted end-of-waste status under certain conditions. In the meantime, the Brussels Capital Region can secure the end-of-waste status by taking the general implementing acts to set the end-of-waste criteria or by granting individual exploitation licenses.

Finally, to the extent the commercial exploitation of substances and objects that qualify as waste is subject to the compliance with specific administrative and other formalities and valorization processes, which “waste-to-resource” activities are in practice reserved for certain operators specifically active in the waste sector, authorities might consider investing more in the support of, or the deployment and making available of (public) facilities and infrastructures that facilitate and simplify access to these waste treatment services for certain types of waste for undertakings that wish to implement a circular business model.