Waste Not, Want Not:
A Practical Guide to “Waste”¹

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INTRODUCTION

1. This paper distils factors to which the European Court has had regard in ascertaining whether or not, in particular circumstances, a given substance is inside or outside the definition of “waste”. Further, it attempts to reflect the process of consideration adopted in each case.

2. Article 1(a) of the Waste Framework Directive states that:

   For the purposes of this Directive:

   (a) “waste” shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard. [emphasis supplied]

3. The following is apparent:

   a) The application of the test to specific circumstances is a matter of fact and degree;
   b) Weight is for the decision maker;
   c) As a matter of construction, the substance or object assumes a holder and assumes discard;
   d) The qualifying criteria of discard may be met by evidence of:
      i. Actual discard (including by omission);
      ii. Intended discard (subjectively or objectively?);
      iii. An obligation to discard;
   e) Whether a given substance or object qualifies as “waste” will vary depending upon satisfaction of the “discard” criteria on given factual circumstances. It is possible for the same material to fall inside or outside the definition in different factual circumstances.

4. It is apparent that the concept of waste is dynamic state of affairs and is time related: over time a substance may pass in and out of the definition depending upon a number of factors.

THE MEANING OF WASTE

5. “Waste” bears 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” (see Case C-9/00, Palin Granit Oy paragraph 32).
6. The concept of waste does not exclude substances and objects which are capable of economic reutilisation (see Case C-224/95, Tombesi, paragraph 52).

7. The concept of waste does not in principle exclude any kind of residue, industrial by-product or other substance arising from production process (see Case C-129/96, Inter-Wallonie ASBL, paragraph 28). Substances forming part of an industrial process may constitute waste (see Case C-129/96, Inter-Wallonie ASBL, paragraph 31).

8. “Waste” does not exclude substances and objects capable of being recovered as fuel in an environmentally responsible manner and without substantial treatment (see Case C-419/97, ARCO Chemie Nederland, paragraph 65).

9. A substance is not excluded from the definition of waste merely because it directly or indirectly forms an integral part of an industrial production process (see Case C-129/96, Inter-Wallonie ASBL, paragraphs 25 and 34).

10. Mere mention of substances, such as animal carcasses, in the Waste Catalogue, and where those animals are not fit for human consumption but died on a farm, were outside the Directive (see Case C-121-03, Commission v Spain, paragraphs 62, 63 and 73). Similarly, the use of pig slurry generated by livestock farms as an agricultural fertiliser in the context of good agricultural practice, was not waste (see Case C-121-03, Commission v Spain, paragraph 65 to 67).

**SUMMARY OF PROCESS**

11. An approach to the question of “waste” is as follows:

   a) The key test;

   b) The question of the material;

   c) The question of the holder;

   d) The question of discard:

      i. is there discard as a fact?
ii. is discard required?

iii. Is there potential for discard, past or present?

e) The question of avoiding discard.

THE KEY TEST:

The question is whether in all the circumstances, having regard to the Directives aim and to ensure its effectiveness is not undermined.

12. The question of “is it waste” must be determined in the light of all the circumstances, having regard to the aim of the Directive and the need to ensure its effectiveness is not undermined (see Case C-419/97, ARCO Chemie Nederland, paragraphs 73, 88 and 97).

13. At the [relevant] time, does the substance or object have the character of waste? (see Case C-419/97, ARCO Chemie Nederland, paragraph 93).

14. For example, contaminated wood chips retain their character as waste even where transformed into (contaminated) saw dust (see Case C-419/97, ARCO Chemie Nederland, paragraph 93).

THE QUESTION OF THE MATERIAL

15. The Annex and Waste Catalogues clarify and illustrate the definition of waste by providing lists of substances and objects which may be classified as waste. However, given Q16 covers any materials, substances or products not contained in the specific categories, the Annex and Catalogue are only intended as guidance (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 56).

16. It is important to be specific in respect of the substance alleged to be discarded. This is because the nature of the material will be relevant to the question of intention of its discard.

THE QUESTION OF THE HOLDER

17. The classification of a substance or object as waste is primarily inferred from the holder’s actions, which depend on whether or not he intends to discard the substance in question. Consequently, the
term “waste” turns on the meaning of the term “discard” (see Case C-129/96, Inter-Environment Wallonie, paragraph 26; Case C-121/03, Commission v Spain, paragraph 57; Case C-1/03, Van de Walle, paragraphs 42).

18. What does the “holder” intend, what has he done? What is he required to do?

19. The system of supervision and management under the Directive is intended to cover all objects and substances discarded by the owner, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or further use (see Case C-235/02, Saetii, paragraph 33).

20. Consequently, the question of the holder is important. This is because identification of the wrong holder at the wrong time dictates the subsequent question of discard. That is, if one identifies the holder upstream or downstream of a continuum, the question of discard may engender different results.

21. For example, if I throw out the plasma tv, I have discarded it as a matter of fact. If another person picks up the tv from the street, and become its holder, he may have further plans for the tv such that it ceases upon pick up to be “waste”.

22. Proof that the holder regards a substance as waste will, again, indicate but not be sufficient to justify the inference that he intends to discard it (Case C-235/02 Saetti and Frediani (2004), paragraph 45).

23. The qualifying potential of, or action, or omission, of “discard” remains required to be satisfied.

THE QUESTION OF DISCARD

24. The scope of the meaning of “waste” depends on the meaning of the verb “to discard” (see Case C-457/02, Niselli, paragraph 33). The decisive factor in determining the presence of waste is not the assignment of the category of the waste, but rather whether the holder discards or intends or is required to discard it (see Case C-1/03, Van de Walle, Opinion of Advocate General Kokott, paragraph 34) [emphasis supplied].
25. Directive 75/442 does not provide decisive criteria for determining the intention of the holder to discard a given substance or object. Instead the preliminary rulings of the Court demonstrate “indicators” from which the holder’s intent may be inferred (see Case C-9/00, Palin Granit Oy paragraph 25).


27. In respect of aims, the Third Recital states an aim to be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. This is reinforced by Article 174(2) EC which provides for Community policy to aim at a high level of protection, based on the precautionary principle, and that of preventative action should be taken (see Case C-419/97, ARCO Chemie Nederland, paragraphs 3 to 40).

a) The question of factual discard

28. Has the material in fact been discarded?

29. “Discard” includes two ways of discarding:

   a) abandonment;

   b) disposal (see Case C-457/02, Niselli, paragraph 39).

30. “Discard” may arise from omission – not acting.

31. For example, by accident, where there is unintentional discard – i.e. no intention but fact of discard. If it were otherwise, the Directive would be made redundant on the sole ground that contaminated ground was engendered by accidental spillage. Consequently, a holder who accidentally spills a substance and which contaminates soil and groundwater, “discards” those substances which must as a result be classified as “waste” (see Case C-1/03, Van de Walle, paragraphs 23, 44, 48, 49 and 50).

32. As long as the holder is unaware of contamination, an intent to discard must be ruled out. Once he is aware of a pollution incident, and that precludes further appropriate use of the soil, a rebuttable intent to discard may be presumed. For example, pollution of building land may inconvenience the
users of the building. This loss of utility creates the risk, typical of waste, that the holder will neither use nor properly dispose of the material in question (see Case C-1/03, Van de Walle, Opinion of Advocate General Kokott, paragraph 35).

33. What is decisive is whether the holder discards or intends or is required to discard a substance, as in finally discarded (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 57).

b) The question of a requirement to discard

34. Legal instruments could lead to an obligation to discard (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 58). Such instruments may include regulations and contractual agreements.

35. The property of being waste derives from the interplay between waste law and the specialised law regulating the relevant risks (see Case C-1/03, Van de Walle, Opinion of Advocate General Kokott, paragraphs 36 to 38).

36. Consequently, the presence of an obligation inside a planning permission, or contract, to dispose of specified material may engender qualification under that head in respect of that holder at the time of his discard.

c) The question of intention to discard

37. Although the intention of the holder is in principle subjective, in order to avoid abuse it is not his own statements as to his intentions that are decisive but just objective factors from which objective intent can be concluded (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 73).

38. For example, incineration of a substance does not necessarily have to be considered a discarding process from which an intention to discard has to be concluded. This is because incineration may be a disposal or recovery operation – but only if those substances are waste. Not everything that is incinerated can be considered waste simply by virtue of that operation. For example, coal, petroleum and natural gas are primarily used as fuel without those raw materials therefore being
waste (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 74).

39. The Directive does not prescribe any other criteria on which to base the intention of the holder to discard (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 75).

40. Consequently, it is apparent that the nature of the substance remains relevant when considering its discard.

THE QUESTION OF AVOIDING DISCARD

41. As appears from Article 4 and Annexes IIA and B, “discard” includes, in particular the disposal and recovery of a substance or an object (see Case C-419/97, ARCO Chemie Nederland, paragraph 47). However, it does not follow that substances or materials subject to those operations are to be regarded as waste (see Case C-419/97, ARCO Chemie Nederland, paragraph 49). Rather, the fact that a given operation is undertaken is no more than a general start point and it may not be inferred that discarding has occurred (see Case C-419/97, ARCO Chemie Nederland, paragraph 51).

42. It may not be inferred from the fact that a substance undergoes an Annex IIB operation that the substance has been discarded, such that it is waste (see ARCO Chemie Nederland, paragraph 82). The application of an Annex IIA or B operation to a substance does not in itself justify a conclusion that the substance is waste (see Case C-9/00, Palin Granit Oy paragraph 27).

a) The question of common usage

43. The fact that a substance is commonly regarded as waste is a relevant consideration to the question of discard (in that case, wood chips) (see Case C-419/97, ARCO Chemie Nederland, paragraph 54). Likewise, the commonality of the method for recovering the waste (see Case C-419/97, ARCO Chemie Nederland, Order).

b) The question of by-products

44. There is an obligation to interpret the concept of waste widely in order to limit its inherent risks and pollution, recourse to the reasoning applicable to by-products should be confined to situations
in which the further use of goods, materials or raw materials is not a mere possibility but a certainty, without any prior processing to enable reuse, and as an integral part of the production process (see Case C-9/00, Palin Granit Oy, paragraph 36; Case C-235/02, Saetti, paragraph 36).

45. Uncertainty surrounding proposed uses of the leftover material, and the impossibility of reusing the entirety of the given material, support a conclusion that (in that case leftover stone) all the stone is to be regarded as waste including that which would be reused (see Case C-9/00, Palin Granit Oy paragraph 40).

c) The question of production residue

46. A substance or material which is not the product primarily sought by the operator falls in principle inside Q11 residue (see Case C-9/00, Palin Granit Oy paragraph 33).

47. The fact that a substance is a production ‘residue’ whose composition is not suitable for the use made of it or that special precautions must be taken when it is used given its environmentally hazardous nature of its composition may constitute evidence that the holder has discarded the substance, or intends so to do (see Case C-9/00, Palin Granit Oy paragraph 43).

48. The fact that the substance is a residue for which no other use than disposal can be envisaged may be regarded as evidence of discarding, since it gives the impression of acquisition of the substance for the sole purpose of discarding it. For example, because the holder wishes to, or is required to under an agreement with the substance producer or another holder (see Case C-419/97, ARCO Chemie Nederland, paragraph 86).

49. The fact that a substance used as fuel is a residue of manufacturing process of another substance, that no use is envisaged other than its disposal, that its composition is not suitable for the use made of it, or that special precautions are required to be taken when it is used, evidence discard or intention or that it is required so to be (see Case C-419/97, ARCO Chemie Nederland, paragraph 88).

d) The question of full recovery operation

50. For the purposes of D12 Annex IIA if the Directive, the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other
materials which would have had to be used for the purpose, thereby conserving natural resources (see Case C-6/00, Abfall Service (ASA), paragraphs 69 and 71). [emphasis supplied].

51. Recycling is not defined in the Directive. There is no difference between the concepts of waste and recycling as between it and Directive 94/62 (see Case C-444/00, Mayer Parry Recycling, paragraphs 92 to 93).

52. Where the substance starts a process as waste, and it is reprocessed in order to create a secondary raw material suitable for use in substitution for the primary raw material, but the secondary material does not share the same characteristics as the primary raw material since it contains impurities (and consequently cannot be used directly for manufacture) the reprocessed ‘packaging’ waste remains “waste” for the purposes of the Directive (see Case C-444/00, Mayer Parry Recycling, paragraphs 82 to 88). This is because the Grade B material produced has not been transformed into an equivalent primary raw material.

53. There is nothing to indicate that the Directive does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment (see Case C-419/97, ARCO Chemie Nederland, paragraph 67).

54. The absence of risk to public or human health does not preclude the classification of a substance as waste (see Case C-9/00, Palin Granit Oy paragraph 47).

55. The fact that a material has undergone a complete recovery operation for the purposes of Annex IIB is one factor only for determining whether a substance is waste, and is not definitive (see Case C-419/97, ARCO Chemie Nederland, paragraph 95).

56. A complete recovery operation does not necessarily deprive an object of its classification as waste unless it purges the material of its contaminant and has the effect of transforming the material into a product analogous to a raw material, with the same characteristics of that raw material, and capable of being reused in the same conditions of environmental protection (see Case C-419/97, ARCO Chemie Nederland, paragraph 96).

57. Even where a substance undergoes a full recovery operation and thereby acquires the same properties and characteristics as a raw material it may be regarded as waste if the holder discards it,
or intends or is required so to do (see Case C-9/00, Palin Granit Oy paragraph 46; Case C-419/97, ARCO Chemie Nederland, paragraph 94).

58. The fact that a substance or material is used as fuel, in place of normal fuel, is a factor which may give the impression that its user is discarding it, because he wishes to or is required to do so (see Case C-419/97, ARCO Chemie Nederland, paragraph 85).

59. Consequently, it appears that recovery may be satisfied where equivalence of substitution for another material is achieved since natural resources would not be conserved if equivalence were not achieved by the substituting material.

e) **The question of reuse: benefit or burden?**

60. “Now that you have told me the substance may be waste, I have decided I may reuse the material”.

61. Where the full reuse of the substance (in that case stone) is neither immediate nor even always foreseeable, its storage is necessarily a source of harm to, and pollution of, the environment (see Case C-9/00, Palin Granit Oy paragraph 49).

62. Consequently, ascertaining the timescale for contended reuse may engender whether reuse is or is not foreseeable. It appears to follow that a the presence of a timescale indicates reuse may remain a possibility, albeit distant. No timescale indicates necessary source of harm and thus the presence of waste by virtue of the potential for environmental pollution.

63. “Where there’s muck, there’s brass”.

64. Where there is a possibility of reuse, the crucial question is whether that use was economically advantageous or whether the substances would nevertheless have been a burden (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 81).

65. Where in addition to the mere possibility of reuse, there is a financial advantage for the holder in reuse, the likelihood of reuse is high. Consequently, the substance must no longer be regarded as a burden which its holder seeks to discard, but is a genuine product (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 77).
66. Relatively long storage periods give rise to doubt as to whether at all times it was probable that the substance would be used as fuel resulting in profits, such the possibility of burden could not be ruled out (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 83).

67. A product which is itself not wanted for subsequent use, and which the holder cannot economically re-use without further processing, must be considered to be a burden which the holder seeks to discard (see Case C-1/03, Van de Walle, paragraph 45).

68. A substance, such as hydrocarbon contaminated soil and which remains the ground, remains waste even though not excavated (see Case C-1/03, Van de Walle, paragraph 53).

69. Where a material, irrespective of any contamination, and in the light of all the circumstances comprehensively appraised, constituted a burden to the holder, it was waste (see Case C-176/05, KVZ retec GmbH v Austria, Opinion of the Advocate General Kokott, September 7th 2006, paragraph 85.

f) The question of timing

70. The holder of resultant material which is stored for an indefinite length of time to await possible use discards or intends to discard that material such that it is waste A substance or material which is not the product primarily sought by the operator falls in principle inside Q11 residue (see Case C-9/00, Palin Granit Oy paragraph 39).

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