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END-OF-WASTE: EU LAW AND NATIONAL REGIMES

End-of-waste is one of the essential legal tools to achieve a circular economy. From an institutional perspective, in order to "close the loop" it is required collaboration either between different government levels (i.e., supranational, national and local), either between public and private sector. The article aims at analysing end-of-waste regime in EU, at the same time focusing on its implementation in the various EU Member States.

Brief introduction. End-of-waste as essential legal tool to achieve a circular economy

The expression «end-of-waste status», encompassed by Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 (herein after, Waste Framework Directive or WFD or 2008 WFD), points out when substances or objects, which have undergone a recycling or other recovery operation, are legally considered to have ceased to be waste [see WFD Article 6(1)].

Precisely defining the meaning of this expression is crucial either from a legal and an economic perspective.

Determining when a substance or an object is no more to be considered as a waste, essentially means laying the scope of the legal obligations deriving from waste legislation down. It is of fundamental relevance settling on that, since waste holders are subject to a number of administrative duties intended to deal with environmental and human health issues. These latters have as general outcome the restrictions of waste circulation on the internal market and their violation may also lead to criminal sanctions.

It is undoubted that the aforementioned restrictions and obligations, including those arising from Waste Shipment Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 (WSR), are intended to deal with environmental and human health issues. As stated in its Recital 1, WSR's «main and predominant objective and component […] is the protection of the environment, its effects on international trade being only incidental».

Nonetheless, environmental law and waste legislation, in particular after Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018, amending WFD, also aim at «promoting the principles of the circular economy […] by focusing on the whole life cycle of products in a way that preserves resources and closes the loop» as well as «ensuring that waste is valued as a resource», thus creating «important opportunities for local economies and stakeholders» [see Directive 2018/851 Recitals 1 and 2; see also WFD Article 1, as amended by Directive 2018/851].

This last approach seems definitively consistent with the «waste hierarchy» encompassed by WFD Article 4, according to which waste is to be prevented or, at least, recovered, whilst disposal is the

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very “last option”. Therefore, environmental security and health safety provisions do not have to be meant as obstacles to waste re-use as (secondary) raw materials.
End-of-waste status precisely represents the legal tool aimed at achieving circular economy reconciling human health safety with a more comprehensive protection of the environment.

Waste policy in European legal order

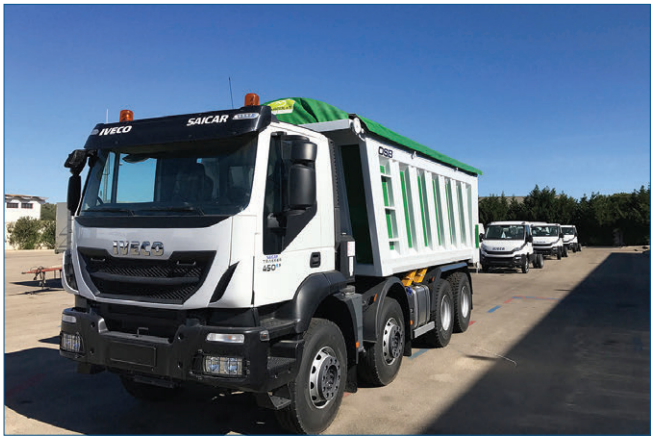
It is well known that European institutions have always played a central role in laying environmental legislation down.
Although environment was not originally encompassed among Communities competences, Directive 75/442/EEC of the Council of 15 July 1975, on waste, was adopted overruling the conferral principle.
Directive 75/442 aimed at enhancing a common market by the harmonisation of MSs environmental protection regimes, which otherwise would have represented barriers to the free movement of goods, services and capitals.
Subsequently, 1987 European Single Act amended the Treaties introducing an ad hoc title on environment, becoming from then onwards an autonomous competence of the European institutions.
Despite the increasing relevance of environmental issues, Directive 75/442 and ff. amendments had been intended to ensure a full environmental protection expanding as much as possible the scope of the duties arising from it. Therefore, it has been held that the concept of waste does not exclude substances and objects which are capable of economic reutilisation and that even where waste has undergone a complete recovery operation, that substance may none the less be regarded as waste [see, *inter alia*, CJ, 28 March 1990, C-206 and 207/88, *Vessoso and Zanetti*, par. 9; CJ, 15 June 2000, C418 and 419/97, *ARCO Chemie Nederland*, par. 82; CJ, 18 April 2002, C-9/00, *Palin Granit*, par. 46].
Although environment was no more considered as a tool for strengthening the internal market functioning, but as a fundamental value to protect in itself, EU institutions were still failing to take a further step. Turning point has been the 2008 WFD, which has ushered in a real Copernican revolution: environment has been intended neither as a tool to drop non-tariff barriers nor as a mere constraint to the freedom of undertakings; instead, the new approach aims at bending market dynamics to the emergent environmental issues. In this new context, policy-makers became aware of the urgency to define when waste may be re-allocated on the market without prejudice for environment and human health.

End-of-waste: fixed points and open issues. A “right” to end-of-waste assessment?

As already said, the 2008 enactment of the new WFD has coincided with the introduction of an end-of-waste status definition.
WFD Article 6(1) sets out four general concurring conditions required for objects or substances ceasing to be waste once having undergone a recovery operation:

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;
d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.

These conditions are meant to be “general” since they are not self-applicable and «cannot, in them-



selves, make it possible directly to establish that certain waste must no longer be regarded as such» [CJEU, 7 March 2013, C-358/11, *Lapin Luonnonsuojelupiiri*, par. 55]. Thus, such conditions need to be specified for each type of waste by setting up detailed end-of-waste criteria.

To this end, Article 6 provides a twofold end-of-waste mechanism, splitting competences between European Commission (EC) and MSs.

As to the former, it is entitled to lay down Union-wide criteria for certain types of waste by adopting specific statutory instruments, i.e. normative act of secondary legislation.

According to 2008 version of WFD, therefore, EC would have borne main responsibility in laying end-of-waste criteria down. Indeed, MSs might «decide case by case whether certain waste has ceased to be waste» only «[w]here criteria have not been set at Community level» [see 2008 WFD Article 6(4)].

Nonetheless, from 2008, just three end-of-waste regulation has been issued at EU level, relating certain types of scrap metal, glass cullet and copper scrap [respectively, Council Regulation (EU) No 333/2011 of 31 March 2011, Commission Regulation (EU) No 1179/2012 of 10 December 2012, Commission Regulation (EU) No 715/2013 of 25 July 2013].

Directive 2018/851 tried to find a solution to that, providing a more consistent application of the subsidiarity principle which, although now enshrined in TFEU Article 5(2), had sprung up precisely from (European) environmental law.

Firstly, new WFD Article 6(1) holds that primary responsibility of taking appropriate measures on end-of-waste weighs on MSs. Secondly, EC has been tasked with monitoring the development of national end-of-waste criteria, assessing the need to develop Union-wide criteria on this basis and, just where appropriate, adopting implementing acts in order to establish detailed criteria on the uniform application of the conditions, thus prevailing on national ones [see, WFD Article 6(2) as amended by Directive 2018/851]. In this respect, it has to notice the EU legislature's choice to expressly qualify end-of-waste statutory instruments as implementing acts, for the purpose of TFEU Article 291: it strengthens the renovated subsidiary role of the EC, since implementing powers are primarily meant to ensure uniform application of legislatives acts among MSs [on delegated and implementing acts' differences, see CJEU, 16 July 2015, C-88/14, *Commission v Parliament and Council*, par. 30; CJEU, 18 March 2014, C-427/12, *Commission v Parliament and Council*, par. 39].

From a national perspective, before Directive 2018/851 enactment, doubts arose related to the legal nature, i.e. general or individual acts, of the MSs decisions on end-of-waste. Uncertainties have come from the wording of Article 6(4) former version which, on a hand, referred to MSs «case by case» decisions (i.e., with individual effects) and, on the other hand, compelled national authorities to notify, in accordance with Directive on technical standards and regulations "where so required" [former Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, now Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015].

In this respect, the *Tallinna Vesi* judgement has held that MSs «may provide for the possibility of decisions in individual cases […] but that they may also adopt technical standards or regulations concerning certain categories of waste or a specific type of waste», adding that only the latters require to be notified to the EC [CJEU, 28 March 2019, C-60/18, *Tallinna Vesi v Keskkonnamet*, par. 24].

Therefore, after the *Tallinna Vesi* case, confirmed by WFD Article 6 as amended by Directive 2018/851 (although not applicable in that case), end-of-waste detailed criteria may have a twofold legal nature: general acts laid down either by EC or MSs and individual orders issued by MSs. The latters may

be issued only where no general acts has been adopted by MSs and EC has not exercised its implementing powers [see WFD Article 6(2)(3)(4), as amended by Directive 2018/851].
Indeed, another issue still lies on the table, having neither the judiciary nor the legislature already answered.
In the *Tallinna Vesi* case, CJEU has also been asked whether, where end-of-waste criteria have not been set at EU level, WFD Article 6(4) may directly grant waste holder the right to apply to the competent authority or to a court in a MSs for a decision on end-of-waste status, irrespective of whether criteria set in a generally applicable national legal act exist for that particular type of waste.
The Court held that, according to WFD, the waste holder does not have a legal position that obliges national authorities to initiate an end-of-waste procedure, since MSs, in exercising their wide discretion, are also entitled to take the view that some waste cannot cease to be waste and to refrain from adopting legislation concerning the end-of-waste status of that waste. The only threshold set forth by the judges has been that, in any case, such abstention shall not amount to an obstacle to the attainment of the objectives of WFD [see CJEU, *Tallinna Vesi*, par. 26-27].
The *Tallinna Vesi* judgement has not closed the matter, though. In the subsequent *Prato Nevoso Termo Energy* case, the Advocate General has observed that, in case of manifest errors of assessment, WFD should grant the waste holder to obtain a determination of end-of-waste status in an individual decision adopted by the competent authorities or the courts and States should provide him with the means of appeal against any rejection or in the absence of competent national authorities [see Opinion of the General Advocate Saugmandsgaard Øe, 20 June 2019, C-212/18, *Prato Nevoso Termo Energy Srl v Provincia di Cuneo*, par. 59]. Up to a certain point, the judgement followed the proposal of the Advocate General when stating: «In that regard, as the Advocate General pointed out in paragraphs 57 and 61 of his Opinion, it must be verified that the situation at issue in the main proceedings is not the result of a manifest error of assessment in relation to the non-compliance with the conditions set out in Article 6(1) of Directive 2008/98. It is necessary, in this case, to examine whether the Member State could, without making such an error, consider that it has not been demonstrated that the use of the vegetable oil at issue in the main proceedings, in such circumstances, allows the conclusion that the conditions laid down in that provision are met and, in particular, that that use is devoid of any possible adverse impact on the environment and human health» [see judgement 24 October 2019, C-212/18, *Prato Nevoso Termo Energy Srl v Provincia di Cuneo*, par. 43]
As it will be highlighted in the following paragraphs, most part of EU MSs with best waste prevention and recovery performances have already granted individuals and legal entities waste holders the "right" (or, better, the legal position) to initiate an end-of-waste procedure before the competent administrative authority, subsequently entitling them to appeal against rejections or refusal to provide.

End-of-waste regimes in MSs: uniformity *vs* efficiency

Once outlined end-of-waste legal framework in EU, it is now possible to draw attention on national regimes.
MSs' policy-makers have been facing two opposing concerns in setting end-of-waste regimes up.
On the one hand, uniform application of the end-of-waste general conditions within the national borders is needed. It essentially leads to regimes based on statutory instruments issued by central government authorities, possibly providing waste holders with scarce participation tools.
On the other hand, it is crucial for public institutions to be updated to technical innovations and to the advancement of scientific knowledge, thus providing rapidly and efficiently. To this end, many end-of-waste regimes grant economic operators legal tools to stimulate authorities' action even accepting unevenness to some degrees.
Consistently with these considerations, recurring end-of-waste models have been classified according with two criteria: (a) nature of the effects produced by the act incorporating end-of-waste de-

tailed criteria, which may be general (i.e., normative acts such as statutory instruments) or individual (i.e., administrative orders); (b) impulse in initiating the end-of-waste procedure, which may come from the competent authority itself (i.e., *ex proprio motu*) or upon motion of the party.
On these bases, the following three end-of-waste models have been isolated:
1) normative acts issued *ex proprio motu*;
2) normative acts issued upon motion of the party and/or *ex proprio motu*;
3) normative acts issued *ex proprio motu* and, where absent, administrative orders issued upon motion of the party.

Model 1: normative acts issued on authority's motion. A (successful) variant:

UK Quality Protocols (QPs)
According to the Model 1, the competent authority is the only body or subject entrusted in initiating an end-of-waste procedure. The act adopted is a statutory instrument, i.e. having general or normative effects: it means that the detailed criteria laid down need to be applied in individual cases by further authorities entitled to grant waste treatment plants' permits.
Competence in adoption of such regulations generally lies with central government or, in hard autonomies States, with regional government authority.
This end-of-waste regime is adopted by a large variety of States, with diverse recycling performances, such as Spain, Portugal, Austria, Estonia, Finland and, within the period from the *Contarina* judgement issued by the *Consiglio di Stato* on February 28th 2018 [see Cons. St., No 1229/2018] to the enactment of Law 2 November 2019, No 128, even Italy. Despite such a large diffusion, it is not free of critical issues, which essentially arise from the circumstance that waste holders are not entitled to activate the procedure to set general detailed criteria or, more generally, from the absence of such mechanisms meant to let the economic operators to collaborate with competent authority.
In this respect, an exemption is represented by the UK Quality Protocols (QPs). QPs are to be classified among Model 1, given their general effectiveness and since individuals and legal entities are not entitled in initiating a procedure. However, there are at least two features that make QPs a (successful) variant.
Firstly, the effects produced. QPs are neither mandatory nor binding: it is just a voluntary tool and it is to be meant as an end-of-waste conditions' modes of proof. Secondly, although UK law does not grant waste holder a right to initiate the procedure, public-private collaboration is ensured as QPs are issued by agreement between the government and representatives of the producers.
The success of this model is testified by the circumstance that UK is the MS which has issued the highest number of end-of-waste regulations in EU (16 regulations notified).

Model 2: normative acts issued upon competent authority's motion and/or upon motion of the party

The second end-of-waste regime has been being carried out in France and in Belgium (Walloon Community).
As well as the previous one, detailed criteria are set up only by normative acts: without a general binding statutory instrument specifying end-of-waste broad conditions, no public body can assess, case-by-case, whether or not a waste must no longer be regarded as such.
Difference is found in the way the procedure may start. Indeed, concurring or alternative to the authority's motion, the law grants waste holder the

possibility to apply before competent body in order to lay down general detailed criteria for that particular type of waste. Parties are also provided with means of appeal against any authority rejection or inertia.
This latter regime is apparently more capable to appease the aforementioned opposing public concerns, due to the provision of an individual "right" to start the procedure.
Nevertheless, a certain degree of rigidity may still be found. As competence in adopting such regulations usually lies with central government (e.g., in France), local authorities entrusted with granting waste treatment implants permits are not entitled to assess case-by-case the existence of end-of-waste conditions, where the ministry for the environment has not already issued detailed criteria.

Model 3: normative acts issued on competent authority's motion and, where absent, administrative orders issued upon motion of the party

The last regime is the most flexible one.
Central government authority is usually the body entrusted with setting generally applicable detailed criteria. In these cases, the procedure initiates only *ex motu proprio*.
However, where such criteria are missing, authorities entitled to issue recovery plants' permits assess the existence of the end-of-waste requirements in individual cases and upon motion of the party.
This end-of-waste scheme seems to be very efficient as it is appears by waste performance of the countries adopting such model, Germany and the Netherlands in the lead, but also Belgium (Region of Brussels) and Italy (before the *Contarina* judgment and starting from 3rd November 2019).
Critical issues are still not missing, though. These particularly regard the risk of heterogeneity and, thus, of discriminatory treatment within national territory, as authorities entrusted with assessing case-by-case end-of-waste conditions are usually at local or at sub-central level.
However, this risk is not unavoidable. Taking advice from Directive 2018/851, national authorities «may make information about case-by-case decisions and about the results of verification by competent authorities publicly available by electronic means» [WFD Article 6(4), second sentence].

Concluding remarks

It has been showed that Directive 2018/851 has consistently implemented the subsidiarity principle. It entrusted MSs with primary responsibility in setting end-of-waste criteria, EC being entitled to monitor national criteria and to assess whether Union-wide criteria need to be developed. In the trade-off between uniformity and efficiency, it seems that EU legislature is inclined to the latter, although without disregarding the former.
A further step in this direction seems to be the attempt made by the Advocate General to grant waste holder a "right" to end-of-waste assessment, at least in borderline case of manifest errors.
From a national perspective, a twofold form of collaboration is needed. Firstly, between public authorities pertaining to different government levels (i.e., central and local). On the other hand, it is crucial to grant individuals and legal entities procedural participation means.
Indeed, such approach would be also consistent with general principles of environmental law, i.e. inter alia, subsidiarity, integration, participation of the public to decision processes. Their common denominator is collaboration between different subjects, in order to provide circular institutions which reflect a circular economy.

Riciclo e recupero dei rifiuti: leggi europee e regimi nazionali

La cessazione della qualifica di rifiuto (*end-of-waste*) è uno degli strumenti giuridici essenziali per realizzare un'economia circolare. Da un punto di vista istituzionale, al fine di "chiudere il cerchio", è necessaria una collaborazione sia tra i diversi livelli di governo (sovranazionale, nazionale, locale), sia tra settore pubblico e settore privato. L'articolo, una volta esposto il regime di cessazione della qualifica di rifiuto di cui alla normativa dell'Unione Europea, si occupa di esaminarne l'attuazione nei diversi ordinamenti nazionali.