

June 13 2022

Waste as a resource: is there a need for national end-of-waste criteria in Sweden?

Advokatfirman Lindahl | Environment & Climate Change - Sweden



JOHANNA
LINDQVIST



JONATHAN
GUSTAVSSON

› Introduction

› EU regulation regarding when waste ceases to be waste

› Introduction of national end-of-waste criteria in Sweden

› Comments

Introduction

The transition to a more circular economy is in progress throughout Europe and in Sweden. Introducing end-of-waste criteria for certain waste streams has been highlighted as one of several particularly important instruments in this process.

Since Sweden is a member of the European Union, Swedish waste legislation must, at a minimal level, follow the EU Waste Framework Directive.⁽¹⁾ Article 6 of the EU Waste Framework Directive allows member states to introduce their own national criteria regarding when waste ceases to be waste.

End-of-waste criteria aims to clarify at which point in the recycling process waste ceases to be waste. This is important because the classification determines the regulations with which an operator handling waste as a resource must comply. After the transition point, the material ceases to be waste and is instead classified as a product or a secondary raw material, which means that the waste regulation is no longer applicable. Since the waste regulation tends to set higher requirements than the corresponding product regulation, the transition could ease the recycling process while also making the process more cost-efficient.

In 2021, the Swedish Environmental Protection Agency (EPA) was commissioned by the Swedish government to investigate the possibilities of introducing end-of-waste criteria in Sweden. The EPA presented the results of its investigation at the end of 2021 in a public report called "Waste as a resource".

This article describes the end-of-waste regulation in the EU Waste Framework Directive and in the Swedish legislation and presents the conclusion in the recent EPA report "Waste as a resource".

EU regulation regarding when waste ceases to be waste

The transition point regarding when waste ceases to be waste follows from the criteria set forth in the EU Waste Framework Directive. Article 6(1) of the EU Waste Framework Directive sets forth the general criteria regarding when waste ceases to be waste. The article states that waste ceases to be waste when it has undergone a recycling or other recovery operation and complies with the following conditions:

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

In addition to the general criteria, the European Commission has the possibility, through article 6(2) of the EU Waste Framework Directive, to introduce specific joint EU criteria for specific waste streams. Such criteria have so far been introduced in three regulations which are directly applicable in all member states. These regulations cover iron, steel, aluminum, copper and glass scrap.

During the past one-and-a-half years, the European Commission has been investigating which additional waste streams should be covered by end-of-waste criteria at EU level. In March 2022, the European Commission reported its findings and stated that suitable waste streams for end-of-waste criteria are plastics and textiles. The European Commission is expected to announce end-of-waste criteria for plastics in early 2024 while the development of end-of-waste criteria for textiles is expected to commence during 2023.

Article 6(3) of the EU Waste Framework Directive allows member states to introduce national criteria regarding when waste ceases to be waste in relation to a specific waste stream. For a member state to be allowed to introduce national end-of-waste criteria, it must be intended as a complement to the general criteria set forth under article 6(1). In addition, the specific waste stream must not be specifically regulated at EU level under article 6(2) of the EU Waste Framework Directive. Should such criteria exist at EU level, the national criteria may only be introduced if the national criteria set forth higher requirements than the joint EU criteria.

The assessment of whether waste has ceased to be waste shall be made by the operator who has treated the waste. The supervisory authority may then, if necessary, review the assessment. If the operator concludes that the waste has ceased to be waste and the supervisory authority disagrees with the assessment, the authority may order the operator to continue to treat the matter as waste or that the operations shall cease.

The assessment carried out by the operator shall primarily be made according to the specific criteria established at EU level in accordance with article 6(2) or at national level in accordance with article 6(3) of the EU Waste Framework Directive. If no such specific criteria exist regarding the waste stream, the assessment shall instead be made on a case-by-case basis in accordance with article 6(4) of the EU Waste Framework Directive. Such an assessment is to be carried out in accordance with the general criteria set forth in article

6(1). In addition to the general criteria, the operator shall also consider the requirements set forth in points (a) to (e) of article 6(2) of the EU Waste Framework Directive as well as the limit values for pollutants and any possible adverse environmental and human health impacts.

Introduction of national end-of-waste criteria in Sweden

Sweden has not yet introduced any national criteria regarding when waste ceases to be waste. The Swedish regulation is instead based on the joint EU provisions in article 6 of the EU Waste Framework Directive and on the regulations issued by the European Union regarding the waste streams mentioned earlier in this article. The general criteria in article 6(1) of the EU Waste Framework Directive have been implemented in Swedish law.⁽²⁾ If an operator in Sweden is performing an assessment and the waste stream is not covered by the joint EU provisions or regulations, the assessment is done on a case-by-case basis in accordance with the general criteria.

In its report from 2021, the EPA concludes that operators often find it complicated to carry out assessments on a case-by-case basis. The operators consider the general criteria to be too vague, which leads to uncertainty as to whether the criteria have been met or not. Due to this uncertainty, the supervisory authority may come to a different conclusion to the operator during a subsequent review. For this reason, several industry organisations believe that national criteria that clarifies the transitioning point should be introduced.

The EPA concludes that there may exist a need to introduce national criteria regarding some waste streams where there are clear difficulties in assessing the transition point. At the same time, however, the EPA emphasises that in many cases the problem can be solved in other ways than by introducing national criteria for the waste stream. For instance, the transition point can be clarified through guidance from the EPA and dialogue between the operator and the supervisory authority.

The EPA is of the opinion that the assessment should primarily continue to be made on a case-by-case basis, but that there may be reasons to introduce national criteria regarding certain special waste streams. In addition to waste streams where there are clear difficulties in the assessment, the following reasons could also be used as motivation for Swedish national end-of-waste criteria for certain waste streams:

- there are many recyclers of the waste stream in Sweden;
- there is a large geographical spread of the recyclers;
- the volume of the waste stream is large;
- the waste stream contributes to high environmental impact;
- there is no ongoing work at EU level regarding joint EU criteria regarding the waste stream;
- the recycled material is not covered by the existing product legislation or chemical legislation; and
- the implementation of national criteria regarding the waste stream will increase the amount recycled.

The EPA concludes that national criteria may have positive effects regarding some waste streams. According to the EPA, national criteria may be a suitable tool to facilitate the assessment of when waste ceases to be waste and thereby will increase the recycling rate of a specific waste stream.

Furthermore, the EPA believes national criteria, in some cases, can contribute to increased legal certainty, predictability and the equal treatment of operators. According to the EPA, the problem is that there is insufficient information for determining which specific waste streams should be covered by national criteria. Thus, the EPA recommends that further research and investigation should be carried out before national criteria are introduced and that the industry calling for national criteria should take the lead in presenting such investigations.

The EPA report has been handed over to the government and is currently being handled by the Ministry for Environment. There is no official information with regard to when and if the government will initiate any further investigations or if, despite the findings and conclusions of the EPA, the government will go forward and propose new legislation regarding end-of waste criteria.

Comment

The transition point at which waste ceases to be waste is important for commercial operators that treat waste. After the transition point, the waste is instead classified as a product or secondary raw material, which usually means less detailed legislation. By having knowledge of when the waste ceases to be waste and becomes a product or secondary raw material, the operator can reclassify the waste as soon as possible, without the risk of making an incorrect assessment. Earlier reclassification results in a more cost-efficient recycling process.

The introduction of national criteria could have both positive and negative impacts on waste treatment operators. The introduction may clarify the transition point and thus make it easier for operators to carry out an assessment of whether the transition point has occurred.

However, there is also a risk that national end-of-waste criteria may include more requirements than an assessment on a case-by-case basis. In that case, the transition point may be shifted forward in the treatment process.

Additionally, the change may also result in the need for some operators to change their treatment process to comply with the national criteria. If the requirements are set higher in Sweden in comparison to other member states, the transition point may also differ between the member states, which may cause problems for operators who transport waste to or from Sweden. Based on the ongoing discussion in Sweden at a political level and amongst the operators it seems that national criteria in the future will be introduced in Sweden regarding certain waste streams. However, it has not yet been decided which waste streams should be included or when national end-of-waste criteria will be introduced. Considering how important the implementation of national criteria is for operators, those producing waste or handling waste as a resource in their production process should assess the possibility that the waste stream that they are handling will be covered. This assessment should be done according to the suitability aspects set forth by the EPA.

For further information on this topic please contact [Johanna Lindqvist](mailto:Johanna.Lindqvist@lindahl.se) or [Jonathan Gustavsson](mailto:Jonathan.Gustavsson@lindahl.se) at Advokatfirman Lindahl by telephone (+46 40 664 66 50) or email (johanna.lindqvist@lindahl.se or jonathan.gustavsson@lindahl.se). The Advokatfirman Lindahl website can be accessed at www.lindahl.se.

Endnotes

(1) Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives

(Waste Framework Directive).

(2) Through Chapter 15 section (9a) of the Swedish Environmental Code (1998:808).