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CONSTRUCTION WASTE HANDLING AFTER AMENDMENTS IN WASTE REGULATIONS

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Abstract. Amendments to regulations on waste management effective from 1 January 2022 and associated with the implementation of the idea of circular economy, respond to the requirement of transposing relevant EU regulations. The proposed amendments address, for example, construction waste. They define construction waste and introduce new provisions as well as modifying existing measures related to the management of this waste. They highlight the principles of circular economy. This article assesses the practical value and applicability of these regulations in construction waste management from several points of view. First, re-use of such waste is discussed. Second, end-of-waste regulations are analysed, and so is the possibility of their application in the management of construction waste, especially construction rubble. The study closes with conclusions suggesting specific addendums to existing waste regulations.

Keywords: waste management; construction waste; waste regulations

INTRODUCTION

Recent amendments to EU waste-related legislation[1] meant that Polish laws had to be adjusted accordingly. The Amending Directive introduced a number of changes, mainly in the so called framework waste directive[2] and these amendments had to be introduced to many national laws, in particular to the Polish Waste Law.[3] These changes have been made by means of a few acts. From the point of view of this study, the amending act of November 2021 is especially important.[4] Its provisions largely entered into force

[1] Primarily Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending directive 2008/98/EC on waste, OJ L 150, 14.6.2018, p. 109-40 [hereinafter: Amending Directive].

[2] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives, OJ L 312, 22.12.2008, p. 3 as amended [hereinafter: framework directive].

[3] Act of 14 December 2012, the Waste Law, Journal of Laws of 2022, item 699 [hereinafter: WL].

[4] Act of 17 November 2021 on amending the Waste Law and certain other acts, Journal of Laws item 2151 [hereinafter: WLA].

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on 1 January 2022. The EU amendments and, consequently, national ones[5] are very robust and touch many issues that serve to implement the idea of circular economy to our legislation. This concept envisages most extensive use of waste (raw materials and deposits contained therein) in the economy and using them to replace natural resources thus saving the latter. This entails, for example, a certain change in the approach to construction waste. The Amending Directive emphasises in its preamble, first of all, that we need to adopt definitions of such waste (recital 9 of the preamble) and that we need to use it on a greater scale as material that replaces natural resources. This statement follows in particular from recital 1 of the preamble that points out at the outset that "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 [...]." However, at the same time, it is expressly pointed out that this cannot infringe the basic rules of procedure with waste, which the theory of environmental protection law refers to as "the security principle."[6] This means that managing any waste should be conducted in a way that ensures protection of human life and health and the environment, in particular it must not have adverse effects these two stakeholders [Górski 2022a, 18].

The preamble also notes that it is irrational to have a separate approach to managing construction and demolition waste that results from minor do-it-yourself construction and demolition activities within private households (thus, classified as municipal waste due to their source), because morphology of this waste is in fact identical to other construction waste (recital 11). Additionally, this thesis points out that this type of waste (construction and demolition waste) as a rule includes waste identified in group 17 of the Waste Catalogue (here of course there is a reference to the European Waste Catalogue included in Decision 2014/955/EU[7]).

[5] Apart from this law, quite a number of transposing provisions were also included in the act of 11 August 2021 on amending the act on keeping the communes clean and in order, the act Environmental Protection Law and the Waste Law (Journal of Laws item 1648).

[6] See Korzeniowski 2014, chapter 9.

[7] Commission Decision of 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 30.12.2014, p. 44-86.

1. LEGAL DEFINITION OF THE CONCEPT "CONSTRUCTION WASTE" AND ITS CONSEQUENCES

The amending act of November 2021 introduced a definition of the concept "construction and demolition waste" to the Waste Law, modelled on the amended framework directive. This definition is in fact, in substantive terms, identical to the EU definition included in Article 3(2c) of the amended framework directive, which lays down that "construction and demolition waste" means waste generated during construction and demolition activities, though its Polish characterization is seemingly one word shorter. According the Polish definition, included currently in Article 3(1)(6a) WL, the concept of "construction and demolition waste" includes "waste that results from building works". Thus, to specify sources of this waste, the legislator used the term "construction waste" used and defined in provisions of the act Construction Law,[8] where the concept of "building works" was specified in Article 3(7). According to this definition, building works include erecting of a building structure as well as works consisting in the redevelopment, assembly, repair, or demolition of such a structure. A full use of this definition requires that definitions of other terms used within it are taken into consideration (construction, redevelopment, assembly, repair or demolition) and the basic term "a building structure". And thus, pursuant to Article 3(1) a building structure shall mean a building, a non-building structure, or a small architecture structure together with installations enabling the use of this structure in accordance with its intended purpose, erected with the use of construction products; the terms building, non-building structure and small-architecture structure are defined separately, in Article 3(2), (3) and (4) of Construction Law.

In turn, pursuant to the Waste Law, a producer of waste generated during construction and repair activities and at the same time its holder is, by default, the entity responsible for these activities. This results from the definition of waste producers defined in Article 3(1)(32) WL, in particular in its last part that indeed specifies who, in the understanding of the law, is the producer of waste generated, for example, during building works. A waste producer is obliged to handle it according to the law (Article 27(1) WL), which includes managing it in a way that is compliant with waste regulations. The possible collection and storage of such waste must adhere to waste-storage requirements, in particular those included in Chapter 7 of division II WL, possibly also in a permit for collecting or storing waste. Collecting waste in a place not designated for it is a breach of obligations

[8] Act of 7 July 1994, the Construction Law, Journal of Laws of 2023, item 682 as amended [hereinafter: CL].

presented above, therefore, the person that collects waste contrary to the law carries an obligation to remove it from the place of illegal storage (Article 26(1) WL). In the event of failure to fulfil this obligation, a relevant obligation-imposing decision may be issued (Article 26(2) WL), in particular cases Article 26a WL may be applied.[9]

Therefore, as follows from the definition above, it refers to the source of waste generation, based on an assumption that we are dealing with substances or objects that have the nature of waste in the meaning of the general definition of this term included in Article 3(1)(6) WL. In other words, we should first state that a given substance or object is waste and then, possibly, classify it under the construction waste category. In such a context, when it comes to any substance or object that triggers doubt or controversy as to their current legal status from the point of view of waste regulations, there should never be a case that something is regarded as waste, unconditionally and indisputably, without an analysis of meeting the requirements for recognition as waste that result from the general definition.

Such a recognition requires a careful analysis of all circumstances important from the point of view of the definition, identified especially in judicial decisions, in particular in decisions issued by EU courts that often address this issue,[10] referred to a specific situation. Acknowledgement of existence of circumstances that promote their recognition as waste means that the entities that caused the emergence of these premises becomes the producer of waste. Such a discussion should be even referred to specific parts of substances, depending on these circumstances that refer to a given part [Górski 2022b, 19; Idem 2021c, chapter 3].

Given the above, taking into account the findings of the previous paragraph, we may address the concept that often surfaces in the practice of construction works, in particular in repair and demolition activities. It is about the previously used construction products which are reclaimed during such activities in a condition that allows for their re-use in the same function, practically without any preparation for such use or with minimal such preparation. In my opinion, we should therefore assume, that, given the definition of the term "waste", such a construction product in the form of a substance or object did not acquire the status of waste in a situation where it may be used in its original function. This application should be made possible without having to do any activities that restore a given substance or object features that allow them to be used in their original function and this use could not cause any threats to people or the environment. Such use should

[9] See Górski 2021c, chapter 4.

[10] See for example decisions of the EU Court of Justice in cases C-624/17, C-212/18, and C-629/19.

be facilitated even in a situation where this substance or object have become useless for the current holder, but have been taken over by a different entity that makes use of them. This may apply to, for example, objects which appear during street repairs, for example while fixing pavement slabs, curbs or similar objects including sand ballast, which may be questioned for their recognition as "construction waste". We should also assume that simple activities that restore the primary practical value to the substance or object (for example activities that involve cleaning them of possible admixtures such as vegetation, soil or other substances) will not bear the feature of waste treatment, as an element decisive in acquiring the status of waste, as long as they do not interfere with physical properties of a given substance or object. In the example given we see use in the original function – a pavement slab is re-used to build a pavement, not necessarily the one being repaired, from which it originates. However, such interference would include activities that involve cleaning the substance (or object) of various contaminants, such as oils (grease), other chemicals or similar impurities, that require the use of adequate chemical substances, provided that such cleaning should be necessary to restore the original practical functions. Such tampering would also accommodate activities that involve even further interference (repairs related to restoring a previous practical function). These should be considered as recovery activities, for example remanufacturing (that is indeed restoring a practical value), and thus activities that have the character of waste treatment; this, in turn, would be key in recognizing a substance as waste.

These comments refer mainly to construction products recovered during demolition, repair or redevelopment activities, such as bricks, curbs, pavement slabs or slabs used to build road surfaces (e.g. so-called jomb slabs), as long as these objects are not damaged and still have practical-use features characteristic for a given type of "construction product" within the meaning of applicable laws, primarily the Construction Law act in conjunction with the Construction Products Law[11] and the key Regulation of the European Parliament and of the Council 305/2011.[12] In my opinion, in a situation where such an object still meets the requirements of a "construction product" it will obviously not have the features of "waste" within the meaning of the definition under Article 3(1)(6) WL – mainly because the basic requirement will not be met, that is "disposing of" a useless object. A suggestion included in point 7 of Annex 1 of Regulation 305/2011 would also be important in this question. It stipulates that construction works must

[11] Act of 16 April 2004, the Construction Products Law, Journal of Laws of 2021, item 1213.

[12] Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, OJ L 88, 21.12.2011, p. 5-209 as amended.

be designed, built and demolished in such a way that the use of natural resources is sustainable and in particular ensure reuse or recyclability of the construction works, their materials and parts after demolition. However, we must note that this remark suggests that "providing on the domestic market" such objects obtained during demolition, repair or redevelopment works as construction products (not waste) will be possible where they will meet requirements for "construction products" in the meaning of the provisions quoted. These requirements are both substantive (identified above) and formal (different for the legal state of affairs from before and after 1 July 2013 due to the implementation of EU laws, especially the aforementioned Regulation 305/2011).

We must also note that the suggestion formulated above which refers to the possibility to recognize objects that have features of construction products and that have been used before and that are used again in the same character as non-waste (that is not qualifying them to the category of waste) is not, unfortunately, in line with the current position expressed by construction authorities, in particular the General Office of the Construction Supervision Authority (GUNB). As a rule, these bodies recognize the assumption of "one-time use" of construction products. This means that the use of a given construction product to build a building structure does not allow for this product to be reused in the same capacity, based on documentation that certifies that a given construction product meets the assumed requirements before it is first used.

This position is mainly argued using concerns for the security of using building structures. The suggestion formed above is, in turn, based on the content of the recommendation included in Annex 1 to Regulation 305/2011 and on a statement that construction laws do not feature provisions that clearly construct "the disposal obligation" with respect to construction products that have been used once already in the assumed function; according to a general definition of waste, such an obligation would clearly require that a given product be considered as waste in the moment of its recovery during repair or demolition works. Looking at things systemically, it seems that construction laws do not really keep up with the evolution of waste regulations and the idea of circular economy, which would require their review and possible amendment (which is, after all, suggested in the preamble to the 2018 Amending Directive). Let us have a look at another example. Why could we not recognize aggregate used as tramway – or railway-track substructure or even road substructure as non-waste, that is why we could we not classify it to the waste category, as long as it is reused in the same role directly or only after basic cleaning off of soil or vegetation.

2. MANAGEMENT OF CONSTRUCTION WASTE

Should these conditions not be met, objects that have previously had the nature of construction products, obtained during demolition, repair or redevelopment works, should, naturally, be recognized as waste and then as managed waste, pursuant to general principles of the Waste Law and detailed requirements on handling the procedure of collecting and treating waste. The aforementioned amendment of the Waste Law of November 2021 also introduced certain guidelines on managing construction waste, included in chapter 6A in division VII WL. These guidelines are based on an obvious obligation of selective collection of this waste which distinguishes between its identified fractions (wood, metals, glass, plastics, plaster, mineral waste, including concrete, bricks, tiles and ceramic materials and stones – Article 101a(1)). This obligation does not apply to construction waste generated in households and in selective municipal waste collection points and construction and demolition waste for which the law does not provide the obligation to hold waste records[13] specified in provisions issued pursuant to Article 66(5). The legislator has stipulated an adjustment period for these requirements which enter into force on 1 January 2023.

When we consider the possibilities of using substances or objects obtained especially from repair (repair and construction) works in a place other than a construction (repair) site from which they originate, we would have to acknowledge that such a possibility will result mainly from the assessment of the nature of a specific substance – in the context of it obtaining the character (status) of waste or not, which in the context of non-qualification to the waste category has been analysed above. As has been acknowledged, the assessment of acquiring the status of waste or failure to do so must be always based on a general definition of "waste" under Article 3(1)(6) WL. While I do believe we could possibly recognize the aggregate referred to in the previous paragraph as non-waste or not qualify it in the category of waste, such an approach cannot be proposed towards brick or cement rubble. In the majority of cases rubble cannot be used as material directly used in its original function; it must be adjusted in its essence to a specific function that allows it to be used in constructing another building structure, that is – looking through the prism of waste laws – subject to recovery operations. It is not a "construction product" either. In such a situation we are dealing with non-usability of such rubble which is

[13] Provision of Article 101(2) that releases from the obligation points out that it refers to waste identified in the regulation of the Climate Minister of 23 December 2019 on types of waste and quantities of waste for which waste records are not obligatory (Journal of Laws item 2531); however, we need to admit that this also refers to this exemption from the obligation to hold waste records, identified in Article 66(4) WL.

an element of the concept of "disposal". Still though, such non-usability does not have to be permanent, it may be removed during recovery (e.g. by being ground in a crusher, sorted in a sifter or cleaned of contaminants). Nonetheless, rubble itself as waste in such a situation has undisputed economic value. Such value, however, does not rule out obtaining the status of waste and, on the other hand, it should result in actions that serve to restore its practical value and to use the material obtained to possibly replace natural (raw) materials.

Another issue that must be addressed in the analysed context is the activity that involves sorting waste. The WL amendment of 1 January 2022 introduced the sorting of waste to the definition of "managing waste" (Article 3(1)(2) WL) (according to the current content of the first part of the definition, managing waste involves "collecting, transporting or treating waste, including the sorting of it..."). Based on the addition to the definition, we should assume that sorting is not always accommodated in the concept of treatment and thus demolition material that requires sorting must be treated. Given that, it is subject to an activity characteristic to waste management, thus must be recognized as waste. As has been pointed out before, I believe that simple mechanical cleaning of an object (which primarily was a construction product) obtained as a result of demolition activities (e.g. removing soil or sand from an undamaged cement curb or a pavement slab or brick, sieving off soil, sand or plant parts from the aforementioned aggregate), that allows their reuse in the same function without any further "facilitations", will not constitute waste treatment. On the other hand, sorting rubble into e.g. brick rubble and cement rubble should be considered treatment.

3. CONSTRUCTION WASTE AND THE LEGAL INSTITUTION OF "LOSING OF THE STATUS OF WASTE"

The recovery operations applied towards perhaps the most characteristic construction and repair waste, that is construction rubble, may possibly be associated with the institution of the "end-of-waste status". This measure has been expanded by most recent regulations (WL amendment of November 2021) and is regulated primarily by provisions included in Article 14 WL. The latter are quite problematic in interpretation if we are to be frank [Górski 2021a, 20; Idem 2021b, 18].

It seems that a regulation analogous to the one on crushed asphalt is called for. It should establish premises for the end-of-waste status through activities carried out on construction rubble aimed to prepare this rubble in operations of recovery of material that replaces natural aggregate.[14] Until

[14] Regulation of the Minister for Climate and the Environment of 23 December 2021

such a law is passed, it would be possible to use the form of individual consent by introducing relevant provisions to the waste treatment permit, which is stipulated in existing provisions of Article 43 WL. It would be worth obtaining the opinion of construction supervisory authorities. In the context of the formulated suggestion that refers to obtaining the opinion of the construction supervisory authority, we need to point out that even though the law does not stipulate a formal obligation to obtain such an opinion at the moment (July 2022), this suggestion is rooted in the provisions of Article 81(1)(1c) of Construction Law. They stipulate that construction supervisory authorities are responsible for, for example, supervision and inspection of compliance with construction law. Such review should include compliance of design and construction measures with technical and construction regulations and principles of technical knowledge. I believe this is a basis for these authorities to assess the treated waste's practical value for building works. It is also worth noting that using the phrase "end-of-waste status", regardless of the legal forms available now (meeting normatively specified requirements or requirements specified by an individual decision), is beneficial for both interested parties. The waste holder (following recognition of the end-of-waste status of truly former waste) and the entity taking over the former waste alike gain from it because transfer of such already former waste (and now a substance or an object) does not require compliance with rules of procedure for waste. It is particularly noticeable in the context of an obligation to hand it over to the so-called legal waste holders (Article 27(2) WL) or in the context of transport and the related obligation to name the recipient with the status of the so-called legal waste holder.

In a practical example, application of these arrangements would look as follows: concrete rubble created as a result of demolition of an old road surface made of concrete (which, by the way, is quite a typical problem associated with repairs of pre-war motorways in the western regions where such waste is quite abundant) has the nature of waste which may be used after being cleaned and crushed.

From the formal and legal point of view, such activities should be considered as generation of waste (taking off of an old surface and obtaining concrete rubble as waste) and as its preparation for re-use (cleaning and crushing intended to obtain a material that is analogous to natural aggregate). The lack of a practical value of the obtained substance in direct use and having to prepare it for re-use (treatment) is the criterion that determines whether the resulting rubble is counted as waste. This said, adequate treatment could be considered to lead to a situation in which rubble

on specifying detailed conditions for the end-of-waste status for crushed asphalt waste, Journal of Laws item 2468 – new version replacing regulation of November 2021, which became ineffective on 1 January 2022 due to the amendment of the delegation for issuing it in WL.

prepared to play the function of aggregate loses its status of waste by meeting the premises stipulated in the regulation or in an administrative decision.

In the current state of affairs, where there is no adequate implementing regulation, one would have to obtain a waste recovery permit and such a decision could name the premises for the end-of-waste status for the treated rubble (the basis for it is stipulated in Article 43(2)(3a) WL). The problem lies in the fact that there are no set standards for specifying and for the scope of such requirements provided in a decision. That being said, this is a problem both for the authority (which formulates the content of the waste treatment permit) and the applicant, who must demonstrate in their application that they meet such requirements (Article 42(2)(6a) WL). A crucial element in such a situation for specifying the premises for the end-of-waste status could involve taking into consideration the material so obtained in the design draft, along with possible identification of its obligatory features. The requested permit would concern preparation of waste for re-use (preparation operation R-12) and permission for final use of the waste prepared for a given manner of using it (operation R-5). Combining both operations in one permit would be possible it they were both carried out by the same holder and it would be a relatively easier case.

On the other hand, in a situation where another holder was to actually use it, there seem to be two options. In the first one, a decision for carrying out preparatory operations would be to express consent only for this operation. As a consequence, the entity that takes over the prepared aggregate (which is still considered waste after preparatory operations) will become the waste holder and is naturally obliged to obtain permission for the final use of the waste, which would also specify premises for such use (permission for treating waste in the form of recovery that specifies requirements for carrying out such a recovery). On the other hand, a possible second solution would involve obtaining confirmation of the end-of-waste status directly after carrying out preparatory operations. Then, upon completion of this operation and having agreed on the meeting of the requirements for the end-of-waste status specified in the decision, the treated waste ceases to be waste and may be handed over for intended use a product, thus non-waste (a useful product). As a result, the entity that uses this product would naturally have to obtain permits for recovery and would not become the waste holder, thus would not be subject to waste regulations. It seems obvious in such a situation that the entity that takes over a given product (which is not waste any more) may adjust such product to their own needs that result from the intended use. However, it should be such final use that was identified in specified requirements for the end-of-waste status (in the example: use of natural aggregate as substitute); the entity that uses this product should also comply with possible requirements resulting from construction laws

that refer to the given type of use. The ultimate conclusion for the example analysed would then be as follows – construction rubble loses the status of waste after being prepared for re-use in the function intended for natural aggregates used for construction purposes and after meeting requirements that such aggregates should meet; subjecting such a product (former waste), treated as a substitute of aggregate, to operations that allow obtaining the degree of granulation appropriate to the intended purpose should not be considered as further treatment of the waste [Górski 2022b, 24].

CONCLUSIONS

This analysis allows a conclusion that the amendments, introduced at the beginning of this year, which addressed handling construction waste, are heading in the right direction, compliant with the assumptions of circular economy and current EU regulations. At this, it seems that they require a certain clarification, especially in the context of principles of defining the criteria for the end-of-waste status for this type of waste (and at least certain kinds of waste). This should be done by means of general laws, that is implementing regulations, or by means of more precise guidelines on defining these requirements in a waste treatment permit. However, certain doubts do arise in differentiating activities that involve direct re-use of specific construction products, without qualifying these products to the category of waste, and activities that involve preparation for re-use, carried out for products that have already been recognized as waste. It is indeed a question of whether a construction product used in such a function once may be reused in the same function, along with a possible specification of condition for such use. This question is addressed towards construction regulations that concern requirements necessary for construction products.

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