1. Introduction

In principle, if waste for recycling retains the status of waste, there is no debate, as waste is exempted from the scope of the Regulation because waste is not considered as a substance, a preparation or an article. It is only when "waste for recycling" has been granted "non-waste" status in generic terms, without detailed conditions prescribed by the waste legislation, that a discussion on the applicability of REACH will start.

In the NFM industry many such cases (Aluminium scrap, Copper scrap, Zinc scrap, etc.) could be considered to fit with this description, which clearly fits recovery processes with a simple substance output. However, for complex residues (by-products) of complex NFM process flow sheets where no recovery takes place and where the primary route is still applied, a full detailed material flow / production chain / life cycle of a material stream should be considered in determining the status of recovered metals & alloys an illustration of such a process can be found below.

Additional aspects that should be taken into account are:

- Similar material streams have been named differently by different companies (residues, by-products, intermediate products, waste, commercial products, concentrates, etc.)
- Similar material streams have been looked at differently by local, regional, member state and international competent authorities responsible for waste legislation or for waste transport legislation
• Earlier long-standing discussions between industry and competent authorities or institutions failed to clearly define the distinction between waste and non-waste for complex material streams in our industry
• The discussions on the non-waste status of such material streams have not been coherent within the NFM sector and certainly not within the European industry
• Several sectors have opposite opinions in considering material streams as waste, and there has been no common point of view of the whole industry in this discussion.

Based upon these considerations, individual companies should analyse in full transparency the status of the material streams that are not covered by waste legislation, and they should also take into account all the steps of the material flows throughout the entire supply and production chain over the full life-cycle of the material stream.

This analysis should be evaluated against the spirit of the waste legislation and the spirit of the REACH regulation to determine which of the two regulatory systems would be applicable to a particular material stream.

2. Definition

Recovery: is currently defined as any of the recovery operations listed in annex IIB of the Waste Framework Directive 2006/12/EC (see annex I):

Recovered materials: secondary raw materials do not appear in any EU & national legislation; they are only a convenient term that is used by industry and the Commission to describe waste that has ceased to be a waste.

Recovered metals & alloys: is a term adopted by Eurometaux to describe a range of materials within the non-ferrous metals (NFM) industry, including pure metals and very complex mixtures of metal compounds that result from processes to collect and (pre-)treat waste or residual materials within its complex production chains.

Recycler: means an establishment that re-melts metals/metal compounds and/or alloys to produce new metals/metal compounds or alloys, and not a company that collects or prepares metals and alloys for recovery.

Same Substance: In the absence of a clear definition, the criteria from the manual of decisions, criteria for reporting substances under EINECS, can be used as a common base for the identification and naming of substances. In this context, a substance can be considered the same if it has the same identity and physico-chemical properties. Detailed guidance is available in the ECHA guidance document on substance identification and naming.

By-products: Are not defined in REACh, but in the draft text¹ of the Waste Framework Directive (WFD) that recently went into second reading, by-products are defined as "a substance or object, resulting from a production process, the primary aim of which is not the production of that item".

End-of-waste: In the future waste framework Directive, it is foreseen that certain wastes that meet a set of criteria, to be developed by the European Commission, might cease to be waste and would be considered as products.

3. Recovered metals and alloys in REACh

Article 2.7 (d) indicates that substances, on their own, in preparations or in articles that result from a recovery process carried out in the Community, are exempted from registration (Title II) when:

- The substance resulting from the recovery process has been registered by any actor in the EU; and
- The substance resulting from the recovery process must be the same as the registered substance; and
- The legal entity that did the recovery must ensure that the information on the registered substance is available, in the sense that it must be in the possession of either:
  - A safety data sheet, as required by Article 31 (1) or (3) for the registered substance; or
  - Other information sufficient to ensure the safe use of the recovered substance according to article 31 (4) for the registered substance; or
  - The registration number (if available), the status of the substance under authorization, details of any applicable restrictions, and information to allow appropriate risk management measures to be identified and applied.

Remark: In the context of access to the above-mentioned information, a legal opinion obtained has pointed out that the recycler must have a legitimate access to the registration number for the substance concerned. Specifically in the case of end-of-life product waste, it is therefore considered unlikely that independent recyclers would have access to this information.

4. Options for the industry:

When determining the responsibilities of the recycler it is important to also consider the spirit of the law. A strict interpretation according to the letter of the law would lead to discrepancies between the registered tonnage and the tonnage that is actually placed on the market, due to:

- Import of waste for recovery; and
- Long lead-in times before metals enter the recycling loop.

Subsequently, this could lead to wrong conclusions in the Chemicals Safety Assessment. Although, it is not feasible to provide one generic advice for interpretation of REACH on this subject, the number of scenarios that need to be considered can be limited to Six.

a) Recycler that recovers metals/ metal compounds within the EU or EEA:

The recyclers, and specifically independent recyclers, are advised to pre-register the metals/ metal compounds they recover in order to retain all marketing rights during the transition phase.
Furthermore, Eurometaux encourages (independent) recyclers to closely collaborate* with the metal consortia in order to:

- ensure that the metal dossier reflects the full metal life cycle and the total amounts that are actually placed on the market; and
- for the recyclers to obtain a legitimate access to all information needed to meet the requirements of 2.7.d(ii).

b) Recycler that recover metals, metal compounds and alloys outside the EU or EEA:

The recycler is recovering the metal outside the EU, and therefore either:

- The EU/EEA\(^2\) importer of the recovered substance will have to register the substance; or
- The non-EU/ non-EEA recycler may appoint an only representative (OR) that takes over the responsibilities of the importers, who subsequently will become Downstream users of the OR.

Importers or the ORs are advised to join the relevant metal consortia as full members.

*Note: importers of metal-containing waste will have obligations under waste regulations but no additional obligations under REACH*

c) Recycler that recovers an alloy inside the EU or EEA\(^1\):

Recyclers that recover alloys within the EU/EEA territory are advised to pre-register the constituent metals in order to retain all marketing rights during the transition phase.

Additionally, they are encouraged to collaborate* closely with constituent metal consortia in order to:

- ensure that the metal dossier reflects the use of the constituent metals in the recovered alloy in the full metal life cycle and correct data on the amounts of metals that are placed on the EU market; and
- for the recyclers to obtain a legitimate access to all information needed to meet the requirements of 2.7.d(ii).

d) Recyclers that recover alloys outside the EU or EEA\(^1\):

If the recycler is recovering the alloy outside the EU, the import of the alloy is considered as the import of a preparation containing a number of metals, and subsequently either:

- The EU/ EEA importer will have to (pre-)register all the constituent metals of the Alloy; or
- The non EU/ non-EEA recycler may opt to appoint an only representative (OR) that will have to (pre-) register all the constituent metals of the Alloy and subsequently the EU/ EEA importers will become Downstream users of the OR.

In order to retain the right to market the alloys during the transition period.

\(^2\) EEA is the European economic area consisting of the EU 27 member States and Norway, Iceland and Lichtenstein.
Eurometaux encourages importers to collaborate* with the consortia for the preparation of the registration for each constituent metal.

*Note: importers of alloy-containing waste will have obligations under waste regulations but no additional obligations under REACH.

e) EU or EEA manufacturers or importers of substances or articles that could meet the future Waste Framework Directive criteria for by-products:

Although by-products, as defined in the draft text of waste framework Directive, might currently be considered as wastes their status may change in the future in case they meet a set of criteria set out in the future Waste Framework Directive and therefore be no longer considered as wastes. Instead they may be considered as products that fall within the scope of the REACh Regulation, unless they are specifically exempted (partly or completely).

Because of:

- The legal uncertainty on the final outcome of the political process of the Waste Framework Directive; and
- To assure the access to the EU/EEA market and right to benefit from a transitional measures for phase-in substances when these by-products no longer be considered as waste, but instead considered as products within the scope of REACh;

Eurometaux advises its members to pre-register by-products that could potentially meet the by-product criteria and get in contact with the relevant consortia.

f) EU or EEA manufacturers or importers of wastes that could meet the future end-of-waste criteria:

In the on-going revision of the waste framework directive, one of the major changes are going to be the end-of-waste criteria that will define when a waste may cease to be a waste and again becomes a product. This could be an option for uncontaminated scrap metal (end-of life products or process waste).

Because of:

- The legal uncertainty on the final outcome of the political process of the Waste Framework Directive; and
- To assure the access to the EU/EEA market and right to benefit from the transitional measures for phase-in substances when these products are no longer considered as waste, but are be considered as products within the scope of REACh;

Eurometaux advises its members to pre-register (uncontaminated) waste that could potentially meet the future end-of-waste criteria and get in contact with the relevant consortia.

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3 The revision of the waste framework Directive is expected to be finalised by the end of the Year an dtherefore there is still an uncertainty wether the By-product provisions will be retained in the final text.
*collaboration arrangements need to be agreed with consortia on a case-by-case basis.

Annex I - List of operations considered as recovery operation in Dir 2006/12/EC

R1 Use principally as a fuel or other means to generate energy
R2 Solvent reclamation/regeneration
R3 Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes)
R4 Recycling/reclamation of metals and metal compounds
R5 Recycling/reclamation of other inorganic materials
R6 Regeneration of acids or bases
R7 Recovery of components used for pollution abatement
R8 Recovery of components from catalysts
R9 Oil re-refining or other reuses of oil
R10 Land treatment resulting in benefit to agriculture or ecological improvement
R11 Use of wastes obtained from any of the operations numbered R1 to R10
R12 Exchange of wastes for submission to any of the operations numbered R1 to R11
R13 Storage of wastes pending any of the operations numbered R1 to R12 (excluding temporary storage, pending collection, on the site where it is produced)