

Definition of waste: Legal Guidance Note

Use of materials resulting from the manufacture or sale of food / drink for human consumption as animal feed (with or without further processing)

1. Scenario 1: Materials that are always produced as an inevitable result of the process of manufacturing food and drink for human consumption (spent yeast, brewers grains, molasses, etc.)

1.1. Use of these materials in the manufacture of human or animal food/feed

Materials: "Materials resulting from the manufacture of food or drink which are passed on directly to another undertaking for processing into food or drink (for human or animal consumption)."

Conclusion

Not waste.

Example: Brewers grains and spent yeast, where they are used to make animal feed or yeast based products; molasses and other derivatives from sugar manufacturing where they are used to make animal feed.

Rationale

Raw materials are being processed in a series of stages (albeit by different undertakings) to extract nutritional value for a number of different purposes, all of which are aimed at manufacturing food and drink from the materials. In these circumstances, the Environment Agency considers that it is appropriate to regard these food and drink by-products as not being discarded as waste but simply as another food and drink product obtained from the original raw materials. In the Agency's view, this conclusion is compatible with the aims of the Waste Framework Directive (WFD) and the need to ensure its effectiveness is not undermined.

Legal rationale (in more detail)

These substances are produced in a manufacturing/production process so the first question is whether they are products/by-products (which are *prima facie* not waste) or production residues (which are *prima facie* waste). Having regard to recent case law these substances can be classified as products/by-products. Although their nutritional value is sought at a different stage of the production process (and by different undertakings), they are nonetheless used in their entirety *for the same purposes* as the other (main product) substances sought by the operator of the initial food and drink manufacturing process - i.e. food.

In order to reach a decision as to whether something is a by-product or a production residue, it is also necessary to consider all the other relevant factors /questions (except for the questions (i) whether they can be used only in a way that involves their disappearance or (ii) whether their use must involve special measures to protect the environment, as these questions are not relevant to products/by-products). In the case of the materials identified in this scenario the answers to these questions tend to support the conclusion that it is not waste: *Is it specifically listed in Annex 1 WFD?* No. *Is it consigned to a recovery or disposal operation?* This is a rather circular question but the use of food materials in the manufacture of food/feed is not an obvious R or D operation. *Is it commonly regarded as waste?* No. *Is it a common method of recovering/disposing of waste?* No.

The final and ultimate question: *Having regard to all the circumstances and the aims of the Waste Framework Directive, would it undermine the effectiveness of the WFD not to treat this material as*

waste? Answer: No. The human food and animal feed manufacturing businesses are subject to the types of controls that would ensure that any environmental risks were also addressed during the collection, transport and manufacture of this material into human food / animal feed.

1.2. Use of these materials to feed directly to animals on farm

Conclusion

In general, materials resulting from the manufacture of food and drink which are passed on to a farmer for direct use as animal feed on farm (i.e. without being manufactured into animal feed by an intermediate animal feed manufacturer) will not be regarded as waste, as long as the material is suitable for that use, there is certainty of that use and the material is only being passed on for that use. In determining whether the material is suitable for that use, compliance with the relevant animal feed legislation and recognised industry standards can be regarded as demonstrating suitability for use as animal feed. However, if the materials are unsuitable for use as animal feed and/or are being passed on in circumstances which indicate that what is really happening is waste disposal (for example a farmer is taking in excessive quantities of the material), then the Agency will treat the material as waste. Each case must be considered on its facts, having regard to all the circumstances, the aims of the Waste Framework Directive and the need to ensure the effectiveness of the Directive is not undermined.

Rationale

In this case the rationale is almost the same as above – and the conclusion indicates that they are products/by-products not production residues - but in looking at the aims of the WFD being undermined does it make a difference that the food is going directly to farms and not through a strictly controlled feed manufacturing process?

The Agency has received information from the Food Standards Agency about the obligations on animal feed manufacturers in relation to 'feedingstuffs'. From 1 January 2005 the EC Regulation 178/2002 General Food Law, amongst other things, prohibits the placing on the market, or the feeding to food-producing animals, of unsafe feed and requires feed business operators to have traceability systems in place. EC Regulation 183/2005, laying down requirements for feed hygiene, extends the approval/registration requirements to all feed businesses including food businesses selling co-products for feed use. Such businesses will have to comply with various conditions appropriate to the operations that they carry out. Annex I of the Regulation covers provisions applicable to feed businesses involved in primary production and includes hygiene standards and record keeping. The controls (178/2002 and 183/2005) apply to businesses selling and using feed materials from the human food/drink sectors and further strengthen existing controls in place for additives and undesirable substances. For example, it is illegal for the seller of feed:

- to sell to the farmer, for use as feed, any product which contains any ingredient deleterious to the animal, or to humans through consumption of animal products; or
- to sell feed materials that are not sound, genuine and of merchantable quality.

Further controls are to be introduced in the future, through European legislation, on matters such as transport, traceability and quality/suitability for use. It is not clear what difference if any these new controls will make to the feeding of materials from manufacturing human food/drink direct to animals.

What is clear from the information provided at the present time (including the ACAF Review of On-Farm Feeding Practices) is that:

- many 'co-products' from the manufacture of human food/drink are suitable for feeding direct to animals without being processed into animal feed; and

- there is increasing pressure for all materials, purchased by farmers for animal feeding, to come from sources and suppliers who can demonstrate compliance with recognised quality assurance standards, and for farmers themselves to use/participate in the relevant codes of practice and assurance schemes.

It is however important that any 'co products' intended to be fed directly to animals are properly identified as being suitable for use because, unlike manufactured feed, they will not have been specifically selected and processed for that purpose. In the ACAF Review they point out that:

"...primary and manufactured foods intended for direct human consumption, which are either surplus to requirements or have been rejected for quality or presentational reasons (e.g. misshapen biscuits, crisps, vegetables) may either be sold direct to farms or via intermediate processors. However, **farmers buying direct from food factories should find out why the food has been rejected and be aware of the possible hazards to livestock.**"

2. Scenario 2: Surplus food or off-specification food from the manufacture of food and drink for human consumption (e.g. potato chips or cereals that are the wrong size or shape to go into the human food chain; leftover dough and liquid chocolate).

2.1. Use of these materials in the manufacture of human or animal food/feed

Conclusion

If these materials are passed on directly to another undertaking for processing into food or drink (for human or animal consumption) then the same principles as in scenario 1.1 can be applied, with the same conclusion, i.e. they are not production residues and not waste.

Rationale

The only difference is that these are 'off-specification products' which are specifically listed in Q2 of Annex I WFD. However, an off-specification product is not necessarily waste even though it falls within Q2. Indeed, some off-specification products could also be regarded as products/by-products of a production process, in the same way as the grains, yeast etc. in scenario 1, and hence prima facie not waste. The Environment Agency also considers that in these circumstances the materials could be regarded as 'off-spec' in one sense (i.e. not of a suitable specification for use in the production of food for human consumption) but not off-spec in another sense (i.e. suitable for use in the manufacture of animal feed).

2.2. Use of these materials in animal feed to feed to animals on farm

The same principles apply as in 1.2. above and it is proposed that the same position be adopted (i.e. not usually waste if suitable for use and certain of use but may be waste if not suitable and/or passed on in circumstances that indicate it is in fact being disposed of - each case to be considered on its facts).

3. Scenario 3: Off specification or out of date food from shops/retailers (e.g. supermarket food that's past its sell by date, bruised fruit and vegetables, stale bread).

Use of the materials in the manufacture of animal food/feed or to be fed directly to animals

The response from the FSA on this issue was:

"The vast majority of surplus or part-processed food products derive from food processors, not shops/retailers. However, some wrapped bread does come back from retailers to bakeries, as "returns". This bread is then sent to surplus food processors such as a company that is FEMAS accredited.

As far as intermediate processors are concerned, fruit and vegetables do not fit into the mix with biscuits, pasta, crisps, etc. due to their physical handling characteristics, very short shelf life, resultant perishability and general unsuitability for mono-gastric i.e. pig and poultry, outlets. Of course, ruminant livestock are very able to utilize vegetable materials e.g. carrots, which may be traded inter-farm or, presumably, bought direct from food processors. However, we would question whether shops and retailers would be able to segregate such products from less suitable materials."

We understand this to mean that it is not common practice for food to be taken from shops/retailers either for processing into animal feed or for direct use on farm. However, we are informed by the British Retail Consortium that some of their members do provide food to animal sanctuaries and urban farms (though not to commercial farms) and that the food is provided free of charge and is collected by the recipients. This food is separated out before it enters the waste stream, and it is typically fruit, vegetables and bakery products that have passed their sell-by date. (Meat products are not donated because of the restrictions in the animal by-products legislation).

In this scenario we are not dealing with a production process so there is no distinction to be made between products/by-products and production residues.

The starting point is Annex I WFD. This includes "Q2: Off-specification products" and "Q3: Products whose date for appropriate use has expired." This gives an indication that they may be waste (although as indicated above the conclusion does not necessarily follow). In this context, the terms 'off-specification' and 'appropriate use' may reasonably be interpreted to cover food from a shop/retailer that is no longer suitable for sale for human consumption. They were on sale for that purpose/use and they can no longer be sold for that purpose/put to that use.

It is then necessary to consider all the other relevant factors /questions.

- *Is it listed in Annex 1 WFD? Yes.*
- *Is it consigned to a recovery or disposal operation? The use of off-spec or out of date food from a shop/retailer as animal feed to feed directly to animals may be regarded as a R or D operation.*
- *Is it commonly regarded as waste? In some circumstances, yes.*
- *Is it a common method of recovering/disposing of waste? In some circumstances, yes.*
- *Having regard to all the circumstances and the aims of the Waste Framework Directive, would it undermine the effectiveness of the WFD not to treat this material as waste?*

Conclusions

As a general rule, we consider that it would undermine the effectiveness of the WFD not to treat this material as waste if it is unsegregated, for the following reasons:

- The food will be of variable quantities and types.
- The food will require some form of segregation by the user, to separate out that which is suitable for use as animal feed and that which is not (or is banned, e.g. food containing meat which has to be sent to landfill).
- There is no certainty/continuity of use.
- Treating some of it as waste and some as a non-waste could give rise to practical enforcement difficulties.
- The food is less likely to be 'suitable for use' as animal feed than the food that results from a manufacturing process.

- The materials resulting from manufacturing processes can be regarded more as a resource than a waste, whereas unsold/off-spec/out of date food from shops/retailers would normally be regarded by the shop/retailer themselves as a waste. We understand that in most if not all circumstances the shops/retailers give this food away rather than *selling* it to farmers, which is an indication that it is being discarded.

However, where certain items of food are specifically segregated out and set aside by the retailer, for use as animal feed, before being passed on to the user, and the food is suitable for use for that purpose and there is certainty of use for that purpose, we consider that it can be regarded as non-waste without undermining the aims and effectiveness of the Waste Framework Directive. This principle would apply, for example, to the donation of pre-segregated fruit, vegetables and bakery products to animal sanctuaries and urban farms.

In addition, where surplus bread is collected from retailers, on a daily basis, and returned to the manufacturer, who then passes it on directly to an animal feed manufacturing establishment for use as a raw material, we consider that the bread can be regarded as non-waste. (The bread is effectively being passed from the original manufacturer to an animal feed manufacturer, as in scenario 2 above).

4. Scenario 4: Used food, e.g. used cooking oil (or partially eaten food from restaurants etc.)

The Agency considers this material to be waste, whether it is used as animal feed (which is mostly banned under the Animal By-Products Regulation anyway; the ban on feeding used cooking oil to animals, where it has been in contact with meat, having taken effect in the UK in October 2004) or used for other purposes such as fuel.

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