

# Revision of the European Waste Framework Directive

Joachim Hagmann

Baumeister Rechtsanwälte

## Novelle der Europäischen Abfallrahmenrichtlinie

### Abstract

The Waste Framework Directive will be substantially revised after about 30 years. Several decisions of the Court of Justice of the European Communities concerning the interpretation of waste legislation provisions gave reason to the planned revision. It concerns for example the limitation of the definition of waste, the duration of the period, in which the material is a waste, or the distinction between recovery and disposal. On 21 December 2005 the European Commission presented a proposal for a Directive being lively discussed at present. On 13 February 2007 the European Parliament adopted a report of the proposal of the European Commission with several amendments. These amendments concern on the one hand the methods of the boundaries of the waste/non-waste decision, on the other hand other aspects, for example the implementation of a five step hierarchy of waste, of recycling quotes and the position of points to transfrontier movement of waste. This article is meant to give an overview over the status quo of the proceeding.

### Keywords

Waste Framework Directive, definition of waste, recovery, disposal, hierarchy of waste, recycling quotes, transfrontier movement

## 1 State of the amendment procedure

The Waste Framework Directive<sup>i</sup>, currently in force, was already adopted in its original version in 1975. Quite some time ago the Member States and the Commission already reached unanimity about the fact that the Directive needed to be amended<sup>ii</sup>. On 27 May 2003 in a communication, the Commission already dealt with the topical strategy for the prevention of waste and recycling and with the problems of the European waste policy and announced amendments of the European waste law<sup>iii</sup>. But it was not until 21 December 2005 that the Commission brought forward both a final version of the European strategy<sup>iv</sup> and a proposal concerning the reform of the Waste Framework Directive<sup>v</sup>. After first consideration by the Council on 09 March 2006<sup>vi</sup> and opinion of the European Economic and Social Committee on 05 July 2006<sup>vii</sup> the first reading in the European Parliament could be concluded on 13 February 2007. In this process, a variety of amendment applications regarding the proposal of the Commission were adopted. In the next step of the procedure, the Member States and the European Union have to adopt a common position. Due to its current presidency of the Council, Germany strives to reach the political agreement until the meeting of the Environment Council in the end of June 2007.

## 2 Individual regulatory objects

The amendment procedure concerns a variety of debatable issues. The comprehensive dealing with these would go beyond the scope of the present contribution, which is why only selected problems can be outlined.

### 2.1 Period of waste property

The currently valid Framework Directive 2006/12/EC does not regulate when the end of the waste properties can be assumed in the case of processing waste. However, in practice responding this issue is highly relevant, so that there is an actual need for regulatory action which was provided in the past through various decisions of the ECJ and national courts.<sup>viii</sup> According to the ECJ, the end of the waste property is not to be considered until the actual waste recovery, while a mere pre-treatment of waste is not deemed as sufficient. The Bundesverwaltungsgericht (German Federal Administrative Court) ruled in the above mentioned decision for the treatment of sewage sludge compost that the regime of waste law ends only after application on suitable soil. The production of sewage sludge compost is to be considered simply part and not the end of the recovery process.

The proposal of the Commission of 21 December 2005 under Article 11 for the first time includes a regulation concerning the end of waste property. Pursuant to Article 11(2) of the draft in a Committee procedure environment and quality criteria are to be determined for particular material or substance-specific waste categories. These need to be adhered to in order to classify the respective waste as secondary product, material or substance. By determining these criteria it is to be observed that the new classification will not lead to a general negative impact on the environment and that there exists a market for the secondary product, material or substance. Amongst others, this draft regulation was reproached for shifting the authorisation to decide on the end of the waste property to a technical committee without providing concrete regulatory provisions in the Directive. It was also said that the provisions of Article 11 were not clear enough in order to map out actions in the adequate scope, which are to be adopted by the technical committee.

The Parliament draft bill of 13 February 2007 provides another option and does without a shift of decision to the technical committee. Instead, the Commission is supposed to provide a proposal for an Act within two years after enforcement of the Directive after a corresponding request by the Member States, in which the Commissions sets out the environment and quality criteria that have to be complied with, so that products, materials or substance-specific waste categories can be considered as secondary products, materials or substances. Further proposals are to be made within five years after enforcement of the Directive concerning the extent to which compost, granulate material, International Symposium MBT 2007 [www.wasteconsult.de](http://www.wasteconsult.de)

paper, glass, metal, old tyres and used apparel is governed by Article 11 of the draft bill and which particular provisions are applicable for the particular waste flows. Though the pre-conditions for the statement of facts were not further substantiated, at least with the relinquishment of the shift of decision to the technical committee a central point of criticism was accounted for.

Waste disposal associations criticise that in the event of the end of the waste property secondary raw-materials shall be subject to the area of application of the regulation on chemicals REACH<sup>x</sup> valid as from 01 June 2007. By obtaining the status of a product, secondary raw-materials would be subject to the area of application of REACH. This double charge is considered disproportional, since, according to the associations, Article 11 of the draft Directive pursues the same purpose of protection as the REACH regulation<sup>x</sup> does.

## **2.2 Distinction between recovery and disposal (particularly for waste incineration)**

One of the most difficult issues of waste legislation concerns the distinction between (material or energetic) recovery of waste on the one hand and the disposal of waste on the other hand. Uncertainties regarding the distinction particularly also arise in connection with the incineration of waste because waste incineration can be categorised as both disposal procedure and recovery procedure. The ECJ provided legal advice with its fundamental decisions of 13 February 2003 regarding the distinction between energetic recovery and thermal disposal.<sup>xi</sup> According to these, if waste is used in refuse incinerators, energetic recovery can only be assumed if the operation of the plant without the provision of waste would have to be continued with a primary energy source or if the operator of the plant would have to pay the producer or owner of the waste for the delivery of such.<sup>xii</sup>

The Commission's draft bill provides to determine the distinction between energetic recovery and thermal disposal based on an efficiency criterion, the main purpose of which is the treatment of solid municipal waste. For this purpose, an exact formula for the calculation of energy efficiency is to be specified. Plants already operated or plants that will be approved before 01 January 2009 have to achieve an efficiency value of 0.60 in order to classify the incineration as energetic treatment. For plants approved after 31 December 2008, the efficiency value is required to be 0.65. Associations of operators of refuse incinerators criticised that these values could not be achieved by numerous refuse incinerators.

The amendment proposal of the Parliament dispenses with the introduction of energy efficiency formula in Annexe II as well as in Article 19(4) of the Commission draft bill.

However, as in the previously valid regulation it is to be assumed that an energetic treatment is existent if the incinerated waste is “mainly used as fuel or as another mean of energy production”. In its statement of reasons of the insofar congruent recommendation of decision, the environment committee<sup>xiii</sup> explains that in the Commission’s proposal, to newly classify incinerators for municipal waste based upon the incinerator’s energy efficiency, it is not recognized that plants with the main purpose of treating mixed waste with unsteady and unforeseeable composition should above all concentrate on the ecological treatment (mineralisation) of these wastes and the containment of emissions. Energy (and heat) recovery should be of secondary importance in this case. To apply the energy efficiency formula as only criterion for refuse incinerators for solid municipal waste, characterised as treatment plants, does not harmonize with the approach based on a variety of criteria which aims at the definition of recovery and the principle ecological concern to contain emissions.

### **3 Distinction waste and by-product**

Furthermore, it is often discussed how waste is to be distinguished from so called side products or by-products, which arise in the production process. While the currently valid Directive does not cover this issue, German law states that a will of disposal is to be assumed for such movables that accrue without the purpose of the respective action being directed at this. In order to assess the purpose, the understanding of the producer or owner of the waste is to be taken as a basis considering the trade purposes. For the assessment of the trade purpose, law has developed criteria such as the question for the market value as well as the quality of raw-material.

In numerous decisions, the ECJ dealt with the distinction of waste and by-products.<sup>xiv</sup> With regard to the decisive facts, the court chiefly explained that apart from the criterion of whether the residue from the extraction of a material is to be considered waste, the second relevant criterion for the assessment of the waste property should be the degree of probability of re-utilisation of the material without prior treatment. In case of an economic advantage for the owner beyond the mere possibility of re-utilisation of the material, the probability of such re-utilisation would be elevated. In such a case, the respective material cannot be considered a burden anymore, which the owner intends to “dispose”, but has to be reckoned as a real product.<sup>xv</sup>

While the Commission draft bill of the 21 December 2005 does not provide a regulation for the distinction between waste and by-products, the amendment draft of the European Parliament already contains in the newly created recital 14a the provision that for clarification of particular aspects of the definition of waste, it also should be determined when a material or matter, arising from an extracting or production procedure not mainly aiming at the production and which the owner does not intend to dispose but re-utilise,

is to be considered by-product. The Commission is to issue guidelines for interpretation which are based on the current jurisprudence. If this proves to be insufficient, the Commission shall, if necessary, – taking into consideration the mentioned environment- and health-related concerns and conditions of the stated jurisdiction – propose Acts that contain concrete criteria for the decisions in particular cases when such materials or matters could be regarded as not subject to waste. As long as measures decided on EU level or a commonly valid jurisdiction is lacking, the respective materials and matters should further be considered as waste.

Article 3a of the Parliament draft bill will intend a substantiated regulation. In order to be classified as by-product and not as waste, a matter or object, arising in the production process and its main purpose not being its production, the following requirements have to be met:

- a) the continued re-utilisation of the material has to be ensured,
- b) the material must be able to be used without further processing exceeding common industrial practices,
- c) the further utilisation of the material or object has to constitute a fixed part of the production process or a market for the product has to be existent,
- d) the further utilisation has to be admissible i.e. the material or object has to meet all the respective product requirements applicable for the specific application and/or environment and health regulations.

It is further provided to oblige the Commission to propose an Act based upon the previously mentioned conditions within two years after enforcement of the Directive. The Act shall determine the environment and quality criteria that have to be adhered to in order to classify an object or material as by-product. The proposal is to contain a list with materials and/or objects to be classified as by-products.

## 4 Other amendments

Apart from the points mentioned, the European Parliament also named a variety of regulations that should be part of the amendment procedure. These are briefly described in the following:

- **Five step hierarchy of waste**

Pursuant to Article 1(1) of the Parliament draft bill, the introduction of a five step hierarchy of waste is constituted, reaching in a downward order from the prevention of waste to re-utilisation, recycling, further processing procedures to harmless and environmentally friendly disposal. Variances shall only be admissible if

life cycle assessment and cost-benefit analysis “clearly indicate” that an alternative treatment concerning a defined waste stream bears more advantages. Politically speaking, the determination of a five step hierarchy of waste is controversial. However, the impact on the basic duties covered in waste law should be restricted, since the five step hierarchy of waste, equal to the currently valid three step hierarchy of waste, represents nothing else than a proposal.

- **Recycling quotas**

In order to promote the development towards a “recycling society” and to contribute to a high level of resource efficiency in Article 5(2) of the draft bill the European Parliament wants to oblige the Member States to recycle and/or re-utilise a minimum of 50% of municipal waste and a minimum of 70% of construction, demolition and industry waste by the year 2020. As far as necessary according to Article 5(2) of the draft bill, the Member States shall also introduce systems for separate waste collection. The Parliament wants this to be implemented by 2015 at least for paper, metal, plastics, glass, textiles, biowaste, waste oil and hazardous waste. Additionally the Member States will be required to ensure sufficient and cost-effective disposal options for the recycling procedures while simultaneously maintaining a high level of environmental protection.

- **Biowaste**

With regard to the subject of “biowaste”, the Parliament wants to include a new chapter in the recommendation of the Directive (chapter Iva, Article 18b to 18e of the draft bill) including the guideline to mainly process biowaste materially. The Parliament also stipulates to establish systems for separate waste collection of biowaste (Article 18b(2) of the draft bill) and to undertake that the treated biological waste meets the necessary requirements for its application on agricultural, silvicultural and horticultural cultivated surfaces (Article 18b(3) of the draft bill). Prior to application, a treatment shall be carried through that ensures the harmlessness of waste, including kitchen scraps and leftovers, to the health of humans, animals and plants (Article 18c(1) of the draft bill). The minimum requirements for the safety assessment as well as for the environment and quality criteria for the application of the treated wastes on soil and the categorisation of the material as a secondary raw-material are to be determined in the new Committee procedure pursuant to Article 36(2a) of the draft bill i.e. the regulation procedure with monitoring. The Parliament demands further binding benchmarks as well as a list of appropriate original materials. Finally by 30 June 2008 the Commission is supposed to present a proposal of an Act promoting “the recycling of biowaste” (Article 18e of the draft bill).

- **Principle of self-sufficiency**

The amendment draft of the Parliament eventually envisages amending the regulations of the principle of self-sufficiency. Therefore, pursuant to Article 25(4) of the Parliament draft bill, the Member States are to guarantee that the system for waste collection and waste transfer in the respective sovereign territories and across their borders ensures the collected and transferred waste to be delivered to adequate treatment facilities, which meet the requirements of the Waste Framework Directive. Other than currently no strict self-sufficiency (disposal) would be in force anymore, so that disposal could more and more occur on a bigger scale and also through transfrontier shipment. However, the planned regulation of Article 27a of the draft bill has to be considered, too. According to this the Member States take all actions possible in order to stop waste transfer not being in accordance to their waste management plans. The amplified self-sufficiency (disposal) also gives way to an increase in possibilities for caveats. Especially the last mentioned provision has attracted criticism by the Commission, which intends to reserve this type of provision contents of the European waste shipment regulation.

## 5 Literature

- <sup>i</sup> Council Directive 75/442/EEC of 15 July 1975 on waste (OJ EC L 194, p. 47), replaced by Directive 2006/12/EC of the European Parliament and the Council of 5 April 2006 on waste (OJ EC L 114, p. 9)
- <sup>ii</sup> Cf. Resolution of the Council of 24 February 1997 on a common strategy for waste management of 11 March 1997 (OJ EC C 76, p. 1).
- <sup>iii</sup> Communication of the Commission “Towards a thematic strategy on the prevention and recycling of waste” (COM (2003) 301 final)
- <sup>iv</sup> Communication of the Commission “Towards a thematic strategy on the prevention and recycling of waste” (COM (2005) 666 final)
- <sup>v</sup> Proposal for a Directive of The European Parliament and of the Council on waste (COM (2005) 667 final).
- <sup>vi</sup> Press release Doc. 6762/06 (Press 58).
- <sup>vii</sup> OJ EC C 309, p. 55
- <sup>viii</sup> cf. e.g. ECJ judgement of 19 June 2003 (case C-444/00 – “Mayer Parry”); ECJ judgement of 11 November 2004 (case C-457/02 – “Antonio Niselli”); Bundesverwaltungsgericht (German Federal Administrative Court), judgement of 14 December 2006 – (Az.) [file number] 7 C 4/06

- ix Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC of the Commission of 30 December 2006 (OJ EC L 396, p. 1 et seq.).
- x cf. press release of the Federation of the German Waste Management Industry (BDE) of 13 February 2007 (<http://www.bde.org>); press release of the Federal Association of Secondary Raw Materials and Disposal (BVSE) of 15 February 2007 (<http://www.bvse.de>).
- xi ECJ judgement of 13 February 2003 (case C-228/00 – “Belgian Cement Kilns”); ECJ judgement of 13 February 2003 (case C-485/00 – “Luxembourg”)
- xii ECJ judgement of 13 February 2003 (case C-485/00 – “Luxembourg”), Par. 44 et seq.
- xiii Session document A6-0466/2006.
- xiv ECJ judgement of 18 April 2002 (case C-9/00 – “Palin Granit”); ECJ judgement of 11 September 2003 (case C-114/01 – “AvestaPolarit”); ECJ judgement of 15 January 2004 (case C-235/02 – “Saetti and Frediani”)
- xv ECJ judgement of 18 April 2002 (case C-9/00 – “Palin Granit”), Par. 37

**Author’s address:**

Dr. Joachim Hagmann  
Rechtsanwalt und Fachanwalt für Verwaltungsrecht  
Baumeister Rechtsanwälte  
Piusallee 8  
48147 Münster  
Phone: +49 251 48488 32  
Email: [muenster@baumeister.org](mailto:muenster@baumeister.org)  
Website: [www.baumeister.org](http://www.baumeister.org)