

Analysis

The Revised Directive on Waste: Resolving Legislative Tensions in Waste Management?

Hazel Ann Nash*

Abstract

The revised Directive on waste (Directive 2008/98/EC) entered into force on 12 December 2008. The purpose of the revised Directive is to simplify the existing legislative framework for waste in order to encourage the divergence of waste away from landfills, to strengthen legal certainty and minimise burdens on businesses, regulators and stakeholders. This article explores the main features of the revised Directive and assesses them against the European Commissions' intentions in introducing the Directive. In addition, the paper considers the extent to which the revised Directive promotes successfully (i) reduction of natural resource use, (ii) prevention of environmental impacts of waste generation, (iii) life-cycle thinking and; (iv) securing waste prevention. The paper concludes that there is still room for further clarification, particularly in relation to the criteria for by-products and the new waste management terms 'end of waste' and 'preparing for re-use'. Whilst the revised Directive has weaknesses and limitations it should be considered within the context of decision-making. In this way it represents a multi-party, multi-institutional and multi-national compromise which should be considered as a progressive step towards improving the whole life-cycle of products and resources. Undoubtedly, the revised Directive sets the tone for future legislative developments and bolsters the importance of extended producer responsibility in future waste management measures.

*ESRC Centre for Business Relationships, Accountability, Sustainability and Society (BRASS),
Cardiff Law School, Cardiff University, Cardiff, UK (NashHA@cardiff.ac.uk).

Keywords: waste, definitions, targets, by-products, incineration, regulatory burden

1. Introduction

Since the 1970s, European waste regulation has sought to protect human health and the environment from the harmful effects caused by the collection, transport, treatment, storage and tipping of waste.¹ However, waste management has developed into a challenging area of regulation. Not only has the amount of waste produced in the European Community (EC) continued to increase as a result of economic and social progress,² but also the multitude of legal measures concerned with the management and control of waste has created legislative uncertainty, incompatibility and enforcement difficulties. In addition, vague definitions and the discretionary characteristics of European directives have led to conflicting decisions by the European Court of Justice (ECJ) and this has contributed further to the erosion of legislative clarity. These concerns, coupled with the need for Member States to comply with landfill targets, led to the introduction of Directive 2008/98/EC on waste and the repealing of certain directives (hereafter, the revised Directive). The revised Directive aims to tackle deficiencies of the 1975 Waste Framework Directive (WFD) and its amendments and to encourage the divergence of waste away from landfills.³ The revised Directive was adopted by the European Council on 20 October 2008 and came into force on 12 December 2008.⁴

2. Intentions in Revising the WFD

The European Commission's purpose in revising the WFD through Directive 2008/98/EC was predominantly to simplify the existing legal framework. More specifically, the revision sought to reflect the European Commission's commitment to reduce legislative burdens through consolidation and better regulation. This commitment was established in 2005 by the 'Communication

1 Council Directive (EC) 1975/442 on waste [1975] OJ L194/39 recital 3. This Directive was repealed by Council Directive (EC) 2006/12 on waste [2006] OJ L114/9, which consolidates the 1975 Directive and its amendments.

2 The European Commission emphasised recently: [T]he way we produce and consume contributes to global warming, pollution, material use, and natural resource depletion. Commission (EC) 'Communication on the sustainable consumption and production and Sustainable Industrial Policy Action Plan' COM (2008) 397/3 16 July 2008 at 2. Indeed, a report by the Organisation for Economic Co-operation and Development estimates that by 2020 the European Union could be generating 45% more waste than in 1995. See, Commission (EC), 'A Cleaner, Greener Europe: LIFE and the European Union waste policy' (Report) (2004) Luxembourg.

3 Council Directive (EC) 1975/442 on waste [1975] OJ L194/39.

4 Council Directive (EC) 2008/98 on waste and repealing certain directives [2008] OJ L312/3 (hereafter, the revised Directive).

on implementing the Community Lisbon Programme: A Strategy for the simplification of the regulatory environment', which introduced the rolling simplification programme. This programme aims to enhance competitiveness of the European economy by stimulating innovation and minimising administrative burdens stemming from regulatory requirements. It recognises that:

[t]he development of the European Union . . . has produced a large body of Community legislation . . . legislation can also entail costs, hamper business, channel resources away from more efficient uses and in some cases act as a constraint to innovation, productivity and growth. The challenge is to get the balance right so as to ensure that the regulatory environment is necessary, simple and effective.⁵

As a result, one of the key drivers for European initiatives is the simplification of both existing and proposed European law as a means to improve competitiveness, strengthen legal certainty and minimise burdens and costs on businesses, regulators and stakeholders. This is achieved through the provision of clear, proportionate, compatible, effective and informed measures. The European Commission observed that revision of the WFD was necessary to tackle definitions which were insufficiently clear and precise, in particular, the definition of waste and the distinction between recovery and disposal.⁶

Moreover, in proposing a revision to the WFD in 2003, the European Commission intended *inter alia* to reduce the use of natural resources through the practical application of the waste hierarchy,⁷ to promote the management of resources and the introduction of measures to address waste prevention⁸ and to focus on reducing the environmental impacts of waste generation and waste management by encouraging life cycle thinking.⁹

Following approval on second reading of the revised Directive by the European Parliament in June 2008, European Commissioner for the Environment, Stavros Dimas, explained:

This legislation marks a shift in thinking about waste from an unwanted burden to a valued resource and helps make Europe a recycling society. It introduces a modernised approach to waste management with

5 Commission (EC), 'Communication on implementing the Community Lisbon Programme: A Strategy for the simplification of the regulatory environment' COM (2005) 535 final, 25 October 2005.

6 European Parliament (EC), 'Waste: revision of the Framework Directive (repeal Direct 75/439/EEC, 75/442/EEC and 91/689/EC)' COD (2005) 0281.

7 See Section 3 for a more detailed discussion of the revised waste hierarchy.

8 Commission (EC), 'Communication Towards a thematic strategy on the prevention and recycling of waste' COM (2003) 301, 27 May 2003.

9 Council Directive (EC) 2008/98, Art 4(2): '... Member States shall take measures to encourage the options that deliver the best overall environmental outcome. This may require specific waste streams departing from the hierarchy where this is justified by life-cycle thinking on the overall impacts of the generation and management of such waste.'

clearer definitions, greater emphasis on prevention of waste and ambitious new recycling goals.¹⁰

3. Features of the Revised Directive on Waste

3.1 *Integration of Waste Oils and Provisions Relating to the Handling of Waste*

In the interests of clarity and simplification, Directive 75/439 on the Disposal of Waste Oils¹¹ and Directive 91/689 on Hazardous Waste are repealed and their provisions integrated within the text of the revised Directive.¹²

3.2 *The Definition of Waste*

Legal rules, regulation and enforcement apply only to the handling of what law defines as waste. Under Article 1(1)(a) of Directive 2006/12/EC on Waste,¹³ waste is defined as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'. Unsurprisingly, the concept of waste has been difficult to define with any certainty.¹⁴ A significant number of cases have come before the ECJ for interpretation and the resulting decisions have done little to establish a definitive definition of waste. On one hand, definitions of waste can be narrow which tends to promote recycling and recovery efforts of producers and reproducers of these materials by minimising financial and administrative burdens that accompany the need to comply with waste regulation law. On the other hand, broad definitions of waste can include material going for recovery and recycling for example in *Euro Tombesi*¹⁵ and *Inter-Environnement Wallonie v Regione Wallone*.¹⁶ In both instances the ECJ ruled that substances consigned to a recovery operation will usually be considered to amount to waste. Such a definition provides control of materials going to recycling and recovery operations in order to protect human health and the environment. Nevertheless, it is not necessarily the case that material subject to a recovery or recycling operation constitutes waste. In *ARCO Chemie Nederland Ltd v Minister van*

10 'Commission welcomes EP vote on revision of waste directive', Europa, 17 June 2008, IP/08/950 <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/950>> accessed 8 December 2008.

11 Council Directive (EC) 2008/98, Art 21.

12 Council Directive (EC) 2008/98, Arts 17, 18, 19 and 20.

13 Council Directive (EC) 2006/12 on waste [2006] OJ L 114/9.

14 S Bell and D McGillivray, *Environmental Law* (7th edn OUP, Oxford 2008) 644.

15 Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Euro Tombesi* [1997] ECR I-3561.

16 Case C-126/96 *Inter-Environnement Wallonie v Regione Wallone* [1997] ECR I-7411.

Volkshuisvesting and EPON [2000],¹⁷ the ECJ considered that the determination of waste depended upon whether the holder intended to discard the material. In this way, the definition of waste is based upon the intention of the holder.

The revised Directive splits the definition of waste into two parts. First, the definition for when a material becomes waste remains the same as that established in Article 1(a) of the WFD.¹⁸ Second, a new 'end-of-waste' status is provided in Article 6 of the revised Directive. This establishes criteria to help determine, in the interests of clarity, when a material considered to be waste ceases to be waste. Generally, waste must have gone through a recovery process, including recycling, and it must comply with four broad conditions prior to its reclassification as a primary resource. These conditions are:

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

Further clarification is still to be provided on the 'end-of-waste' status, when a material is to be considered a by-product and whether a material should be considered hazardous.¹⁹

3.3 *The Waste Hierarchy*

In view of the aim of establishing a life cycle approach to waste management in the revised Directive, Article 4 amends the waste hierarchy. It emphasises the flexibility of the hierarchy as a 'priority order' in waste prevention and management legislation and policy rather than anything more rigid or prescriptive. Indeed, the status of the waste hierarchy as a 'priority order' was one of a number of sticking points between the European Parliament and the Council through the stages of the Directive's negotiation. Whilst the European Parliament preferred the waste hierarchy to be considered by Member States as a 'general rule', the Council argued that to deliver the best overall environmental outcome, departure from the waste hierarchy may be appropriate for specific waste streams.²⁰

17 Joined Cases C-418/97 and C-419/97, *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (ARCO Chemie) (C-418/97) and Vereniging Dorpsbelang Hees and Others v Directeur van de dienst Milieu en Water van de Provincie Gelderland and Others (EPON)* [2000] ECR I-4475.

18 Council Directive (EC) 2008/98, Art 3(1).

19 See Council Directive (EC) 2008/98, recital 47.

20 European Parliament (EC) 'Decision on the Committee Responsible: The Committee on the Environment, Public Health and Food Safety', 8 April 2008.

The five steps that comprise the waste hierarchy establish 'prevention' as the most environmentally sound waste management option. Prevention is followed by 'preparing for re-use', 'recycling', 'other recovery, e.g. energy recovery' and 'disposal'. Prevention, which should be understood as the avoidance of waste generation, is extended within the revised Directive to include re-use of products. In this way, a substance, material or product is not waste if measures are taken that enable it to be used again for the same purpose for which it was conceived.²¹

3.4 'Preparing for re-use'

'Preparing for re-use' is a new waste management term included in the revised Directive. It is defined in Article 3(16) as the 'checking, cleaning or repairing recovery operations, by which products or components of products that have become waste are prepared so that they can be re-used without any other pre-processing'. This term will apply to certain recovery operations of products that have become waste. The purpose of incorporating 'preparing for re-use' as the second step in the waste hierarchy is to facilitate a clear distinction between the first step where materials are not considered as waste and the second step of the hierarchy where materials are waste for the purpose of the Directive. Whether the introduction of this option will help clarify waste and recovery remains to be seen; however, it appears that the category itself is open to uncertainty as to the activities which fall within 'preparing for re-use' and thus has the potential to be referred to the ECJ for interpretation. Likewise, whether these activities are subject to permit requirements, contained under Article 23, is likely to depend on the precise nature of the operations—although Member States may exempt waste recovery operations under Article 24(b).

3.5 Incineration

Another area of friction, not only between the European Parliament and the Council but within these institutions, revolved around whether municipal solid waste incinerators may be reclassified from a disposal operation to a recovery operation.

Annex II Category R1 of the revised Directive provides that recovery operations include the use of waste principally as a fuel and includes incineration facilities dedicated to the processing of municipal solid waste where their

21 Council Directive (EC) 2008/98, Art 3(13).

energy efficiency is equal to or above the energy efficiency standards.²² Ultimately, then, the revised Directive will lead to the rebranding of some incinerators as recovery operations rather than disposal. Whether incinerators are classified as recovery or disposal facilities will depend upon their energy efficiency. Whether this will provoke greater efficiency standards in existing facilities or divert waste from re-use, recycling and further recovery operations in the UK remains to be seen. By promoting energy efficient waste incineration as a recovery operation, the Directive conflicts with European measures which aim to reduce carbon dioxide emissions. Such legislative incompatibility may lead to industry confusion and has the potential to inhibit Member States in meeting their obligations in other areas.²³

3.6 *Recycling Targets*

Household recycling targets are established under Article 11(2), which requires Member States to 'take the necessary measures designed to achieve' two sets of recycling targets:

- (a) By 2020, the preparing for re-use and the recycling of waste materials including paper, metal, plastic and glass from households and possibly from other origins where these waste streams are similar to waste from households, will be increased to a minimum of overall 50% by weight;
- (b) By 2020, the preparing for re-use, recycling and other material recovery (including backfilling operations using waste to substitute other materials) of non-hazardous construction and demolition waste will be increased to a minimum of 70% by weight.

These recycling targets are the first ever general or non-waste stream-specific recycling targets. They apply to household municipal waste only, although there is the possibility to incorporate similar waste from other origins

22 Energy efficiency standards to be met by installations in order to be classified as a recovery operation must be:

- equal to or greater than 0.60 for installations in operation and permitted in accordance with applicable Community legislation before 1 January 2009;
- equal to or greater than 0.65 for installations permitted after 31 December 2008.

Best available techniques for waste incineration must also be applied.

23 Consider, for example, the air emission limit values contained within Council Directive (EC) 2000/76 on the incineration of waste [2000] OJ L332/91 Art 7 and Annex V. The Directive aims to prevent or to limit as far as practicable negative effects on the environment and risks to human health from the incineration and co-incineration of waste. It seeks to achieve this through establishing stringent operational conditions and technical requirements and emission limit values for waste incineration and co-incineration plants. Likewise, Council Directive (EC) 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L 275/32 promotes the reduction of greenhouse gas emissions in an economically efficient manner, see Art 1.

in order to meet the targets. This clause appears to be directed towards the Eastern block of Member States who may find it difficult to achieve these recycling targets from household recyclates alone. Generally however, these targets have met with criticism from NGOs, politicians and regulators many of whom consider them to be set too low²⁴ thereby failing to reflect adequately the importance of waste management in resource efficiency. Speaking at the Local Authority Recycling Advisory Committee (LARAC) conference in November 2008, Dr Caroline Jackson, Rapporteur for the revised Directive, defended the targets explaining:

There are 27 countries and 700 MEPs. At some point in this circus... you come to the point when legislation must be adopted. The reason it's messy is that none of the Member States wanted this provision at all.²⁵

The precise nature of the recycling obligation appears ambiguous. The obligation contained in Article 11(2) states that in order to comply with the objectives of the Directive 'Member States shall take the necessary measures designed to achieve' the targets. It is unclear in the legislative drafting whether infraction proceedings will be commenced against Member States who fail to meet these targets although indications in later provisions of the Directive which refer to regular monitoring by the Commission of Member States' progress towards meeting these targets suggest that non-compliant Member States will be subject to proceedings.²⁶

3.7 Waste Prevention

Increasing volumes of waste are being generated by the EC notwithstanding the EU measures in place which aim at waste reduction. In Decision (EC) 1600/2002 laying down the sixth environmental action programme, the European Parliament established sustainable use and management of natural resources and waste as priority areas for action.²⁷ To this end, the revised Directive aims at *inter alia* 'achieving a significant overall reduction in the volumes of waste generated through waste prevention initiatives, better resource efficiency and a shift towards more sustainable production and consumption patterns'.²⁸ Fundamentally, waste prevention is the solution to a

24 Belgium, Germany, Austria and the Netherlands are already recycling >50% of household wastes.

25 Dr Caroline Jackson, MEP, 'The revised waste framework directive', *LARAC conference 2008: Redefining waste into resources*, 13 November 2008.

26 Council Directive (EC) 2008/98, Art 11(5).

27 Commission Decision (EC) 1600/2002 laying down the Sixth Community Environment Action Programme [2002] OJ L242/1, Art 8(1).

28 Council Directive (EC) 2008/98 on waste and repealing certain directives [2008] OJ L312/3 recital 2.

growing waste problem. Although this is recognised by the Commission, the revised Directive remains reluctant to establish waste prevention targets: 'Everyone understands that increasing waste and sustainable development do not go together, yet pressure from EU governments led to postponing discussions for common prevention targets until 2014.'²⁹ Instead, the Commission has committed itself to review waste generation in 2011 and if considered necessary will set waste prevention objectives and objectives which promote the decoupling of economic growth from resource use in 2014 to be met by Member States by 2020.³⁰

Whilst the revised Directive is hesitant in introducing waste prevention targets, which may be explained by the lack of reliable data currently available to the EC on solid municipal waste arising, Article 29 requires Member States to develop national waste prevention programmes. These programmes will either form part of the broader local authority waste management plans or will function as separate but complementary programmes. Again, the aim of the programmes will be to decouple economic growth and environmental impacts associated with the generation of waste. Waste management programmes must: (i) set out waste prevention objectives; (ii) provide information on existing prevention measures; and (iii) evaluate the usefulness of the specified waste prevention measures contained in Annex IV of the revised Directive and include the use of planning measures and economic instruments. Member States are responsible for setting qualitative and/or quantitative benchmarks for waste prevention and are expected to assess the progress of measures adopted. In accordance with the character of European Directives, the revised Directive provides a sufficiently broad and flexible framework for Member States to adopt the measures best suited to their national and regional needs. Thus, outstanding uncertainties and details are likely to be resolved at national level. However, this also has the potential to run counter to the principles of better regulation and undermine integration.

3.8 *By-products*

Substances or objects from a production process may be regarded as by-products rather than waste under Article 5 of the revised Directive if four broad criteria are met. These are that, first, the use of the substance or object is certain; second, the substance or object can be used directly without any further processing other than normal industrial practice; third, the substance

29 Nathalie Cliquot, Waste Policy Officer of the European Environment Bureau, Friends of the Earth, 'Press release: EU waste policy not fit for future' (17 June 2008) <<http://www.foe.co.uk/resource/press.releases/eu.waste.policy.not.fit.fo.18062008.html>> accessed 8 December 2008.

30 Council Directive (EC) 2008/98, Art 9.

or object is produced as an integral part of a production process; and last further use is lawful. Whilst the revised Directive provides for additional measures to be adopted which determine criteria for specific substances to be classified as by-products, the loose definition contained in Article 4 is likely to allow many materials that are currently classified as waste to escape from regulatory controls. Furthermore, the European Parliament's Committee on the Environment, Public Health and Food Safety raised concern over the criteria for a by-product and recommended that the article on by-products be deleted and the current practice maintained. However, the article remains part of the revised Directive and has the potential to create greater uncertainty and confusion regarding the reclassification of some wastes as by-products. Undoubtedly, the broad criteria will lead to referrals to the ECJ, in particular, in relation to the interpretation of 'further processing' and 'normal industrial practice'.

3.9 Bio-waste

Article 22 of the revised Directive provides that Member States shall take measures to encourage separate collection, treatment and use of bio-waste and bio-waste materials. However, there is no duty imposed on Member States to do anything more than 'encourage' and no targets for bio-waste are established. Recital 35 of the revised Directive signals towards a possible forthcoming European proposal on a bio-waste Directive:

It is important . . . to facilitate the separate collection and proper treatment of bio-waste in order to produce environmentally safe compost and other bio-waste based materials. The Commission, after an assessment on the management of bio-waste, will submit proposals for legislative measures, if appropriate.

The Commission is required to carry out an assessment on the management of bio-waste with a view, if appropriate, to submitting a proposal. The assessment shall examine the opportunity of setting minimum requirements for bio-waste management and quality criteria for compost and digestate from bio-waste in order to guarantee a high level of protection for human health and the environment.

4. Conclusions

In 2008, the European Union celebrated its 50th anniversary. Much has changed in half a century. The original aim of the EU has expanded significantly and membership has multiplied from the initial six to the current

27 Member States. This swell in Member States has resulted in discrete changes to the once intimate European law-making process, which is regarded increasingly now as an exercise in diplomacy and compromise between countries with less common interests and diverging political views. The revision of the WFD is a clear example of such a compromise.

Consequently, the opportunities for strengthening waste resource efficiency and waste management have not been embraced fully within the revised Directive and neither do they encompass wholly the intentions of the European Commission in revising the WFD.³¹ Although there is certainly room for further clarification, particularly relating to the definitions of 'preparing for re-use', 'end of waste' and the criteria for by-products, the revised Directive nevertheless remains a reasonable example of better regulation through consolidation and simplification. The revision of the WFD preserves the framework nature of the Directive. Moreover, the revised Directive represents a multi-party, multi-institutional and multi-national compromise that extends current waste management obligations and for the first time sets general, albeit modest, recycling targets.

Regardless of the limitations and weaknesses of the revised Directive, it should be considered as a progressive step towards improving the whole life-cycle of products and materials. It sets the tone for future legislative and regulatory developments and bolsters the importance of extended producer responsibility in future waste management measures. The European Parliament's Rapporteur on waste, Caroline Jackson, emphasised the difficulties in reaching political agreement on the Directive: 'Anyone who still criticises the package we have agreed has to realise that the alternative may not be a better package, but no package at all.'³² Indeed, considering the abandonment of the proposed Soil Framework Directive in spring 2008, the revised Directive on waste is, at the very least, a diplomatic success for the EU.

The revised Directive regulates aspects of waste management, such as definitions and minimum standards, yet enables Member States to implement the details of their waste management approaches at national, regional and local level. Consequently, it is in the transposition into national legislation and subsequent implementation of the revised Directive's obligations where difficulties and uncertainties are likely to give rise to diverging interpretations and regulatory systems between Member States. Member States have until 12 December 2010 to transpose the obligations contained in the revised Directive into national law.

31 See Section 2.

32 Caroline Jackson, MEP, Rapporteur on Waste, 'Watered-down waste directive gets MEPs' green light', 18 June 2008 <<http://www.euractiv.com/en/environment/watered-waste-directive-gets-meps-green-light/article-173447>> accessed 8 December 2008.