

**Decision**of the Bundesrat

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**Proposal for a Directive of the European Parliament and of the Council amending Directives 2008/98/EC on waste, 94/62/EC on packaging and packaging waste, 1999/31/EC on the landfill of waste, 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical and electronic equipment**

**COM(2014) 397 final; Council Doc. 11598/14**

At its 926th session on 10 October 2014, the Bundesrat adopted the following opinion pursuant to Sections 3 and 5 EUZBLG (the Act on Cooperation between the Federation and the Länder in European Union Affairs):

The proposal in general

1. The Bundesrat welcomes the Commission's aim of moving closer to a circular economy and 'recycling society' throughout Europe. This will mean going to greater lengths to prevent waste and increase recycling. Under the Recycling Act of February 2012 and secondary legislation, Germany has set itself certain targets which are stricter than those found to date in European law (e.g. a target to recycle 65 % of municipal waste, as compared to 50 % under the Waste Framework Directive).
2. During the subsequent stages of the proceedings at EU level, the Bundesrat calls on the Federal Government to ensure – together with other Member States – that the Commission rethinks its proposal for a Directive and holds extensive discussions with the Member States. The Bundesrat has not failed to recognise that the Commission considers the circular economy and resource efficiency to be connected and intends to implement them in the first instance by means of

the proposed amending Directive. However, the proposed amendment risks taking the second step before the first, insofar as consistent EU-wide transposition of the legislation currently in force still offers broad scope for action, with considerable challenges. Furthermore, vast sections of the proposed amending Directive and certain ideas contained within concerning practicality and usefulness, as well as proportionality, particularly with regard to administrative costs, need to be verified and discussed in depth with the Member States.

3. The Bundesrat believes in particular that it is essential for the new targets to be methodologically sound, statistically verifiable, technically feasible and of environmental benefit. Furthermore, they must not lead to additional bureaucracy. It is doubtful whether all of the proposals meet these requirements. For example, ambitious quantitative targets must under no circumstances result in secondary raw materials of lower and unmarketable quality, or in greater recycling volumes for which energy demand is considerably higher. Furthermore, a careful assessment should be carried out as to whether the ambitious targets are in fact technically feasible.
4. The Bundesrat is critical of the proposed change to the statistical calculation methods. The change from a rate calculation to output volumes implicitly leads to stricter rates, and significantly increases the burden on businesses and the authorities in terms of data collection. This will impose a recycling approach based on 'quantity over quality', rather than on producing high-quality secondary raw materials, because the only way of achieving these new rates will be to also require waste that is poorly suited to recycling to be sent for material recovery. Recycling is not an end in itself: it only makes sense if a market is available, or can be created for the resulting secondary raw materials. If this is not the case, it may in certain individual situations make more sense to use the energy potential of particular waste (energy recovery). The waste hierarchy, as newly established under the Waste Framework Directive, uses this differentiated approach and should therefore continue to be the guiding principle for European legislation. Furthermore, the Commission's proposal makes reporting by product category under the Waste Framework Directive considerably more questionable, as recycling rates can no longer be confidently attributed to product-specific input volumes when calculating output. The impact assessment does not address any of these issues.

5. Looking back in particular at the difficult decisions required for the 2020 targets as part of the review of the Waste Framework Directive, the Bundesrat believes it is essential to ensure that all Member States meet the existing targets.
6. The Bundesrat is highly critical of the proposed new provisions on data collection and reporting requirements on account of the administrative burden, costs, knowledge gained, etc. It must be ensured that reporting is not required too frequently.

Article (1)(1)(b) (Article 3(4b))

7. During the subsequent proceedings, the Bundesrat asks the Federal Government to clarify whether there is an inconsistency between the scope of the Directive and Article 2(1). According to this Article, 'land (in situ) including unexcavated contaminated soil and buildings permanently connected with land' is not covered by the provisions of the Directive. However, excavated soil is waste. In the Commission's proposal, the definition of 'construction and demolition waste' excludes 'naturally occurring material as defined in category 17 05 04'. Waste category 17 05 04 refers to unpolluted soil and stones. The proposed definition would suggest that this is not waste.
8. During the subsequent proceedings, the Federal Government is called on to press for clarification as to what is meant by the term '*Verteilung*' [in English: 'distribution'] The words 'sent for redistribution' in the original version are translated as '*zur Verteilung*' [in English: 'for distribution']. Urgent clarification is needed as to whether this means the re-entry onto the market of returned or out-of-date food.

Article (1)(1)(c) (Article 3(15a))

9. During the subsequent proceedings, the Bundesrat asks the Federal Government to ensure that the term 'material recovery' is clarified. In the explanatory document to the existing Directive (Guidance on the interpretation of key provisions) and also in the Commission's proposals, a clear distinction is made between recycling with the aim of producing goods from waste, and material

recovery as a use for waste, elaborated further with the introduction of the term ‘material recovery’. However, the proposed amendment does not make this distinction clearly enough, as it includes ‘any recovery operation’, which, by virtue of the general definition of ‘recovery’ under Article 3(15), also includes recycling. Furthermore, by adding ‘and the reprocessing into materials which are to be used as fuel’, fuel reprocessing is excluded from the definition and is therefore not classified as either recycling or disposal. Equating this to energy recovery would contradict the description of recovery operations under Annex II to the Waste Framework Directive, which distinguishes between principal use as a fuel (R1) and pretreatment prior to an R1 operation (R12).

A definition of ‘energy recovery’ would also be helpful. Clarification is also needed as to whether ‘material recovery’, which at least in Germany covers the use of waste in steel and cement works and in certain chemical processes, should be viewed as recycling, material recovery or energy recovery, or indeed whether it can be considered a category of recovery.

#### Article (1)(2)(b) (Article 5(2))

10. During the subsequent proceedings, the Bundesrat asks the Federal Government to ensure that the criteria for establishing whether movable property is waste or not, are set out in an implementing act rather than a delegated act in order to guarantee EU-wide enforcement and the involvement of the Länder.

#### Article (1)(3) (Article 6(2))

11. During the subsequent proceedings, the Federal Government is asked to ensure that the criteria for establishing the point at which waste loses its status as waste, are set out in an implementing act rather than a delegated act in order to guarantee EU-wide enforcement and the involvement of the Länder.
12. During the subsequent proceedings, the Bundesrat asks the Federal Government to seek clarification from the Commission as to whether the German term ‘körnigem Gesteinsmaterial’ is a correct translation of the term ‘aggregates’, as used in the original, and whether treated, recycled aggregate intended for use as bulk material (loose mineral building material) may therefore also have the status of a product.

Article (1)(4) (Article 6(3))

13. The Bundesrat welcomes the clarification that waste which ceases to have waste status is deemed as recycled under the recycling rates which must be established by Member States, providing it is not intended for use as backfilling or fuel.

During the subsequent Council negotiations, the Bundesrat asks the Federal Government to back the creation of an appropriate basis for the collection of statistical data in order to ensure this rule is enforceable. This basis must allow the data by weight, as required in order to determine the recovery rate of waste which is exempt from waste legislation, to be derived from environmental statistics.

Article (1)(6) (Article 8)

14. Likewise, careful consideration should again be given to whether the proposals to extend producer responsibility and the new, well-detailed provisions on extended producer responsibility under Article 1 in conjunction with the latest version of Article 8, with Annex VII to Directive 2008/98/EC, are appropriate and help to protect the environment.

Article (1)(7) (Article 9)

15. The Bundesrat welcomes the fact that the proposed Directive calls on Member States to prevent waste. However, the simplistic provision which states that they should take waste prevention measures, is insufficient for successfully preventing waste in a way which can be measured. The Federal Government is therefore asked to ensure that the provision is expanded to include specific details as to how this can be done without intervening in the market. Guiding principles should also be developed for measuring progress in waste prevention. The Commission's reference to economic growth is not sufficient as negative growth automatically means less production and therefore the generation of less waste, however a strengthening of the economy also means increased waste. It therefore does not provide an absolute benchmark.

16. In principle, the new wording in Article 1(7) (Article 9 of Directive 2008/98/EC), which aims in particular at preventing food waste, is

welcomed. Food is a valuable commodity, and preventing food waste is a priority goal for any rational person. However, there is no need for the European Environment Agency to publish a report on the subject every year – as laid down in paragraph 2 – which would also require corresponding reports from the Member States and their constituent parts. This increases bureaucracy. Moreover, it does not seem necessary for the Commission to issue implementing acts, as endorsed by Article 39(2), owing to the risk of a proliferation in rules.

Article (1)(7) (Article 9(3))

17. During the subsequent proceedings, the Bundesrat calls on the Federal Government to push for the Commission to include agricultural production as a link in the chain under consideration (manufacturing industries, distribution, etc.).

Article (1)(8)(a) (Article 11(2))

18. During the subsequent proceedings, the Federal Government is asked to ensure that the provisions are clarified in terms of how rates are determined and that the set recycling rates are reduced to a realistically achievable level. Whether recycling rates are in fact suitable as a measure of recycling success should also be verified.

According to the Commission's proposal, 50 % of municipal waste must be recycled or prepared for reuse by 2020, and 70 % by 2030. However, it does not propose a clear calculation formula, which would be necessary in order to obtain data that can be compared across Europe and that reflect the reality of recycling levels. As recycling means the production of goods from waste, the provision under Article 11(2) means that, by 2020, half of municipal waste will have to be converted into products. Even a country such as Germany, with its highly developed waste systems will still be far from capable of recycling by then such a high proportion of municipal waste into products that meet the requirements of Article 6 of the proposed directive or existing end-of-waste regulations. Achieving this goal will involve huge economic and environmentally questionable efforts (consumption of energy and raw

materials), and will mean, among other things, putting on the market a slew of lower-quality products that will be difficult to sell. This would be diametrically opposed to the objective of the amendment, namely ensuring higher quality recycling.

Article (1)(9) (Article 11a)

19. Article 1 (Amendment of Directive 2008/98/EC), Article 2 (Amendment of Directive 94/62/EC) and Article 3 (Amendment of Directive 1999/31/EC) of the proposal for a Directive each provide for an 'early warning system' which will detect in a timely manner whether Member States have met the targets set out in the Directive (see Article 11a(3) of Directive 2008/98/EC, Article 6a of Directive 94/62/EC and Article 5a of Directive 1999/31/EC). According to the rules governing the early warning system, Member States which are at risk of not meeting the targets under the relevant Directive are required to send a compliance plan to the Commission (for certain plans, the content must be explained in detail, see Article 11a(3) in conjunction with Annex VIII to Directive 2008/98/EC). These proposed rules are inappropriate and increase bureaucracy unnecessarily.

Article (1)(11) (Article 22(2)(1))

20. During the subsequent proceedings, the Bundesrat calls on the Federal Government to ensure that the phrase 'In order to minimize contamination of waste materials', as used in the proposal for a Directive, is adapted to the objectives of the Directive. The Commission's proposal qualifies bio-waste as 'dirty' and therefore unsuited to any meaningful form of recovery. However, this is at odds with the objectives of the proposal for a Directive to improve resource efficiency, obtain products from waste with as high-value as possible (end-of-waste criteria are also currently being developed for bio-waste), and achieve high recycling rates. However, high-value compost, which can be widely used, can only be produced if the source material is not polluted or not qualified as polluted.

Article (1)(12) (Article 24(d))

21. During the subsequent proceedings, the Bundesrat calls on the Federal

Government to ensure that waste permit requirements for facilities and undertakings remain in place as a minimum for hazardous waste and that Article 24(d) is written in such a way that hazardous waste may not be exempted from the permit requirement. The Commission's proposal would represent a major step backwards in terms of the safety and monitoring of waste treatment facilities, as hazardous waste would increasingly (have to) be recovered. However little, if anything, would change in terms of the waste and waste processes.

Article (1)(16)(b) (Article 29(4))

22. The intended new version of Article 29(4) of Directive 2008/98/EC, as set out in Article 1(16)(b), is not necessary. As indicators for waste prevention measures have proven extremely difficult to establish (see 2013 Waste Prevention Programme of the German Government with the involvement of the Federal Länder), paragraph 4 should be deleted in its entirety.

Article (1)(18)(a) (Article 35(1))

23. Article 1(18)(a) of the proposed Directive (amendment to Directive 2008/98/EC) includes an amendment to Article 35(1) of Directive 2008/98/EC that extends the obligation to keep records on waste to all producers of waste and all professional collectors, transporters, dealers and brokers of waste. This obligation previously applied only in the case of hazardous waste, and moreover the information only had to be made available on request (not automatically). This blanket extension to non-hazardous waste is not necessary to protect the environment, places a disproportionate burden on those who handle waste, and makes administration unnecessarily difficult.
24. The intended extension to the rules to include the keeping of an electronic register will greatly hamper the performance of the affected establishments, without any apparent justification. The Federal Government is asked to scrutinise critically the extent to which these additional provisions are proportionate.

Article (1)(20) (Article 37(1)) et al.



25. Article 1 (Amendment of Directive 2008/98/EC), Article 2 (Amendment of Directive 94/62/EC on packaging and packaging waste), Article 3 (Amendment of Directive 1999/31/EC on the landfill of waste), Article 4 (Amendment of Directive 2000/53/EC on end-of-life vehicles) and Article 6 (Amendment of Directive 2012/19/EU on waste electrical and electronic equipment) of the proposal for a Directive lay down annual reporting requirements for Member States concerning the (recovery) targets set out in these Directives (see Article 37(1) of Directive 2008/98/EC, Article 12(3a) of Directive 94/62/EC, Article 15(1) of Directive 1999/31/EC, Article 9(1a) of Directive 2000/53/EC and Article 16(5a) of Directive 2012/19/EU). According to the proposed new rules under Article 37(5) of Directive 2008/98/EC, Article 15(4) of Directive 1999/31/EC, Article 9(1b) of Directive 2000/53/EC and Article 16(5c) of Directive 2012/19/EU, the annual reports submitted by the Member States must be verified by an ‘independent third party’. Article 12(3d) of Directive 94/62/EC delegates powers to the Commission to adopt implementing acts, amongst other things, for establishing uniform conditions for verification by an ‘independent third party’. The proposal to increase the frequency of reporting from every three years, as is generally the case, to every year unnecessarily increases administrative costs. The Bundesrat also rejects the proposal for data reports to be verified by an ‘independent third party’ due to the unnecessarily large burden it entails. The proposal to verify Member State reports is therefore completely inappropriate.

26. In addition to the above criticism of the annual reporting obligation under Article 37, the latest version of paragraph 4 which requires new statistical data to be reported on waste used for backfilling, should be deleted. Keeping account of this will lead to considerable additional costs, but will be of no specific environmental benefit. This rule is therefore considered unnecessary.

Article 1(22) (Article 38a) et al.

27. In Article 1 (Amendment of Directive 2008/98/EC), Article 2 (Amendment of Directive 94/62/EC on packaging and packaging waste), Article 3 (Amendment of Directive 1999/31/EC on the landfill of waste) and Article 6 (Amendment of Directive 2012/19/EU on waste electrical and electronic equipment), the Committee procedure is replaced at various points, e.g. in Article 39, by the new procedure for delegated acts laid down in Article 38a, which delegates

extensive legislative powers to the Commission. As the Committee procedure has worked well so far, extending the delegation of powers to the executive at the expense of the European Council and Parliament should be reconsidered.

Article (2)(3)(b) to (d) (Article 6(1), (1a) and (1b))

28. During the subsequent proceedings, the Bundesrat asks the Federal Government to ensure that the provisions are clarified in terms of how rates are determined and that realistically achievable recycling rates are set. Whether recycling rates are in fact suitable as a measure of recycling success should also be verified.

According to the new Article 6(1a), only recycled waste, i.e. the products made from it, may be used to determine the recycling rate. However, for physical and practical reasons, the rates proposed by the Commission are impossible to achieve. For example, as paper fibres can only be recycled around six times, no more than approximately 83 % of fibres can be recovered and therefore recognised as recycled according to the definition. As it is impossible for various practical reasons to enter all manufactured paper into the recycling chain, the share of waste paper fibres used in paper production has remained at approximately 60 % in Germany for many years and will be difficult to increase without considerable effort and expense.

Although individually specifying the different constituents of composite materials when calculating the recycling rate is welcomed in principle, for many composite materials only one of the constituents is actually recycled. The others are lost. It would take considerable ecological and economic effort to change this, possibly far exceeding the benefits of doing so.

Article 3 in general

29. From a technical landfill perspective, the proposal set out in Article 3 to amend Directive 1999/31/EC on the landfill of waste, is unnecessary. Environmentally friendly waste disposal is ensured by existing EU rules, as transposed into German law. It is currently already the case that only waste which cannot be recycled or recovered is sent to landfill. The additional rules envisaged by the Commission are of limited relevance and are in part completely exaggerated, e.g. reporting obligations, early warning system, delegation of powers to the Commission (Articles 16 and 17a). In particular, the existing rules for adapting

the Annexes to the Landfill Directive to scientific and technical progress, etc. have worked well in practice. This takes better account of technical landfill-related concerns than a high-level committee as established by the Waste Framework Directive.

Article (3)(1)(b) (Article 2)

30. During the subsequent proceedings, the Bundesrat asks the Federal Government to ensure that the Commission extends the definition of residual waste to also include waste which cannot reasonably undergo a recovery operation. The Commission has defined residual waste as the remains following recovery and recycling operations. However, the nature of certain of types of waste is such that a recovery process makes no sense (e.g. asbestos).

Article (3)(2) (Article 5)

31. The Bundesrat welcomes the priority of effectively stopping municipal waste from being sent to landfill, in line with the positive experience in Member States such as Germany, heading 'towards a circular economy' through a combination of high recovery targets and landfill restrictions.
32. The Commission's proposals to limit the amount of waste sent to landfill, in particular recycled waste, are therefore expressly supported. Germany has acquired good experience since the introduction of a ban on sending untreated municipal waste to landfill in 2005. The ban has led to an increase in recycling and made a significant contribution to the 56 million tonnes CO<sub>2</sub> equivalent saving achieved by the German circular economy.
33. However, the Bundesrat does not believe this means that landfilling can be phased out completely. On the contrary, experience from Member States which already largely ban landfill has shown that there are no viable alternatives to the safe storage of contaminated mineral waste (for example from construction, remediation of contaminated sites and certain industries) other than to remove it from the environment and send it to landfill.
34. In order to avoid mismanagement in Member States as a result of the misleading references to fully eliminating landfill, the Bundesrat calls on the

Federal Government to ensure that during the subsequent Council negotiations on the proposal for a Directive not all waste authorised for landfill (including mineral construction waste and industrial waste) is limited to an amount corresponding to 5% of municipal waste. Such a target would not be compatible with practical experience in Germany, nor would it be justifiable from an environmental protection perspective (removal of pollutants).

35. Referring again to municipal waste and the subsequent residual waste generated following treatment prior to disposal in landfill, the Bundesrat also calls on the Federal Government to critically review the 5 % threshold and to feed the results of this review into the subsequent Council negotiations. Landfill fraction by mechanical-biological waste treatment facilities will contribute to the percentage. However, achieving the percentage will largely depend on whether ash from the incineration of municipal waste can be permanently and almost entirely recovered, e.g. from construction projects. Indeed, the availability of measures in which ash can be recovered in an environmentally friendly manner, is becoming increasingly problematic in practice.
36. During the subsequent proceedings, the Bundesrat also calls on the Federal Government to ensure that the Commission limits these provisions to municipal waste. Regrettably, the Commission's proposal does not systematically distinguish between waste and municipal waste. The term 'waste' includes excavated earth and construction waste. As such waste can, by definition, be recycled, the landfill ban could also apply to waste excavation and construction waste. Given that the amount of waste in question is greater than in the case of municipal waste, even if the majority is not sent to landfill for non-hazardous waste (landfill class I and II), the current broad wording could give rise to implementation problems
37. Furthermore, during the subsequent proceedings, the Bundesrat asks the Federal Government to ensure that instead of using a dynamic reference to the previous year (from year X to year X+1), the Commission sets an annual amount, e.g. based on 2024 or the 2020 to 2023 average. Consideration should be given to the fact that fluctuations in landfill input of +/- 20 % in year X will lead to fluctuations in the landfill rates for year X+1 of between 16.7 and 37.5 %. If the previous year was marked by high waste, more waste may be sent to landfill in the year in question, even if the amount generated that year had fallen. If, on the

contrary, less waste was generated the previous year (weak economy, low construction), only an extremely low amount of waste would be sent to landfill, which would then be problematic in particular once the economy and construction activity improve.

38. Furthermore, the Bundesrat asks the Federal Government to press for an extension to the proposed ban as of 2025 on sending recyclable waste to landfill sites for non-hazardous waste, so that it also includes waste with energy recovery potential. Such waste should also be used rather than being sent to landfill. In terms of the wording, the erroneous reference between plastics, metals, etc. and 'other' biodegradable waste should be corrected.

#### Annex VII

39. The 'minimum requirements for extended producer responsibility' set out in Annex VII should be verified in order to ascertain whether the successful provisions which have been applied in Germany may be maintained and whether these requirements have to be determined at EU level (principle of subsidiarity).

#### Closing remarks

40. The Bundesrat calls on the Federal Government to take these concerns into account during the upcoming EU negotiations.

#### Direct transmission of the decision

41. The Bundesrat is sending this opinion directly to the Commission.