WORKSHOP ON EU LEGISLATION

WASTE

The EU Waste Framework Directive
Overview on presentation content
This animated slide shows the developing framework of EU-waste legislation. After 12 December 2010 the new Waste framework directive will replace the old one. The Hazardous Waste Directive then will be integrated into the WFD as well as the Waste oils directive. When the new Directive on Industrial Emissions (IED) will be set into force, the waste incineration directive and the titanium dioxide directive will be integrated into this new Directive.

The Directive on Hazardous waste will be integrated into the new Waste Framework Directive.

Source: Communication from the Commission, Thematic Strategy on the prevention an recycling of waste, Annexe III, 2005
This slide shows the time frame for the entry into force and the transposition limit for MS.

Article 20 WFD 2008: „Directive 75/442/EEC is hereby repealed, without prejudice to Member States, obligations relating to the time-limits for transposition into national law set out in Annex III, Part B. References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex IV. “


The information link opens the text of the Directive.
The state of transposition

- In 2009, 11 cases for structural and wide-spread failure to address illegal waste dumping,
- 10 for bad application,
- 4 related to waste planning, and
- 3 on non-conformity of national laws with directive 2006/12/EC were still pending.
- In 2006, the environment sector accounted for about one fifth of the total number of open cases concerning non-compliance with Community law under investigation by the Commission and remains the sector with the highest number of open cases.


Self-explaining
This slide highlights the legal relevance of the waste definition.
This slide compares the definition of waste in the old and the new WFD. Except for the elimination of the reference to Annex I the definition remains unchanged. The relevant term is „to discard“. The definition contains subjective and objective elements. The concept of discard is interpreted by the Court of Justice in a broad way, making reference to the „effet utile“ jurisprudence and the general principles of precaution and prevention.
What is waste?

- A is transporting used dilute hydrochloric acid on behalf of third parties without obtaining prior authorization. He is prosecuted for illegal transport of waste according to the national waste act.

- In his defence, A maintains, first, that the substances transported do not constitute waste within the meaning of the national waste Act which defines waste as including "any substance or object produced by human activity or natural processes which is, or is intended to be, abandoned." A is claiming that in this case the substances transported were capable of economic reutilization and were not therefore abandoned or intended to be abandoned.

Is A right?

This slide refers to the facts of the famous case *Vessosso and Zanetti, ECJ, C-206/88*
The main findings in the Zanetti Case have become standing jurisprudence since then. In the Inter-Environnement Wallonie case the Court upholds and concretises his findings.
In the famous van der Walle case the Court held that contaminated soil may be considered as waste.
Contaminated soil – waste?

Proceedings were brought inter alia against Mr Van de Walle, Texaco’s managing director, before Criminal Courts. The Brussels-Capital Region claimed damages in those proceedings. The court of appeal took the view that the national law in force imposed penalties under the condition that the actions of the accused constitute abandonment of waste. The court was in doubt, however, as to whether subsoil contaminated as the result of an accidental spill of hydrocarbons could be considered waste and stated that it doubted that that classification was possible, since the land in question had not been excavated and treated. It also pointed out that legal opinion differs as to whether the accidental spill of a product which contaminates soil is comparable to the abandonment of waste.

How would the ECJ decide?
The slide shows, first, the findings of the Court in the van de Walle case and, second, that this jurisprudence was modified by the legislator. According to the new Art. 2 of the WFD 2008, contaminated land in situ is no longer considered as waste under the WFD.
The distinction between waste and non waste has still a prominent relevance in practice. In particular the difference between waste and by-products is a never ending story.

In the ARCO case the Court held that a substance deriving from a production process that can be used in an environmentally sound way as a fuel in a combustion process could nevertheless constitute waste.

Remark to the trainer: In order to save time, the slides 13-15 may be left aside and instead just the courts result (slide 16) can be presented.
Waste or by-product?

- ARCO states that in its view LUWA-bottoms are not waste. Because the fact that a substance is recovered in an environmentally responsible manner and without substantial treatment constitutes a cogent argument that the substance in question is not waste. It states that LUWA-bottoms, whose calorific value is comparable to that of first-grade coal compounds, can be used as to 100% as fuel without further treatment. Their use in the cement industry is an environmentally responsible option, since in that case the molybdenum has no negative effects on the environment but during the process is immediately and completely immobilised and bound up in the cement.
Waste or by-product?

- The competent authority stated that the LUWA bottoms constituted waste and that ARCO would need to notify the shipment under the WSR. ARCO lodged an appeal against that decision before the Court.

The Court is unsure as to whether the shipment of LUWA-bottoms to Belgium is covered by the Waste Shipment Regulation, because the Court doubts whether that substance constitutes waste for the purposes of the Regulation.

*What do you think?*
Waste or by-product?

- (...) the method of treatment or use of a substance does not determine conclusively whether or not it is to be classified as waste. What subsequently happens to an object or a substance does not affect its nature as waste, (...)
- (...) the concept of waste is not to be understood (...) as excluding substances and objects which are capable of being recovered as fuel in an environmentally responsible manner and without substantial treatment.
- The environmental impact of the processing of that substance has no effect on its classification as waste. An ordinary fuel may be burnt without regard to environmental standards without thereby becoming waste, whereas substances which are discarded may be recovered as fuel in an environmentally responsible manner and without substantial treatment yet still be classified as waste.

*Case C-418/97 and C-419/97 ARCO Chemie, paragraphs 64 - 66*
The slides shows the text of the new Art. 5 of the directive. The approach of the legislator is different from the Courts approach: Wheras the court always tries to define waste, Art. 5 defines the term by-product and thus a non-waste. Only if all the four conditions are met, a substance may be regarded as a by-product, otherwise it has to be considered as waste.

Most of these criteria are derived from the ECJ rulings. There are nevertheless two differences:

• Under (b) there has been added "other than normal industrial practice", this means if there is further processing, which can be considered as a “normal industrial practice” the substance could be considered nevertheless as a by-product.
• Criterion (d) is new.
The slides sums up the criteria for differentiating waste from by-product and also clarifies the relevance of the economic value of the substance.
The Courts ruling in the ARCO Chemie case on the question of the end-of-waste status.
The Courts ruling in the ARCO Chemie case on the question of the end-of-waste status.

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**EU LEGISLATION ON WASTE**

**When does waste cease to be waste?**

- If a complete recovery operation does not necessarily deprive an object of its classification as waste, that applies a fortiori to an operation during which the objects concerned are merely sorted or pre-treated, such as when waste in the form of wood impregnated with toxic substances is transformed into chips or those chips are reduced to wood powder, and which, since it does not purge the wood of the toxic substances which impregnate it, does not have the effect of transforming those objects into a product analogous to a raw material, (...)  

  *Case C-418/97 and C-419/97 ARCO Chemie*
The slide shows the new hierarchy of waste compared to the one in the old directive.
The following slides give arguments in favour and against the binding character of the waste hierarchy.

The wording „shall apply ... in waste management legislation“ is an argument for the binding character.

On the other hand, consideration 7 of the Directive gives priority to re-use and recycling only \textit{where and insofar} as they are the best ecological options. We may therefore conclude, that the waste hierarchy does not constitute an \textit{absolute} priority but leaves a discretionary power to the member States.

This is approved by Art. 4 (2) which states that Member States shall take measures to encourage the options that deliver the best overall environmental outcome.

Under Art. 10 and 11 Member states shall take measures („as appropriate“) to promote recovery, re-use and recycling. Also the setting up of separate collection systems is under the condition that this is technically, environmentally and economically practicable.

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**The waste hierarchy**

- **Is the waste hierarchy legally binding?**

<table>
<thead>
<tr>
<th>Arguments in favour</th>
<th>Arguments against</th>
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<tbody>
<tr>
<td>Wording of Art. 4: “The following waste hierarchy \textit{shall apply} as a priority order in \textit{waste prevention and management legislation} and policy.”</td>
<td>Consideration 7: “(...) re-use and material recycling should be preferred to energy recovery from waste, \textit{where and insofar} as they are the best ecological options.“</td>
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<td>Art. 4 (2)</td>
<td>See also Art. 10 (2), 11 (2) \rightarrow principle of proportionality</td>
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</tbody>
</table>
This slide shows the idea of a European recycling society which derives from Art. 11(2) of the Directive.
The concept of extended producer responsibility is newly laid down in Art. 8 of the Directive. The slide shows its aim and the measures which may be taken by the MS in order to strengthen re-use, prevention and recovery. The concept is legally rather weak in so far as it is at the discretion of the MS to implement it („may“).
This slide shows the implications deriving from Art. 9 of the Directive concerning the prevention of waste.
The distinction between recovery and disposal is still a crucial legal issue, as there are far-reaching legal consequences linked to these concepts.
The following slides show the findings given by the Court of Justice in the Case Commission /. Germany dealing with incineration of waste in cement kilns. The Court gives 3 criteria that have to be fulfilled so as to consider the incineration as a recovery process.
Recovery or disposal?

- In particular, the use of waste as a fuel in cement kilns may be classified as a recovery operation if the main purpose is to enable the waste to be used as a means of generating energy, it takes place in conditions which give reason to believe that it is indeed a means to generate energy, the greater part of the waste is consumed during the operation and the greater part of the energy generated is recovered and used.

....the second and the third condition.
The new system according to the Directive: For certain specified wastes, the Commission may define criteria when waste ceases to be waste. The decision is taken under the Comitology procedure, described in Article 39(2) of the Waste Framework Directive (so called "comitology"). A mandate to set end-of-waste criteria was introduced to provide a high level of environmental protection and an environmental and economic benefit. They aim to further encourage recycling in the EU by creating legal certainty and a level playing field as well as removing unnecessary administrative burden.

A methodology to develop the criteria has been elaborated by the Joint Research Centre (JRC reports).

After having agreed this methodology with the MS, the Commission is now preparing a set of end-of-waste criteria for priority waste streams. The criteria have been laid down for:

iron, steel and aluminium scrap (see Council Regulation (EU) No 333/2011)

Next waste streams to be addressed include copper scrap metal, recovered paper, glass cullet, plastics and biodegradable waste / compost.
Recovery or disposal?

- It follows that, where the use of waste as a fuel meets the conditions laid down in point R1 of Annex II B to the directive, it must be classified as a recovery operation, without the need to take into consideration criteria such as the calorific value of the waste, the amount of harmful substances contained in the incinerated waste or whether or not the waste has been mixed.

(see paragraphs 41-47 C-228/00, Cm / Germany)

... the conclusion.
The same question arose in a case where waste was dumped in a former salt-mine. The Court affirms the criterion of “useful purpose”: If the waste replaces other materials and thus natural resources are conserved, it is recovery.
17 Following a complaint referred to it by NTMR, the Commission sent a letter of formal notice to the Grand Duchy of Luxembourg on 22 October 1999 requesting that Member State to submit its observations within a period of two months on the charge that the competent Luxembourg authorities had infringed the provisions of the Regulation and the Directive by refusing to classify as a recovery operation incineration of waste in a non-industrial incineration plant where the energy generated during incineration is recovered in full or in part.

18 As the Grand Duchy of Luxembourg had not responded to that letter of formal notice, the Commission sent it a reasoned opinion by letter of 4 April 2000 in which it found that that Member Sate had failed to fulfil its obligations under Articles 6 and 7 of the Regulation, Article 1(f) and point R1 of Annex II B to the Directive and, where appropriate, Article 34 of the EC Treaty (now, after amendment, Article 29 EC). In the same letter the Commission called upon the Grand Duchy of Luxembourg to take the necessary measures in order to comply with the reasoned opinion within a period of two months from the date of notification of the reasoned opinion.
**Recovery or disposal?**

- Incineration of municipal solid waste – recovery or disposal?
- → Annex II, R 1 → energy efficiency criteria applicable for incineration facilities of municipal solid waste, not applicable for hazardous waste incinerators
- → adaptation to technical process may be done in comitology procedure, Art. 38 (1).

**Article 3**

15. ‘recovery’ means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations;

19. ‘disposal’ means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations;

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Discard □ act, intention or obligation
The revision of the recovery definition may have a negative impact on the national waste management structures as waste for recovery may easily be shipped within the EU. Therefore, Art. 3 (5) WSR and Art. 16 of the Directive provide that municipal waste is subject to the (more strict) disposal provisions of the Regulation. Art. 16 allows also the restriction of incoming recovery waste for incineration under certain conditions. These provisions apply only for „mixed“ household waste. For sorted waste the general rules apply.
Note for the trainer: The following two slides should only be used if there are particular questions on the legal status of sorted household waste. There is the position of German officials, that national restrictions concerning sorted household waste is in compliance with Art. 106 TFEU and the Courts findings in the Case C-360/96.
National waste management structures

In this case it is undeniable that the removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

Case C-360/96, Gemeente Arnhem/BFI Holding
This slide gives an overview on a number of waste recovery requirements that are to be found in the cited Articles of the Directive.
This slide shows the new target for Re-use and Recycling. This quantitative approach is new compared to the old directive.
This slide gives an overview on the waste management planning instruments as laid down in chapter V of the Directive.
This slide explains the details concerning waste management plans. Waste management plans existed already under the old directive. The Court of justice hold in the joined cases C-53/02 and C-217/02 Commune de Braine-le-Château and Michel Tillieut and Others, although MS have the obligation to set up such plans, which also have to specify appropriate sites, the absence of waste management plans does not hinder the issuing of permits for a disposal installation on a specific site.
Hazardous waste

Definition: Art. 3 (2), Annexe III; list of hazardous waste, Art. 7 decision 2000/532/EC update comitology procedure

General provisions: Art. 17-21

Article 7 List of waste

The measures designed to amend non-essential elements of this Directive relating to the updating of the list of waste established by Decision 2000/532/EC shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 39(2).

The list of waste shall include hazardous waste and shall take into account the origin and composition of the waste and, where necessary, the limit values of concentration of hazardous substances. The list of waste shall be binding as regards determination of the waste which is to be considered as hazardous waste. The inclusion of a substance or object in the list shall not mean that it is waste in all circumstances. A substance or object shall be considered to be waste only where the definition in point (1) of Article 3 is met.

This slide shows how hazardous waste is defined under the Directive. Beside the general definition in Art. 3 (2) the list of waste established by Decision 2000/532/EC is of utmost relevance in this respect. The list is binding as far as the determination of hazardous waste is concerned (hazardous waste is marked with an asterisk in this list). The list is updated by the Commission in accordance with the comitology procedure.
This slide gives an overview on obligations concerning the management of hazardous waste.

- Control of hazardous waste (Art. 17)
  - Production, collection, transportation, storage, treatment → Art. 13
  - Traceability from production to final destination → chronological record (Art. 35)
- Hazardous waste should not be mixed (Art. 18)
- Labelling, packaging, identification document
More information

Further references:

http://ec.europa.eu/environment/waste/