

**2014 Proposal for a Directive amending EU waste policy and
regulation:**

A progressive step towards effective waste management?

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Abstract:

Following a review of the key targets in the EU waste legislation, in line with the review clauses found in the EU Waste Framework Directive, the Landfill Directive and the Packaging Waste Directive, the European Commission adopted, in July 2014, a legislative proposal to review recycling and other waste-related targets in the EU. Although this proposal was withdrawn by the 2014 new Commission, in March 2015, taking into consideration that the latter aims to bring forward, a new and more ambitious proposal to promote effective waste management, this paper aims to present the main provisions of the Directive and to critically discuss the extent to which these can form the basis for a new legislative proposal on effective waste management. More specifically this paper will initially address the Directive's waste prevention and management targets. The paper will move on to examine, *inter alia*, the new "early warning system", the "amended extended producer responsibility scheme" and the updated recording and reporting duties. In examining these provisions this paper aims to bring forward the weaknesses encompassed in these proposals, taking into consideration the varying implementation levels and techniques already in place in the Member States as well as the extent to which these proposals violate general principles of EU law. Can this Proposal form the basis for a progressive step towards effective waste management?

2014 Proposal for a Directive amending EU waste policy and regulation:

A progressive step towards effective waste management?

Introduction

“European waste law has been described as ‘strangely engaging’ and has even resulted in a former ECJ [European Court of Justice – now Court of Justice of the European Union (CJEU)] judge expressing his amazement at the judicial effort put into defining the concept of ‘waste’. (Hans and Vedder 2012). Central to European waste law is Directive 2008/98/EC on waste and repealing certain Directives, (hereinafter “Waste Framework Directive”) regulating core issues regarding waste management. Yet this engaging area of law encompasses additionally multiple legislative acts dealing with specific waste streams and methods of treating waste. All of these legislative acts have the same uniform aim, that of effective waste prevention and management. As a result effective waste management has been climbing on the agenda of the European Union, (hereinafter “EU”), as a first class priority.

The aim of this article is to examine the legislative proposal (Proposal for a Directive 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, hereinafter “the Proposal”) adopted in July 2014 to review recycling and other waste-related targets in the EU. Although this proposal has been withdrawn by the 2014 new Commission, on March 7 2015, taking into consideration that the latter aims to bring forward, according to the 2015 Roadmap on a Circular Economy Strategy, a new and more ambitious proposal to promote effective waste management, this article will examine ten of the key targets brought forward by this Proposal, in order to examine from a legal perspective the main reasons these have appeared to be problematic and whether they could be amended and form a basis for a new proposal or whether they should be totally withdrawn and replaced in order for the Commission to produce a clearer and more effective legislative proposal for effective waste management.

Materials and methods

This article, being legal in its nature, has been based mainly on library based research and in practice on primary law legislative documents of the EU such as Treaty and directives provisions as well as on legislation being on a preparatory stage. Furthermore this article has used academic literature and more specifically books and commentaries, various practitioners briefs regarding the issues examined as well as

various figures and statistics regarding the issues in question found in the European Environmental Agency website (Permission for use given).

Background

Responding to a legal obligation found in the Waste Framework Directive, the Directive 1999/31/EC on the landfill of waste, (hereinafter “the Landfill Directive”), and the Directive 96/42/EC on packaging and packaging waste, (hereinafter “the Packaging Waste Directive”), regarding the review of the recycling and other waste-related targets set by these Directives, the European Commission adopted in July 2014 the Proposal to review recycling and other waste-related targets in the EU. At first one must note that this Proposal amended six Directives (the Waste Framework Directive, the Landfilling Directive, the Packaging Waste Directive, Directive 2000/53/EC on end-of life vehicles (hereinafter “End-of-life vehicles Directive), Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC (hereinafter “Waste Batteries and Accumulators Directive”) and Directive 2012/19/EU on waste electrical and electronic equipment (hereinafter “Waste Electrical Equipment Directive”). More importantly this Proposal was presented as part of a circular economy package aiming to achieve a zero waste programme for Europe and to establish a common and coherent EU legal framework to promote the circular economy. According to Recital 1 of the proposed

Directive waste management in the Union should be improved, with the view to protecting, preserving and improving the quality of the environment, protecting human health, and ensuring prudent and rational utilisation of natural resource.

In March 2015, the Proposal was withdrawn along various other Commission proposals in the field of environment, maritime affairs and fisheries. One month later, the 2014 newly appointed Commission explained in its 2015 Roadmap for a Circular Economy Strategy that regarding the Proposal, the Commission will examine, in particular, how to make it “more country specific, and how to improve the implementation of waste policy on the ground”.

The Targets - Introduction

This article will focus on ten of the key targets brought forward by this Proposal affecting solely the Waste Framework, the Landfilling and the Packaging Waste Directive. Firstly this article will consider the main waste prevention and management targets brought forward by this Proposal. These are recycling and preparing for re-use of municipal waste, recycling and preparing for re-use of packaging waste and phasing out landfilling for recyclable non hazardous waste. In addition to these targets this article will examine the proposals for the reduction of food waste generation, the separate collection of bio-waste, the introduction of an “early warning system”, the extension of producer responsibility, the updated record

keeping duties, the increased reporting obligations and lastly the alleviation of burdens faced by small and medium enterprises (hereinafter “SMEs”). The aim of this targeted analysis is twofold. Apart from exploring theoretically in detail the content of these key proposals, in contrast to their corresponding provisions, if at all, in the existing Directives, this article aims to examine additionally the extent to which these appear problematic and whether they could be amended and used as a basis for formulating a new proposal or whether they should be completely withdrawn and replaced.

The Waste Prevention and Management Targets

Recycling and preparing for re-use of municipal waste

The Proposal, amending Article 11(2) of the Waste Framework Directive, set a target for the **recycling and preparing for re-use of municipal waste to be increased to a minimum of 50% by the beginning of 2020 and to a minimum of 70 % by 2030**. Looking at these targets, one initially notes that, the Commission widened the spectrum of waste to be recycled and prepared for re-use from “household waste” (term used in current Article 11(2) of the Waste Framework Directive) to, the almost all encompassing, “municipal waste”. According to the definition of municipal waste, found in the new Annex VI, this includes, household waste, waste from retail trade, small businesses, office buildings and institutions (such

as schools, hospitals, government buildings) similar in nature and composition to household waste. More specifically it includes bulky waste (white goods, furniture, mattresses), yard waste and litter and waste from park and garden maintenance and street cleaning services. Moreover ones notes that apart from widening the categories of waste to be recycled and prepared for re-use to a minimum of 50% by the beginning of 2020, the Commission additionally inserted a new, highly challenging, long-term high target of a minimum of 70 % by 2030.

Recycling and preparing for re-use of packaging waste

Moreover the Proposal, adding to the targets found in Article 6(1) of the Waste Packaging Directive, proposed **recycling and preparing for re-use, of packaging waste to be increased to a minimum of 60% by the end of 2020, to a minimum of 70% by the end of 2025 and to a minimum of 80 % by the end of 2030**. Interestingly the Proposal moved on to propose material-specific targets that shall gradually increase between 2020 and 2030.

SPECIFIC MATERIAL	AT PRESENT	2020	2025	2030
PLASTICS	22,5%	45%	60%	NONE STATED

WOOD	15%	50%	65%	80%
FERROUS METAL	50%	70%	80%	90%
ALUMINIUM	—	70%	80%	90%
GLASS	60%	70%	80%	90%
PAPER / CARDBOARD	60%	85%	90%	NONE STATED
TOTAL PACKAGING	60%	60%	70%	80%

Table 1

Furthermore the Proposal inserted in the Package Waste Directive, a new provision, this being Article 6(1a) according to which “for the purpose of calculating whether the targets laid down in Article 6(1)(a) to (k) have been achieved, the weight of waste prepared for re-use and recycled shall be understood as the weight of the waste put into a final preparing for re-use or recycling process less the weight of any materials which were discarded in the course of that process due to presence which need to be disposed of or undergo other recovery operations”, therefore using “an output based” rather than an “input based” measurement (Bonn and Reichert 2014).

Looking at this proposal one firstly notes that the Commission placed higher targets in the waste management pyramid regarding this issue, as it referred to

preparing for re-use and recycling of packaging waste rather than to recycling and recovery. Furthermore the Commission, apart from adding stringent long term generic targets, widened, once again, the spectrum of specific materials targets, adding to the existing materials aluminium, a material that is interestingly not even mentioned in the Waste Packaging Directive.

Phasing out landfilling by 2025 for recyclable non hazardous waste

Additionally the Proposal, amending Article 5 of the Landfill Directive, ambitiously proposed that as from the beginning of 2025, **recyclable non-hazardous waste, particularly plastics, metals, glass, paper, cardboard and other biodegradable waste, shall no longer be permitted to go to landfill** whereas Member States must ensure that the total weight of all non-recyclable, non-hazardous waste which goes to landfill does not exceed as from the beginning of 2025 and 2030, 25% and 5% accordingly of the total amount of municipal waste generated in the previous year.

Were these targets achievable in practice?

Looking at these targets as a whole one may initially note that although these could be welcomed, at least in theory, as proposals leading to a zero waste programme for Europe, yet in practice these targets encompassed significant weaknesses. More specifically these targets failed to take into account of the varying, or even at some

instances opposite, positions of the Member States regarding re-using and recycling municipal waste. More specifically examining Figure 1, one realises the divergences that exist between Member States in recycling municipal waste. According to this figure one may claim that although some member states, like Austria, Germany, Belgium, Netherlands, Sweden, Luxembourg, Denmark, Norway and the United Kingdom could probably be able to meet these challenging targets of 50% for 2020 and 70% for 2030, for some other Member States, like Malta, Czech Republic and Greece, these targets were unachievable.

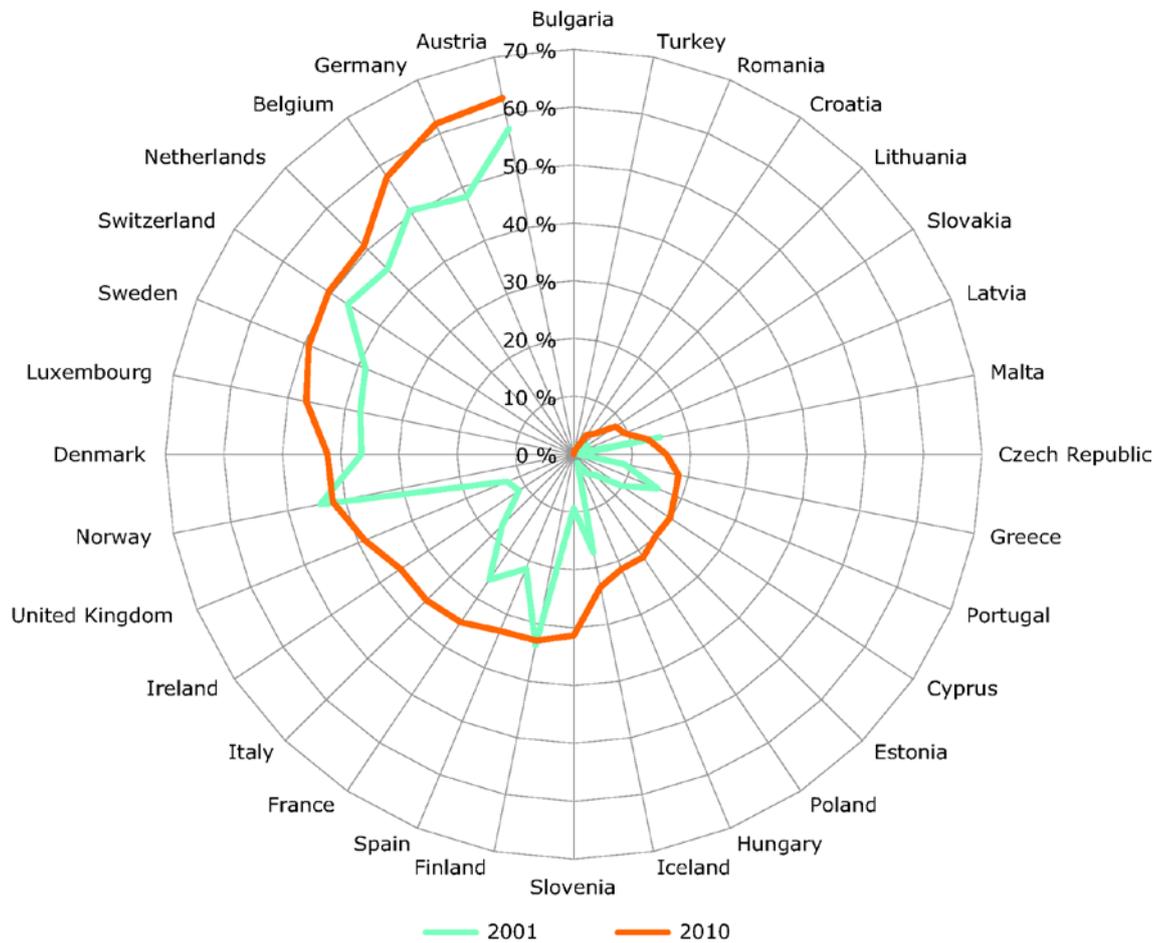


Figure 1: Municipal waste recycling rates in 32 European countries, 2001 and 2010, Source: European Environmental Agency website

Examining Figure 2, although it can be claimed that the generic packaging waste targets might not have been so difficult to be achieved, this does not appear to be the position regarding specific materials where again positions of Member States vary significantly between them.

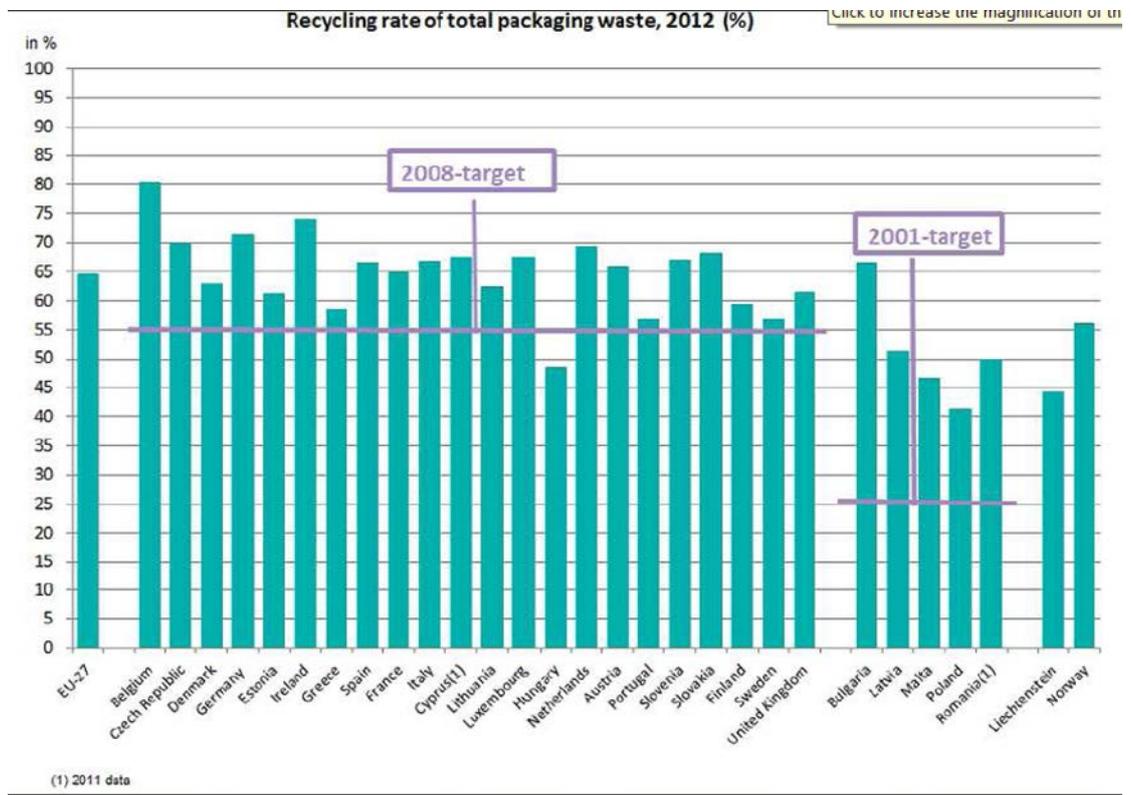


Figure 2: Recycling rate of total packaging waste, 2012 (%), Source: Eurostat, European Union website

Furthermore regarding the use of “out-put” measurement, according to Bonn and Reichert this new method renders it more harsh for Member States to achieve the targets set as the waste going into the recycling process often contains elements which, due to contamination, cannot be recycled. Although these targets could be achieved if more waste was channelled into the recycling process, such an increase could have led in a reduced quality of recycled materials thereby reducing their possible application in future production processes (Bonn and Reichert 2014).

Regarding the landfill ban target one can fairly argue that this “blanket” ban target forgot, once again, to take into account of the differing conditions in the Member States on sending recyclable waste to landfill (Bonn and Reichert 2014). More specifically examining Figure 3 and 4 one notes that for Member States like Croatia, Malta, Greece and Cyprus, that currently send more than 80% of their waste to landfill, this blanket ban target was, again, hardly achievable.



Figure 3: Municipal waste landfilling rates in 32 European countries, 2001 and 2010, Source: European Environmental Agency website

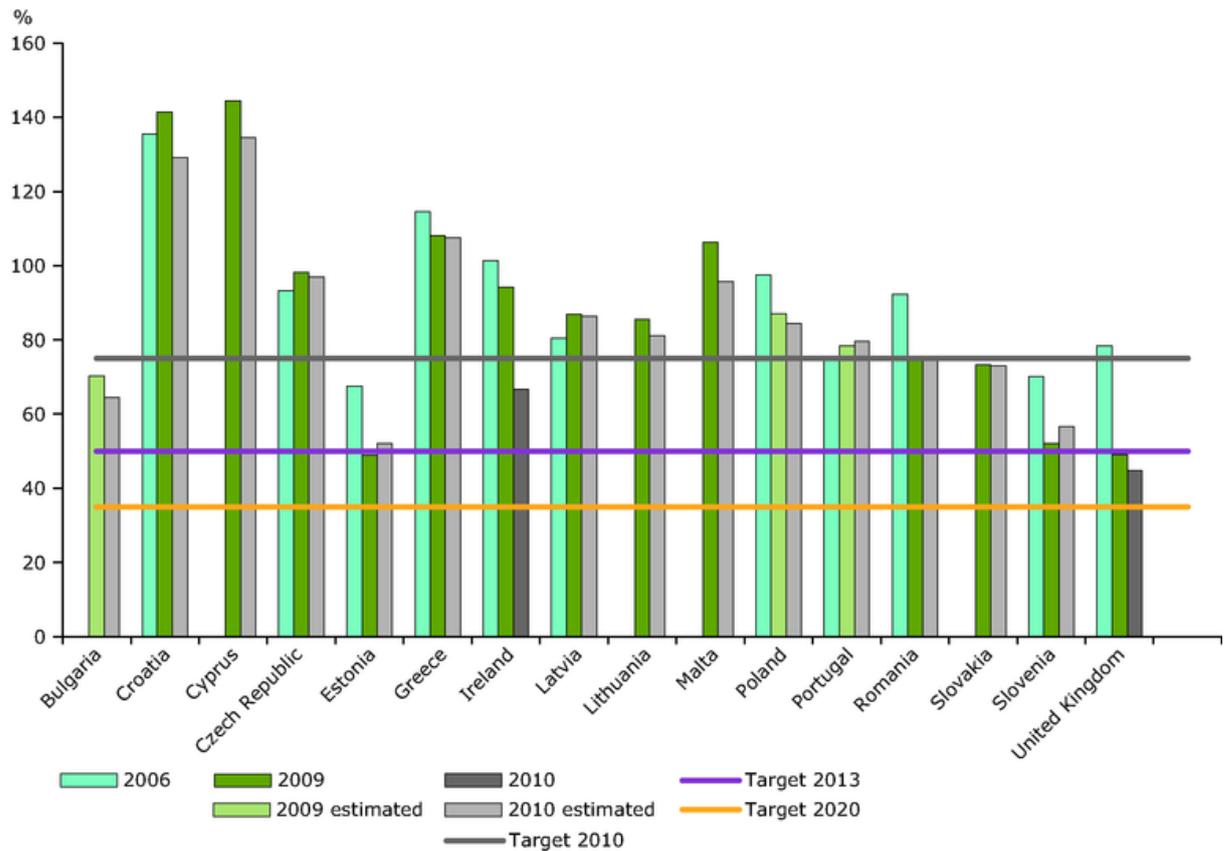


Figure 4: Percentage of biodegradable municipal waste landfilled in 2006, 2009 and 2010 compared with the amount generated in 1995 — countries with derogation periods, Source: European Environmental Agency website

More importantly from a purely legal perspective, one may easily claim that this flat targeted approach followed by the Commission regarding the above targets was not the appropriate one, taking into consideration the principle of subsidiarity found in Article 5(3) of the Treaty of the European Union (hereinafter the “TEU”). More specifically according to this principle “in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the

proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. In practice it can be proposed that the principle of subsidiarity, the varying conditions that exist between different Member States, as well as the Commission’s already established practice of specifying individual targets regarding this area of law (see for example Directive 2004/12/EC amending Directive 94/62/EC on packaging and packaging), call instead for a varied approach targeting different group of Member States or even more a “country specific” approach, regarding waste prevention and management targets including apart from varying percentages, varying deadlines, if needed for their implementation.

Reducing food waste generation

Moreover the Proposal, replacing Article 9 of the Waste Framework Directive, interestingly suggested that **Member States shall take measures to prevent food waste generation along the whole food supply chain**. More specifically according to the Commission the measures should have endeavoured to ensure that food waste in the manufacturing, retail/distribution, food service/hospitality and household sectors is reduced by at least 30% between 1 January 2017 and 31 December 2025. Examining this provision one may ask what “food waste” stands for? According to the

Proposal, Article 3(4)(a) of the Waste Framework Directive read "food waste" means food (including inedible parts) lost from the food supply chain, not including food diverted to material uses such as bio-based products, animal feed, or sent for redistribution.

Various important issues must be raised regarding this target. Firstly one may question whether such a drastic legislative transformation could be in practice implemented and monitored by all Member States. Again even if some Member States encompassing already in their national legislation the regulation of "food waste", could start working on this target, one cannot surpass the issues raised by the broad definition ascribed to this term, including *inter alia* agricultural food losses, and therefore its extended scope of application rendering this target even more difficult to be achieved. More importantly it can be argued that the fact that this target could probably not be achieved by the Member States renders it disproportionate therefore violating the principle of proportionality found in Article 5(4) of the TEU. According to this principle "under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". Therefore within the new proposal the Commission shall work again on the content of "food waste" as well as employ a "grouped" or "country specific" approach in inserting target for this category of waste.

Seperate collection of bio waste

Apart from the category of “food waste” the Proposal proposed significant alterations in another category of waste, that of “bio-waste”. According to the new Article 22 (2) of the Waste Framework Directive “in order to minimize contamination of waste materials, **Member States shall ensure separate collection of bio-waste by 2025**”. This proposal should contribute, according to Recital 10 of the Proposal, to the prevention of contamination of recyclable materials. This can be viewed as an effective waste management proposal. Yet one must not omit the fact that the procedure for proceeding to such an action was not provided by the Commission. Again in the new proposal, it can be said that such a procedure, although uniform for all Member States shall contain different percentage targets according to the current position of treating bio-waste in the various Member States.

Early Warning system

Apart from setting actual proposals regarding waste avoidance, recycling targets and landfill bans, the Proposal introduced “an early warning system” to anticipate and avoid possible compliance difficulties in Member States regarding the Waste Framework, the Package Waste and the Landfill Directives. More specifically according to this “system” **three years before the expiry of each stipulated time limit set by the three aforementioned Directives, the Commission shall, with the**

support of the European Environmental Agency, publish a report on the achievement of the targets set. The report shall contain an estimation of the achievement of the targets by each Member State, an assessment of the expected time of the achievement of these targets and, more importantly, a list of Member States at risk of not meeting these targets within the respective time limits, together with appropriate recommendations. More importantly Member States at risk of not meeting the targets shall submit to the Commission, within six months of the publication of the report, a compliance plan detailing the measures that they intend to take to achieve the targets. In drawing up a compliance plan the Member States concerned shall take into account, according to the Proposal, the Commission's recommendations as well as various measures contained in Annex VIII such as progressive increase of landfill taxes, "pay as you throw" schemes and introduction or increase of incineration taxes.

Examining this proposal one may generally claim that such a system would have aided Member States to work closer to achieving waste prevention and management targets and would have additionally helped the Commission in responding more quickly to deficits found in the implementation of these targets in the Member States. One may therefore suggest that such a proposal appears to be a measure of effective waste management and could be inserted in the new proposal.

Extended producer responsibility

Moreover the Proposal suggested strengthening the already existing provisions of extended producer responsibility. More specifically according to the new Article 8(2) of the Waste Framework Directive **Member States shall take appropriate measures to encourage the design of products in order to reduce their environmental impact and the generation of waste.** Furthermore when developing and applying extended producer responsibility, Member States should according to the Proposal have complied with the minimum requirements laid down in Annex VII these being, *inter alia*, taking into account the technical feasibility and economic viability of products, supporting litter prevention and clean-up activities and defining the geographical coverage of the schemes. These amended provisions should, according to the Commission, have increased the cost efficiency of both existing and forthcoming producer responsibility schemes.

At first sight one must note that the rule that Member States should have taken measures to encourage the design of products in order to reduce their environmental impact as well as the development of multiple use products was appropriate because governments could not directly affect waste disposal practices of businesses. However according to Bonn and Reichert (2014) “which measures are most suitable depends however on the local conditions and can therefore only be decided individually by the

Member States. Member States should not therefore be restricted by minimum requirements with regard to extended producer responsibility”. Furthermore from a legal perspective it can be argued that it remains unknown whether other requirements existed, apart from the minimum ones mentioned in Annex VII as well as what happened in case only some of these requirements were entirely fulfilled? Additionally one may claim that it is unclear whether Annex VII was intended to apply across other directives apart from the waste framework directive. It is therefore central to the success of the new proposal to clarify its full extent and possible limitations.

Record Keeping Duties and Control of Hazardous Waste

Interestingly the Proposal amended Article 35(1) of the Waste Framework Directive, regarding record keeping, **assigning an obligation on all businesses that produce, collect or transport waste, hazardous or non – hazardous**, to keep a chronological record of the quantity, nature and origin of the waste, and, where relevant, the destination, frequency of collection, mode of transport and treatment method foreseen in respect of the waste. More importantly these businesses should have **made this “information” available to the national competent authorities**, for hazardous waste every year by 31 December, where for non-hazardous waste on request. Furthermore according to paragraph 4 of the same Article **Member States**

should have set up electronic registries to record data on hazardous waste and where appropriate other waste streams. Interestingly the Commission proposed in new Article 17 that **this “information” shall be used by the Member States to improve the traceability of hazardous waste.**

Looking at Article 35 one realises that the Commission extended the obligation of record keeping additionally to businesses producing or “treating” non hazardous waste, widening up in this way the scope of application of this mechanism, in contrast to its current position which covers solely hazardous waste. From an economic point of view one may claim that this proposal should have resulted in a significant, and probably unnecessary, increase of administrative costs for non hazardous waste industry stakeholders. Yet from a legal perspective this proposal should be seen as a positive one, and could be included in the new proposal, as it would render the Commission’s task of monitoring all companies producing or treating waste more efficient and transparent and it would overall strengthen the waste record keeping and traceability mechanisms at EU level.

Reporting to the Commission

Furthermore the Proposal amended Article 37 of the Waste Framework Directive. According to this provision **Member States should have transmitted annually their data concerning the implementation of waste prevention and**

management targets electronically to the Commission. More importantly the **data reported by each Member State should have been accompanied by a quality check report and shall be verified by an independent third party.** With this proposal the Commission increased the frequency with which Member States must report to the Commission, from once every three years, as it currently stands, to annually therefore strengthening the targets implementation control for this Directive.

Examining this proposal from an economic perspective one may comment that this will impose an additional annual obligation on national governments, taking specifically into account the requirement for third party verification introduced. Irrespective of this economic burden, on a legal note, this proposal shall be considered for its inclusion in the new proposal taking into consideration that it will allow, working in parallel with the early warning system, better monitoring, on behalf of the Commission, of the waste prevention and management targets set.

Exemptions for SMEs

Lastly the Proposal, added to Article 26 of the Waste Framework Directive a new provision according to which “small establishments or undertakings” collecting or transporting very small quantities of non-hazardous waste could have be exempted from the requirement of registering with the competent authority. Reading this provision one may fairly ask what does “small establishment or undertaking” stand

for? According to new Article 3(20a) of the Waste Framework Directive this means “establishments employing fewer than 250 persons and having an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million”.

Although this new exemption should be generally welcomed as it distinguishes theoretically the obligations between a large company and an SME producing or treating waste, removing unnecessary burdens faced by the latter, various issues remain open for discussion regarding this provision that shall be thought, before its insertion, if at all in the new proposal. More specifically examining this proposal from a legal perspective one may fairly argue that the definition given to “small establishments or undertakings” is vague and ambiguous taking into consideration that it encompasses the element “of very small quantities of non hazardous waste”. What does “very small quantities” cover? Where should the line be drawn? Such an ambiguous definition, if left intact, will allow judicial divergences at national level in interpreting this exception. Furthermore it can be claimed that the provision should have referred instead to small establishments or undertakings collecting or transporting very small quantities of “*their own* waste, like gardeners and shop-keepers rather than [leaving it open to include] professional waste operatives, who should be subject to regulatory controls protecting human health and the environment”. (European Scrutiny Committee, 2014).

Discussion

As it has been aforementioned in the introductory section this article aimed to assess the extent to which ten key targets of the Proposal, despite its temporary withdrawal could be seen as measures of effective waste management. The above analysis has shown that the effectiveness of each of these measures diverged from another.

More specifically it can be said that the proposals brought forward by the Commission for reducing municipal, package and food waste and eliminating landfill could be seen in theory as targets leading to a zero waste programme for Europe, in practice these were unachievable taking into consideration the varying positions of the Member States and the fundamental principles of subsidiarity and proportionality in EU law. Therefore these targets should be rethought for the new proposal, on a more grouped or country specific approach basis. Moreover the mechanisms introduced in the Proposal, meaning the new early warning system, the updated record keeping and reporting duties as well as the new exemptions for SMEs should be welcomed. More importantly these measures encompassing more frequent and more extended implementation and application requirements regarding the production and treatment of waste should form part of the new proposal, yet various issues remaining

unanswered regarding each of these mechanisms explained above should be reconsidered by the Commission.

Conclusion

Although the Proposal can be seen as a step forward effective waste management, a long way still exists for the submission of a legislative proposal being a progressive step towards effective waste management. One can conclude that this Proposal can form a basis for this progressive step, yet various amendments and additions shall be made to both its content and approach by the Commission. In any case the way towards successful legislative reviews is always a long one. Regarding effective waste management this Proposal formed the first step.

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