

Defra Consultation on Proposal by European Commission to Revise the Waste Framework Directive and related EU Legislation

FDF Response

1. General comments

1.1 FDF is concerned that the Commission proposes to use the process of comitology for implementing several aspects of the proposal including inter alia:

- Defining the recovery operations listed in Annex II in terms of efficiency criteria (Art 5.2);
- Adopting minimum standards for waste management operations as part of re-focussing the Directive on the reduction of the environmental impacts from waste generation and management, taking into account the whole lifecycle (Art 21).

FDF understands that this proposed use of comitology, where the Commission is advised by an expert committee, chaired by the Commission and representatives of the Member States, is a fairly unusual practice. Despite attempts to rectify the democratic deficit through the recent inclusion of the European Parliament, comitology remains in our view a remote and un-transparent process, hence the concerns.

FDF would therefore urge DEFRA to challenge this process, replacing it with the more usual route of co-decision making, which in our view is more democratic.

1.2 Given the emphasis Defra is placing on climate change FDF would welcome some clarity on how it plans to unite these objectives with the proposed WFD revisions. FDF would urgently request that Defra consider developing a climate change management framework where all environment-related policies, directives and consultations can be ranked according to their impact on climate change.

2. Specific comments

Chapter Three – The Revised WFD

Chapter I: Subject Matter, Scope and Definitions

Article 1 – Subject Matter

Q1: Do you consider that Article 1 fulfils the Commission's intentions? If not, in what ways should it be revised? For example:

- (a) Should the terms of the waste hierarchy be set out more explicitly in Article 1 - as in the Environment Council's conclusions – see Annex 5 (Page 137); and*

(b) Should Article 1 contain clear references to the Environmental and human health objectives for Article 7 of the Revised WFD which re-enacts Article 4 of the existing WFD?

FDF supports retaining the present EU policy and Commission Proposal which places prevention as the highest priority, final disposal as the least favoured option and a flexible approach to the choice of recovery options. Changing the existing EU three-step hierarchy to a five-step one, as per the Environment Council's conclusions and as per the amendment adopted by the EP Environment Committee, would in FDF's view:

- contradict the current waste management practices of many local authorities and render them open to legal challenge;
- place a huge bureaucratic and cost burden on industry and Government with negative consequences for UK competitiveness;
- conflict with fundamental principles of law (proportionality and equal treatment) and hence unjustifiably interfere with the internal market and distort competition.

Regardless of the number of steps, the waste hierarchy should be seen as a flexible guideline, not a strict rule. Non-bureaucratic deviations should be possible without requiring justification by controversial and expensive studies such as lifecycle analyses. Environmental, economic and social impacts of each individual measure should be taken into account.

Article 2 – Scope

Q2: What are your views on the revisions which the Commission proposes to make to the list of wastes excluded by Article 2 from the scope of the revised WFD? For example:-

- (a) Should the list of excluded wastes be more extensive and, if so, which wastes should be excluded and on what grounds:*
- (b) Should the list of excluded wastes be more limited and, if so, which wastes should remain within the scope of the WFD and on what grounds; and*
- (c) Do you agree with the Commission's proposal to reverse the AvestaPolarit judgement and so to preclude Member States from relying on national legislation to control certain wastes (e.g. decommissioned explosives)?*

In respect of Q2(c) whilst FDF acknowledges that different regimes in all 25 Member States is suboptimal we recognise that in practice waste management solutions are best developed and deployed regionally. This is often for sound environmental reasons – a solution in metropolitan Paris would not be the same as one for the Highlands of Scotland.

Given this local nature of waste management, as well as our concerns on using comitology, we would not support any measures to preclude Member States from relying on national legislation to control certain wastes. FDF would therefore recommend and welcome the introduction and adoption of carefully developed minimum standards for all Member States. However, this should not have the effect of down-grading the standards used in the more progressive states; rather it should raise the standards of the less developed States.

Article 3 - Definitions

Q3: What are your views on the revisions which the Commission proposes to make to the list of terms defined in Article 3 for the purposes of the revised WFD? For example:

- (a) Are the revised definitions practicable and will they provide the greatest certainty and clarity essential for both competent authorities and industry/business; and*
- (b) Should any of the other definitions in the existing WFD be revised or new definitions introduced for other terms used in the revised WFD?*

In response to point Q3(a) FDF is concerned that the Commission is proposing to introduce a new definition of “re-use” which is different to that currently used in the Packaging and Packaging Waste Directive, 94/62/EC. Currently this Directive states that reused products (packaging) will only become waste when no longer subject to re-use. Furthermore there is no hierarchy between reuse and recycling (ECJ cases C-463/01 and C-309/02) as there is no environmental justification to systematically prefer reusable over recyclable packaging. However the new definition proposed for the WFD could mean that any reuse of products would automatically fall under the category of prevention, even if the process involved further treatment (and therefore resource use) of the object before reuse (eg washing). This we consider to be inappropriate as the industry sees no case for a distinction between reuse versus recycling, the merits of which can only be decided at a local level depending on the case-specific circumstances. Therefore, it seems appropriate to extend the definition of “re-use” under the framework directive to waste and products that require prior “reconditioning” before they can be used again for the same purpose.

Furthermore we do not wish to see the reuse of products such as packaging considered as a waste recovery operation with all the connotations this would have not least in terms of requiring waste management license. This is likely to be viewed as unnecessarily burdensome and therefore discourage the use of such systems. We therefore concur with the concerns made in Defra’s Partial Regulatory Impact Assessment about this change.

In relation to point Q3(b) FDF would like to see a definition of by-products inserted into Article 3 of the Directive based on ECJ jurisprudence and become directly applicable to all relevant materials thereby excluding them from the scope of the Directive.

For example each year 85 million tonnes of by products from the food and drink sector are used in animal feed across the EU. Of this about 60 million tonnes are used in the production of compound feed with a market value of about 7 billion euro. It is therefore very important to the UK food and drink industry and related downstream industries, many of whom operate on a Europe wide basis, that there is a harmonised and clear legal framework across the EU regarding the status of by products as distinct from waste. Although the current Environment Agency legal guidance note, prepared in the context of PPC legislation, provides some clarity in the context of UK operations, it does not apply on an EU-wide basis. FDF would therefore strongly encourage Defra to support the current Finnish Presidency’s efforts to reflect the ECJ criteria in the Directive under a new Article 3a.

Whereas Commission guidelines can be of use as a supporting interpretive tool, our general experience with non binding guidelines is that, on their own, they will not provide sufficient legal certainty to guarantee a harmonised and certain legal framework across the EU.

Chapter II; Recovery and disposal

Article 5 - Recovery

Q4: What are your views on the definition of “recovery” proposed by the Commission in Article 5 of the revised WFD? For example:-

- (a) Do you consider it practicable and/or environmentally sound to require Member States to take the necessary measures to ensure that “**all** waste undergoes” waste recovery operations. For example, do you think that there is currently sufficient capacity in the UK to ensure that all waste undergoes recovery and, if not, what level of investment would be required to provide sufficient capacity;*
- (b) Do you consider that the substitution of resources should be the sole criterion in the classification of an operation as a recovery operation – rather than being the principal aim of an operation;*
- (c) Do you consider that the definition of recovery should be based on the concept of substitution of resources in the economy as opposed to in a specific plant; and*
- (d) Do you consider that the Commission should be enabled to adopt efficiency criteria by means of comitology – which would have the practical effect of classifying operations as disposal operations where the efficiency criteria are not met?*

In respect of Q4(a) FDF would question whether the UK has sufficient capacity to ensure all waste undergoes waste recovery operations to a high level. Rather than imposing additional legislation that may adversely affect UK competitiveness, we would recommend that Member States are encouraged (incentivised) to develop creative and innovative solutions which will generate capacity building investment. It is also worth reiterating our earlier request that Defra consider developing a climate change management framework whereby all environment-related policies, directives and consultations can be ranked according to their impact on climate change.

In respect of Q4(b) FDF would recommend that substitution be the principal aim, rather than the sole criterion. We think that flexible and innovative thinking is required on all areas of waste management, which could be undermined by excessive reliance on aims and criteria. We would also urge the Department to explicitly state how substitution of resources fits within the climate change architecture.

Article 6 – Disposal

Q5: What are your views on the definition of “disposal” proposed by the Commission in Article 6 of the revised WFD? For example:-

- a) Do you consider it practicable and/or environmentally sound to define disposal as something that happens only where recovery is not possible; and*

- b) *Do you consider that the Commission should be enabled by means of comitology to add specific operations to the list of disposal operations set out in Annex 1 where, despite substitution taking place (ie, a purported waste recovery operation), the results indicate that the operation has only a low potential?*

In respect of Q 5(a) it is FDF's view that defining disposal in this way is neither practical nor environmentally sound. There will always be some waste output whatever waste process is adopted and whatever waste definition is agreed. We recommend adopting the best environmental option approach - which whilst potentially untidy, does have the objective of delivering a beneficial environmental impact.

In respect of Q 5 (b) we do not consider that the Commission should be able to use the comitology process to make these changes. Despite attempts to rectify the democratic deficit through the recent inclusion of the European Parliament, comitology remains in our view a remote and un-transparent process. We would therefore urge DEFRA to challenge this process, replacing it with the more usual route of co-decision making, which in our view is more democratic.

Article 9 – Costs

Q6: What are your views on the revision of the “polluter pays” principle proposed by the Commission in Article 9 of the revised WFD? For example:-

- (a) *Do you consider that an explicit reference to the “polluter pays” principle should be retained in the revised provision or is this unnecessary;*
- (b) *Do you consider that the application of the “polluter pays” principle should remain limited to waste disposal or should it be extended to waste recovery; and*
- (c) *Do you consider that application of the “polluter pays” principle should continue to apply to “the producer of the product from which the waste came” or should it be limited to “anyone whose activities produce waste”?*

In respect of Q 6 (a) we agree that explicit reference should be retained but not expanded.

In respect of Q 6 (b) our understanding and experience of the polluter pays principle is that it already extends to waste recovery and waste recycling. We would therefore request more information on the context of the question before providing a view.

In respect of Q 6 (c) FDF considers that any organisation that derives economic benefits from an activity should bear their share of the environmental costs. We consider that this helps to create more sustainable supply chains. We would therefore be opposed to the limitation of polluter pays and producer responsibility to a narrow definition. On the other hand we would support an expansion of the principle in dialogue with business. We believe that there are significant benefits to the shared producer responsibility approach because it helps in integrating benefits across the supply chain of goods.

Article 10 – Network of disposal operations

Q7: What are your views on the proposed change in Article 10 of the revised WFD to require the establishment of an adequate network of disposal installations to take account of “best available techniques” (“BAT”), as defined in the IPPC Directive, instead of “best available technology not involving excessive costs”?

FDF considers that unless cost is considered any and every solution will not be sustainable. Economic cost has to be considered – not least because the EU operates within a global economic environment. Sustainable solutions are required, and this necessitates reasoned and reasonable cost considerations. Equally important is the development of sufficient capacity to meet long-term disposal needs.

Chapter V: Permits or registration

Article 21: EU wide minimum standards for disposal and recovery operations

Q12: What are your views on the proposal in Article 21 of the revised WFD that the Commission should be able to adopt by comitology EU-wide minimum standards in permits for waste disposal and recovery operations? For example:-

- (a) Do you consider that the responsibility for standard setting in permits for waste disposal and recovery operations should be transferred to the Commission or should remain with Member States’ competent authorities to determine on the basis of the risk posed by each operation;*
- (b) Do you consider that the adoption of EU-wide minimum standards for waste disposal and recovery operations would have (i) a positive or negative environmental impact in the UK and (ii) a positive or negative economic impact on UK industry/business; and*
- (c) Do you consider that the adoption of EU-wide minimum standards for waste disposal and recovery operations would have a positive or negative impact on recovery/recycling targets and landfill diversion rates in the UK?*

In response to Q12(a) and given our view on the local nature of waste disposal, FDF would suggest that the most appropriate authority to set standards will be that which resides in each Member State.

Regarding Q12(b) this depends entirely on the level at which the standard is set! Once we have seen the provisions we will be able to provide a more considered answer. However, we would like to see recovery, particularly recycling) taking place within the EU wherever possible because firstly it will provide materials for EU businesses and secondly EU quality standards are likely to be higher than those in the developing world.

Regarding Q 12(c) this depends entirely on the level at which the standard is set! Once we have seen the provisions we will be able to provide a more considered answer. However, any EU standards should apply equally to materials for exportation.

Chapter VI: Waste Management

Articles 29-31 – Waste Prevention Programmes

Q16: What are your views on the proposals in Articles 29-31 of the revised WFD to require Member States to draw up waste prevention programmes? For example:-

- (a) Do you consider that Member States should be required to assess the opportunities for taking all 16 of the measures set out in Annex IV to the revised WFD;*
- (b) Do you consider that the Commission’s proposals will fulfil their aim of breaking the link between economic growth and the environmental impacts associated with the generation of waste; and*
- (c) Do you consider that the Commission’s proposals will prove beneficial in terms of waste prevention and the meaningful measurement of progress in waste prevention or result in the imposition of administrative burdens and costs without such commensurate benefits?*

FDF is not convinced that Articles 29, 30 and 31 are suitable for inclusion in the Directive. An obligatory requirement to develop national prevention programmes combined with the wide freedom left to Member States in developing individual indicators, targets and instruments, triggers the risk of industry having to deal with 25 inconsistent prevention programmes supported by uncoordinated economic instruments. This would clearly create obstacles for companies to operate efficiently across the EU.

Experience with economic instruments in the field of packaging has shown that the uncoordinated use of national measures (e.g. eco-taxes) can result in arbitrary discriminations, which harm the functioning of the internal market without being justified on environmental grounds. In addition, the question arises why new administrative duties should be imposed, if prevention is already the most important point in the waste hierarchy and is covered by the national waste management plans. Articles 29 to 31 would create heavy additional bureaucratic burdens for both Member States and business without providing tangible environmental benefits at the EU level.

Therefore given these concerns and in line with the principles of proportionality and subsidiarity, FDF supports the deletion of proposed Articles 29 to 31 from the Directive.

Specifically in response to Q 16 (c) FDF considers that such outcomes, desirable as they may be, are not likely to come from the Commission’s intervention. We believe there is a stronger rationale for local solutions in waste management.

Annex II: Waste Recovery Operations

(R1): Municipal Solid Waste Incineration

Q18: What are your views on the proposal in Annex II to the revised WFD to classify as waste recovery operations “incineration facilities dedicated to the processing of municipal solid waste only” which meet a specified energy efficiency threshold? For example:-

- (a) Do you consider that the application of an energy efficiency threshold for municipal incinerators could generate both economic and environmental benefits and facilitate achievement of the targets for diversion from landfill;*
- (b) What are your views on the energy efficiency threshold and the formula proposed by the Commission – is the proposal practicable and is the proposal threshold set at the right level or too high or too low; and*
- (c) What do you consider will be the practical implications for the UK of classifying as recovery operations municipal waste incinerations which meet the proposed energy efficient threshold?*

FDF is not currently in a position to comment in detail on this proposal. However if it is decided to make this change to the WFD FDF considers it important to ensure that there is no detrimental impact on the regime which currently operates under the EU Packaging and Packaging Waste Directive where incineration with energy recovery per se (ie without any efficiency threshold) is allowed to count towards achievement of the targets.