Revising the Waste Framework Directive

Basic Deficiencies of European Waste Law and Proposals for Reform

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For years, there has been criticism that there are substantial ambiguities in European waste law and that, in particular, crucial legal terms, such as waste, disposal and recovery, have not yet been defined sufficiently clearly. Such ambiguities hamper transposition into national law, complicate implementation by the national authorities and thus give rise to considerable economic and environmental problems in the waste management sector. Prompted by the Sixth Environmental Action Programme, the European Commission has finally initiated a revision of the general legal framework for European waste management. Amendments to the Waste Shipment Regulation have already been approved at a political level and are likely to be adopted this year. Revision of the basic terms, principles and provisions of the Waste Framework Directive (WFD), however, is still at a rather early stage.

Against this background, we hope to show by the following that the ambiguities in EC waste law are not just a consequence of a lack of definitions but also the result of uncertainty surrounding basic regulatory and strategic issues which must be addressed first (Part I). We will therefore submit recommendations as to how these strategic questions should be answered in the light of both the environmental risks currently faced by the waste sector and the specific potential of waste-law approaches to reduce these risks (Part II). Finally, we will show how these strategic solutions could be converted into specific provisions and amendments to the WFD (Parts III and IV). The recommendations and suggestions presented below have been generated by a study conducted by the authors at the request of the German Ministry of the Environment[1].

I. Major deficiencies in existing EU waste law and basic reform issues

The vast majority of practitioners in the field of waste management and waste law basically agree that the WFD and, in particular, fundamental matters – such as the definition of waste and the distinction between recovery and disposal – should be revised and clarified. Obviously, such major ambiguities give rise to considerable uncertainty on the part of the markets and authorities affected. Moreover, the vagueness of the basic terms is not just a matter for legal interpretation which could be confidently delegated to the judiciary. Instead, the ambiguous terms and provisions in the WFD conceal basic strategic questions and challenges which must be tackled coherently by the legislature.

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1. The definition of waste and the regulatory scope of waste law

The definition of waste is very unclear[2]. According to Article 1 WFD, it encompasses substances or objects that are undergoing recovery operations. However, not every kind of secondary use of substances and objects must automatically be regarded as recovery. It is still unclear how the recovery of waste is to be distinguished from the secondary use of products and materials and in what circumstances waste ceases to be waste so that the relevant waste law obligations also cease to apply.

Neither the lists of potential waste substances and materials in Annex I to the WFD and in the European Waste Catalogue nor the descriptions of recovery operations contained in Annex II B to the WFD provide sufficient answers to these fundamental questions of scope and function[3]. Such crucial issues are, thus, largely left to judicial interpretation. The European Court of Justice (ECJ) has already made admirable attempts to construe the definition of waste in numerous decisions[4]. However, it has scarcely adopted a systematic approach in its judgments. Instead, it has continuously widened the scope of the waste definition on the basic assumption that this is necessary to guarantee the high level of environmental protection required by Article 174(2) EC[5]. Surprisingly, it has never considered whether the required high level of protection might be (better) accomplished by means other than waste-law instruments. In Case C-1/03[6], it even extended the scope of waste law to cover non-movable substances, without addressing that possibility and without examining the functional limits of the WFD and its supplementary legislation. The same fundamental shortcomings can be identified in prominent approaches taken by authorities and academics to the distinction between waste and non-waste[7]. However, without a systematic functional approach, it is impossible to develop an adequate set of criteria for applying waste law where it is actually needed.

A clear and effective distinction between waste and non-waste certainly cannot be derived solely from the general objective of ensuring a high level of environmental protection and resource efficiency, since this objective applies not only to the waste sector but also to production and consumption processes and is pursued not only by waste law but equally by the general environmental law applicable to products, substances and installations. In order to delimit the scope of waste law appropriately, it is necessary to distinguish the specific functions of waste law within the wider scheme of environmental law. Waste-law instruments need and must not be applied where a high level of protection can equally be guaranteed by general rules on products, substances and installations. In order to draw a conclusive distinction between waste and non-waste, it must be clarified how waste law and other environmental law instruments can interact effectively.

2. The distinction between recovery and disposal and the scope of spatial market restrictions

The distinction between recovery and disposal plays a fundamental role within the existing system of waste law. It is the basis for both the general priority of recovery and the principles of self-sufficiency and proximity. The disposal of waste should be prevented by means of recovery. Where waste must be disposed of, it is to be assigned to local

2 Dieckmann, Das Abfallrecht der Europäischen Gemeinschaft, 1994, p. 162; Petersen, "Regelungen des Bundes", in: Klett et al., Abfall ohne Ende? oder Ende der Abfalleigenschaft duch Umwandlung zu Rohstoff, Druckschrift zu den 9. Kölner Abfalltagen, 2000, pp. 173 ff., 177 f.; Enders, "Vorschlag zur Änderung des Abfallbegriffs der EG-Abfallrahmenrichtlinie", DVBl. 2002, pp. 1021 ff., 1023; Scherer-Leydecker, "Europäisches Abfallrecht", NVwZ 1999, pp. 590 ff., 593; Krämer, "The distinction between product and waste in Community law, in: Klett et al., pp. 253 ff., 266; de Sadeleer, "New Perspectives on the Definition of Waste in EC Law", JEEPL 2005, pp. 46 ff.; Weidemann, "Abfallrecht: Grundlagen", in: Rengeling (ed.), EUDUR, Vol. II, Part 1, 2nd ed., 2003, section 70, para. 49.

3 Expressly: ECJ, Case C-9/00 – Palin Granit [2002] ECR I-3533, paras. 25, 26 and 27, and Joined Cases C-418/97 and C-419/97 – ARCO Chemie Nederland [2000] ECR I-4475.

4 Joined Cases C-206/88 and C-207/88 – Zanetti and Vessoso [1990] ECR I1461; Cases C-304/94 – Tombesi et al. [1997] ECR I-3561; C-129/96 – Inter-Environnement Wallonie [1997] ECR I-7411; ARCO Chemie Nederland, supra note 3; C-444/00 – Mayer Parry Recycling [2003] ECR I-6163; Palin Granit, supra note 3; C-114/01 – AvestaPolarit [2003] I-8725; and Case C-235/02 – Marco Antonio Saetti; Case C-1/03 – Van de Walle; and Case C-457/02 – Antonio Niselli.

5 See, inter alia, Case C457/02 – Niselli, and similar wording in Case C9/00 – Palin Granit, para. 23.

6 Van de Walle, supra note 4.

7 In particular: OECD, Final Guidance Document for Distinguishing Waste from non-Waste, ENV/EPOC/WMP(98)1/Rev.1 of 2 July 1998, and Ökopol, Definition of waste recovery and disposal operations, Part B – Neutralisation of waste specific environmental risks, March 2004.

facilities and exempted from international trade in compliance with the principles of self-sufficiency and proximity.

However, many waste-management operations result in only partial and not full recovery of the waste and, therefore, cannot be classified entirely under a single category of either recovery or disposal. This is true, more specifically, of (1) incineration operations, given the distinction to be drawn between energy recovery and thermal pre-treatment for disposal, (2) operations using only the waste volume and (3) various operations (such as bio-chemical sorting treatment) which lead to partial but not full recovery of heterogeneous waste. In the case of these "ambivalent operations", the applicability of both the priority of recovery and the principles of self-sufficiency and proximity remains largely controversial. As a consequence, this wide area of waste management has been the subject of an intense legal dispute arising particularly in those Member States which make extensive use of their competence to restrict the shipment of waste destined for disposal. In principle, however, it is not a matter for the ECJ but rather for the legislature to provide solutions to the basic regulatory issues surrounding the distinction between recovery and disposal. A partial decoupling of the spatial restrictions on the waste market from the unclear distinction between recovery and disposal is conceivable only within the context of a legislative revision, which could increase both the effectiveness and clarity of the legal framework (see Parts II.7 and III.5 below).

3. In particular: scope of exclusive public-sector competence to manage household waste

The scope of the spatial management principles (proximity and self-sufficiency) is of particular importance in the field of household waste. Many Member States have granted exclusive competence and responsibility for the management of all household waste to public-sector bodies. Households must offer their waste to public enterprises, regardless of whether the waste is destined for disposal or recovery. As a consequence, no free (transboundary) market whatsoever is permitted in the field of household-waste management. However, since the principles of proximity and self-sufficiency apply only to disposal operations and waste destined for such operations, they cannot justify the general market ban imposed in relation to household waste. Consequently, even under existing European law, Member States could be forced to open up the recycling of household waste to the free market. However, that is obviously not the intention of either the Community or the Member States. Rather, it is widely accepted that there are convincing arguments for maintaining an exclusively public-sector system of managing household waste, not only on environmental grounds but also from the point of view of the market and for efficiency reasons, and, accordingly, Member States should be entitled to restrict free trade generally in relation to household waste. A sustainable legal basis for this must therefore be introduced to EC waste law. The Commission's proposal for amendment of the Waste Shipment Regulation already contains such an addition, which entitles Member States to prohibit the shipment of household waste even where it is destined for recovery. Provision for an exemption of household waste from the common market should, however, also be made in the basic legal framework of the WFD.

4. Legal objectives and standards for waste recovery

Another fundamental shortcoming of the existing waste law can be found in the regulation of recovery operations. At present, only few waste streams and recovery operations are subject to specific environmental standards, for example those imposed by the Incineration and Landfill Directives. Otherwise, there are no standards other than the purely general objective laid down in Article 4 WFD, which stipulates that recovery operations must not endanger human health or harm the environment. A uniform and coherent implementation of that objective, however, can be achieved only by specific common minimum standards.

Where there are no such common environmental standards, Member States will be entitled under the revised Waste Shipment Regulation to prohibit any shipment of waste which circumvents national standards. According to a recent ECJ judgment, this would already be permissible under the existing law. Thus, the subsidiary setting of national standards remains permissible and enterprises complying with

national standards can be shielded from foreign competition subject to either lower or even no standards. This is true, at least, of standards designed to protect human health and the environment.

It is not clear, however, whether Member States are similarly entitled to link export bans to standards designed to guarantee a particular level of high-grade recovery, for example those giving priority to recycling over energy recovery. In the context of the general scheme of the WFD, this raises the question whether the concept of high-grade recovery should be introduced explicitly to European waste law as a (new) general objective. There is no such general objective in the current version of the WFD. Requirements aiming at high-grade recovery have been imposed only through specific directives applying to particular waste streams (e.g. recycling quotas laid down in the Waste Packaging Directive).

II. Aims and essential elements of a revised Waste Framework Directive

1. Clarification of basic terms and provisions: only with a coherent approach

The overriding aim of any revision must be to reduce the persistent ambiguities in the basic terms and provisions with a view to establishing a clear and reliable legal basis for European waste management permitting effective implementation of the relevant legal instruments. Legal certainty should not, however, be pursued as an end in itself.

Rather, clarification and development of the WFD should be based on a coherent regulatory approach which applies the waste-law instruments as effectively as possible so as to make a meaningful contribution to achieving the environment policy objectives of the WFD.

The WFD should make a substantial contribution to achieving a high standard of environmental protection in three ways and expressly aims to:

– prevent risks to the environment and health potentially arising from the disposal or recovery of waste by placing the Member States under a general obligation "to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment" (Article 4 WFD);
– guarantee sufficient domestic waste management capacities by requiring the Member States to adhere to the management principles of self-sufficiency and proximity in waste disposal (Article 5 WFD) and carry out waste-management planning (Article 7 WFD);
– ensure preventative resource efficiency by requiring the Member States to adopt measures to encourage, firstly, the prevention of waste production and, secondly, the recycling of waste and its use for energy recovery (Article 3 WFD).

Since protection of the environment and health and the conservation of resources are likewise the central objectives of other environmental-law provisions on methods, installations, substances and products, one of the crucial challenges in adopting an appropriate approach is to find a means of coherently and effectively co-ordinating waste-law instruments and such other regulatory schemes. The potential for overlap and collision with other legal instruments should be borne in mind, in particular, when developing the definition of waste and the standards to be met by recovery processes under waste law (recovery standards).

2. The strategic perspective: achieving objectives by setting specific standards for installations, substances and products

Legal certainty and effective implementation of environmental protection objectives cannot be attained throughout Europe on the basis of the general provision in Article 4 WFD. Thus, it was not the WFD but the Incineration and Landfill Directives which first introduced a uniform level of protection, together with the necessary implementation obligations, to the fields governed by them respectively. The primary aim of European waste policy must therefore be to convert the general protection requirement into specific standards for waste processing and recyclable products in relation to other important methods of waste management. However, in pursuing that aim, it is important to ensure that the waste-law rules adopted perform an appropriate function. In the context of the law on installations, substances and products, waste law should fulfil the following three functions:

– guarantee of adequate supervision of waste destined for recovery or disposal (transitory function);
– subsidiary setting of substantive standards for recovery in so far as protection of the environ-

ment and health is not properly guaranteed by other provisions of environmental law relating to installations, substances and products;
– establishment of a scheme regulating the production of waste which permits the use of high-quality recovery processes in the interests of resource efficiency.

The substantive standards set by waste law in the context of its important subsidiary function should, as far as possible, refer directly to installations, substances and products and the rules laid down should supplement the general environmental law in those areas. Thus, uniform limit values and classification categories for recyclable building materials and cement, maximum levels of harmful substances for products made of (waste) wood, for the impoundment of compost (from organic waste) and fertilisers (from sewage sludge) as well as, in the long term, integration of the Incineration Directive and the law on industrial installations (Directive on large combustion plants, Integrated Pollution Prevention and Control (IPPC) Directive) would, for example, be desirable.

The more the risks involved in recovery and disposal are regulated by the environmental law on installations, substances and products and limited by setting specific standards (emission ceilings, substance bans and restrictions, restrictions on use, etc.) aimed at ensuring a high level of protection, the less legal uncertainty as to the definition of waste and the distinction between waste disposal and waste recovery will impair the effectiveness and efficiency of the relevant law. At the same time, the acceptance of recyclable products will be increased. In the mid to long term, European waste policy should therefore aim towards securing a high level of environmental protection and resource efficiency throughout the entire production cycle by laying down the necessary framework rules on installations, products and substances and thereby reduce the need to set subsidiary standards in waste law.

3. The next steps: cautious use of the WFD and waste shipment law as a basis for a strict profile of standards for installations, substances and products

As explained above, implementation of the protective objectives of waste law must begin at all levels of the other fields of environmental law. Thus, in future, provisions supplementing the existing law on products, chemicals and installations, in particular, will also be required. However, the WFD and the Waste Shipment Regulation could themselves be geared better than at present towards converting their abstract objectives more rapidly into specific standards for installations, substances and products.

This development should be encouraged, firstly, by laying down in the WFD requirements that the Member States and, in particular, the Commission or Community themselves adopt rules designed to make the protective duties relating to processes and products more specific. In order to force the adoption of relevant Community-law requirements, express reference can be made, as in the Air Quality Directive, to subsidiary directives, for which proposals would have to be submitted in the near future. At the same time, however, it is advisable to explore the avenue of a "substatutory" development of standards in the form of "technical guidelines" to be adopted in committee procedures and an appropriate legal basis for this should be established.

Secondly, the Directive should offer the necessary incentives to make the standards more specific in terms of processes and product requirements. To this end, the WFD should, in so far as is compatible with its function, ensure that, where appropriate, the specific standards prevail over the general waste-law instruments and that material is not designated as waste where, in the particular circumstances and on the basis of the relevant installation and product standards, it is guaranteed that waste or secondary raw material will be processed to a non-hazardous product by non-hazardous means. The relevant sectors might then even regard the specific environmental standards applying to production and products as a release from the vague obligations, controls, permit conditions and any shipment restrictions imposed on them under waste law.

Similarly, the rules governing spatial management of waste, an issue closely linked to the distinction between recovery and disposal, should, in future, be fashioned so as to contribute more to implementation of the environmental objectives and specific minimum standards set by Community law. The fact that operations comply with as high a level of environmental protection as possible and that waste is not shipped in order to be deposited at

a cheaper landfill site to the detriment of the environment should be considered more important than the proximity of the disposal.

In light of these basic considerations, it is possible to identify the following core elements of any revision.

4. Definition of waste and the limit of its scope: link to installation and product standards

The definition of waste should make the scope of waste law more precise so as to allow it to perform fully the three functions mentioned above for which it is responsible within the system of waste regulation. Therefore, the definition of the waste must, first of all, be tailored to the function of ensuring adequate supervision of waste destined for recovery or disposal. In order to be able to prevent risks to human health and pollution of the environment in the "search phase" on the basis of the waste-law supervision scheme, the term "waste" must therefore be given a wide scope. Consequently, objects (inclusive of substances) should be defined as waste whenever it is clear, from a statement of intent made by the holder or in light of the circumstances, that an object is not destined for any use, or indeed even where there is merely evidence to suggest, possibly contrary to an untruthful statement of the holder, that this is the case. At the same time, however, account must also be taken of the "transitory" function of waste law of ensuring that the relevant object is either returned to the product cycle or properly deposited at a landfill site. If, and as soon as, it is certain that an appropriate management (recovery) route will be taken, the object can cease to be regarded as waste, or, indeed, if this is already certain when the object is generated, such character could simply not be conferred, in the first place. Such certainty exists precisely in those cases in which a management option is chosen for which adequate regulation of the risks is – to the extent necessary – provided by standards applying to installations, substances and products.

In sum, a revised definition of waste should make clear that any allocation of an object which has become "purposeless" or been produced "without any purpose" to a recovery, production or consumption process governed by adequate rules on installations, substances and products renders it unnecessary to designate that object as waste either a priori or a posteriori. The abstract and general definition of waste in the WFD, to be clarified as described above, will thus become all the more precise, narrow and easy to apply, the more reliance can be placed on the existence of adequate rules on processes, substances and products for disposal and recovery methods.

5. Recovery standards: require, and provide the basis for, more specific rules on installations, substances and products

As has already been stated in relation to the strategic aspects of the development of waste law, any revision of the WFD should also lay down appropriate "foundations" for imposing specific minimum standards under Community law on processes, substances and products used in high-risk recovery methods.

Primarily, those standards should be laid down directly by, or on the basis of, the law on installations, substances and products. However, in order to achieve the aims of the prevention of risks, sufficient domestic capacity and resource efficiency, an additional basis for the subsidiary setting of substantive standards should be incorporated into the WFD. Above all, subsidiary directives come into question as a means of strict regulation. However, as has already been touched upon, the necessary framework should also be established at a "sub-statutory" level, that is to say, in the form of guidelines to be adopted and drawn up by the Regulatory Committee, where appropriate, on the basis of the Seville Process. In the future, the WFD should provide a basis for such guidelines, although the process of standardisation must not be restricted to waste standards but should expressly encompass the recycling (subsidiary) products. Only then can waste law, too, be used a basis for creating the conditions (sufficient installation and product standards for secondary uses) in which the subsidiary controls and general duties imposed under waste law can give way to other, more specific instruments and in which, accordingly, waste and the duration of any designation as waste can be defined more clearly and restrictively.

6. In particular, resource efficiency: cautious promotion of high-quality recovery

Effective contributions to resource efficiency can only and should continue predominately to be made on the basis of recovery and recycling standards for products and substances and not on the basis of the general priority of recovery or a general requirement of high-quality recovery, as laid down, for example, in German waste law. A high degree of quality is too vague a criterion to be able by itself to regulate recovery processes in the transboundary market in a manner which can both provide legal certainty and respond to market needs. This is all the more true in relation to the criterion of excessive costs. Considerable differences of opinion and disputes between the Member States, and thus legal uncertainty, would be unavoidable if, for example, it were to be permitted to base export restrictions on national standards of high quality. Accordingly, any action taken on the basis of the WFD should continue to follow cautiously the approach of specific directives on products and substances where this appears necessary to exploit clearly existing potentials for high-quality recovery of certain product or substance categories.

In that context, the WFD should lay down rules only in so far as is generally necessary to introduce high-quality recovery options to the market and to maintain their availability. Since high-quality recovery frequently becomes impossible as a result of a lack of separation or the subsequent mixing of waste, the Member States should, in any event, be granted the right to order, within the limits of the economically reasonable, the separation and sorting of recyclable waste.

7. Distinction between recovery and disposal: link spatial management more closely to environmental objectives

The spatial management of waste streams, in accordance with the principles of self-sufficiency and proximity, on the basis of the general distinction between recovery and disposal should, as far as possible, be replaced by a system of management based on standards of environmental permissibility. It is, in principle, incompatible with a system of market regulation which focuses consistently on environmental protection to link spatial management generally to a definition of disposal, particularly as it is now acknowledged that disposal and recovery can be of equal risk to the environment. More appropriate, therefore, is the solution, already put forward in the proposal for amendment of the Waste Shipment Regulation, that shipments may be prohibited, irrespective of whether they are intended for recovery or disposal, if there is no compliance at the foreign destination with the relevant environmental provisions of the exporting State or, as the case may be, Community law.

However, although such a solution promises a better scheme of management, a distinction between disposal and recovery and the associated principles of self-sufficiency and proximity cannot, for the time being at least, be dispensed with entirely. Firstly, the concept is deeply rooted in the international law on waste shipment, which cannot be amended at present, and, secondly, the Member States' existing (public-sector) waste-management structures are still based partially on the idea that waste for disposal must be disposed of domestically, in the region and, in many cases, by public-sector waste-management bodies[8]. Therefore, even a revised WFD cannot depart from the principles of self-sufficiency and proximity of disposal. However, as part of the transition to a management system focusing on the level of environmental protection, the scope of those principles can and should be restricted by basing the distinction between recovery and disposal expressly on a broad definition of recovery which, in principle, encompasses all "double-function" waste-management measures allowing a significant recycling or energy benefit to be derived from the waste.

Only by way of such a broad definition of recovery can the linking of spatial management to the distinction between recovery and disposal be reconciled with the aim of resource efficiency, because it is basically inconsistent with that aim to classify treatment deriving a significant benefit from waste as disposal, as such classification bars entry to the Europe-wide recovery market and, possibly, modern recovery facilities.

Limiting the relevance and impact of the self-sufficiency and proximity principles by means of a broader definition of recovery does not constitute a

8 See the Article by Bree in this issue, p. 478.

disproportionate breach with existing conditions. In fact, those management principles have already become considerably less relevant in the face of the increasing trend of waste streams towards recovery and the broad interpretation of the term recovery.

As a logical consequence of that trend, a revised WFD should subject only disposal measures in the strict sense, that is, in particular, the deposit of waste at landfill sites, to the proximity principle and should do so in the form of an obligation on the Member States to ensure that sufficient disposal and pre-treatment capacity is available for the disposal of locally produced non-recoverable waste close to the site of its production. However, in the context of a scheme more closely orientated to the level of environmental protection, resource efficiency and the potential of a common waste management market, it must be accepted that, where only partially usable waste is recovered, the non-recoverable parts of that waste will not be classified as waste for disposal until they are eventually "left over" as a result of the recovery process.

Precisely for that reason, steps must be taken to avoid a situation whereby recovery is notified simply in order, in reality, to circumvent strict national standards of disposal by way of the then possible shipment of the non-recoverable parts, as this, too, is contrary to the idea of management focusing on the level of protection. It must therefore be considered in each case whether shipment is environmentally justifiable in the light of the recycling or energy benefit to be derived from the waste, the share of residual non-recoverable waste and the nature of its disposal. In principle, the "disproportionality objection" provided for in the fifth indent of Article 7(4)(a) of the Waste Shipment Regulation, which will also appear in the amended version, provides a workable basis for weighing up such considerations.

The distinction between energy recovery and thermal treatment for disposal purposes should likewise be based on a broad definition of recovery. However, for reasons of legal certainty, that definition must be made more precise. Such clarification should, essentially, be based on the case-law of the ECJ (Case C228/00 Belgian Cement Factories) but should add the correction that the substitution of fuel which would otherwise have to be used in an installation other than the incineration plant using the waste can also be regarded as recovery. The view taken by the ECJ in its Luxembourg judgment (Case C-458/00) that recovery is not, in principle, possible in a waste incineration plant because primary fuel is not substituted in the plant itself cannot be reconciled with either the aim of resource efficiency or with a broad definition of recovery. If that interpretation was intended to secure the exclusive competence of local authorities for the incineration of household waste, this approach – incidentally unsuccessful – will not be necessary in future, if the Member States are granted the right to assign the management of household waste to public enterprises and, as is already provided in the proposal for amendment of the Waste Shipment Regulation, to prohibit shipments regardless of whether the waste concerned is to be recovered or disposed of (see section 8 below).

8. Safe disposal and waste management by local authorities: create a basis for household waste-management by the public sector

In order to establish legal certainty and further disengage the distinction between disposal and recovery from a function which it is, in any event, unable to fulfil, the WFD should lay down a separate e authorisation to provide public-sector waste-management services which specifies, in terms of the origin, nature and collection of the waste, the fields of waste management subject to the relevant market restrictions, that is, above all, household waste. The attempt by the ECJ, in its Luxembourg judgment, to ensure that the management of household waste remains the responsibility of local authorities or the State by classifying waste incineration as disposal is unlikely to be successful and gives rise to legal confusion. Most modern waste incineration plants satisfy the requirements of waste recovery if recovery is defined broadly to include resource-efficient operations. The "disposal" of household waste in such incineration plants is thus recovery and subject to neither the principles of proximity and self-sufficiency nor the obligation to supply the waste to particular bodies for disposal.

III. Regulatory proposals

Article 1

For the purposes of this Directive:

(a) "waste" shall mean any *movable* substance or object in the categories set out in Annex I which

the holder discards or intends or is required to discard. *That shall be the case where the object or substance*

– *is no longer used or may no longer be used for its original purpose or*
– *has been generated as a by-product or residue of an action not primarily intended to produce it,*

unless the holder shows that the substance or object has a general market or utility value and will immediately be used as a product or raw material for a permissible purpose which can neither endanger human health nor harm the environment. Such a non-hazardous purpose shall be presumed, in particular, where, in view of the intended use or on the basis of the applicable provisions, a release of pollutants posing a risk to health or the environment can be ruled out.

Where specific standards for secondary raw materials and products have been laid down in accordance with Article 4, a use shall be deemed to be non-hazardous as soon as those standards are met.

…

(e) "disposal" *shall mean any measure which serves to exclude permanently any further use of the waste, in particular permanent storage and landfill and the thermal treatment of waste for the purpose of landfill. A non-exhaustive list of waste-disposal operations is set out in Annex II A.*

(f) "recovery" *shall mean any measure whereby secondary raw materials, products or fuel are extracted from or energy is directly generated by waste. A non-exhaustive list of operations which may serve the recovery of waste is set out in Annex II B.*

Recovery in the form of the generation of energy (Annex II B, R 1) covers any incineration of waste, provided that it directly substitutes primary sources of energy or energy is generated from the waste and used predominately in the form of heat or electricity.

Recovery shall also include measures whereby waste is used only partly to generate raw materials, products or energy and must otherwise be disposed of.

Article 3

Member States shall take appropriate measures to encourage:

(a) …

(b) secondly, *the most extensive possible use of waste for recycling or energy recovery in accordance with the standard of the best technology available and to the extent economically reasonable. For this purpose, the Member States may require that certain usable waste substances be stored separately or sorted.*

Article 4

1. Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular
   – without risk to water, air, soil and plants and animals,
   – without causing a nuisance through noise or odours,
   – without adversely affecting the countryside or places of special interest.

   (To be deleted: Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.)

   Those measures shall also guarantee that neither secondary raw materials or secondary products nor their use pose a risk to human health or the environment.

   Member States shall take the measures necessary to ensure that, in the interests of protecting human health and the environment, the best technology currently available not entailing excessive costs is used in recovery and disposal operations.

   Member States may also prohibit recovery measures which, in view of the value and quantity of the secondary raw materials or energy which can be generated, on the one hand, and the environmental risks usually associated with such operations, on the other, are generally unjustifiable on environmental and economic grounds.

   Member States shall notify the Commission of the adoption of any of the above measures.

2. *In so far as adequate rules on installations or products designed to prevent emissions which pose a risk to health or are otherwise harmful have not been laid down by Community law, the Commission shall*
   – *submit proposals for appropriate supplements or amendments to the Community directives on installations or products;*

– *in compliance with the procedure provided for in Article 18(2), lay down, in Annex III to this Directive, guidelines on the standards which, in the light of the best available technology not entailing excessive costs, must be met by individual recovery methods and secondary raw materials and products in order to prevent or reduce the release of pollutants posing a risk to health or the environment;*
– *submit to the Council proposals for subsidiary directives laying down, in relation to recovery methods of particular importance economically, environmentally or in terms of the quantities processed, standards to be met by those recovery methods and by secondary raw materials and products and the use thereof, with a view to ensuring a high level of environmental protection.*

The standards set out in Annex III in relation to particular recovery methods and secondary raw materials and products shall constitute binding Community environmental protection standards within the meaning of Article 12(1)(c)(i) of the Waste Shipment Regulation (as revised).

Article 5

1. Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best technology not involving excessive costs. The network must enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste.
2. The network must also enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.
3. *In order to implement the objectives referred to in paragraphs 1 and 2, Member States may order that waste substances which cannot be used for either recycling or energy recovery are to be stored separately from recoverable waste substances or that non-usable parts of a waste mixture are to be separated and disposed of near to the place of their production, provided that this is technically possible and does not involve excessive costs.*

Article 5a

In order to guarantee the orderly recovery or disposal of household waste and other types of waste collected with household waste, Member States may provide that such waste is to be supplied to publicsector bodies or enterprises exclusively responsible for the collection, disposal and recovery of that waste.

IV. Reasons for the individual provisions

1. Article 1(a): definition of waste

(a) It is proposed to insert into the definition of waste in Article 1 of the WFD additional clarifying features, which, on the one hand, establish an – extensive – presumption that an object is to be designated as waste but, on the other, enable the holder to rebut that "waste presumption". It is for the waste holder to demonstrate that an object has the features required to preclude its designation as waste. This "two-tier" definition of waste is intended to reflect the current attempts to make the term waste more precise and, in particular, to clarify when an object ceases to be waste. However, it is not proposed to define separately when an object ceases to be waste. Rather, the definition of "waste" will itself include criteria which, if satisfied by an object or substance, will preclude its classification as waste. The "non-waste criteria" may be satisfied immediately on the object's "loss of purpose" or else the holder may be able to prove their fulfilment at later point. More specifically, the following should be noted in relation to the definition:

(b) As under current law, an object or substance falls under the definition of waste where, in light of the specific circumstances, it must be assumed that it can or should no longer be used. This is the case, in particular, where possession of a substance or object is abandoned, leading to the loss of any purpose, that is, for example, where it is thrown into a waste collection container, dumped at a landfill site or simply carelessly discarded.

Secondly, as a result of the presumption, the definition of waste will apply whenever, despite the holders claim of a new intention to use, the external

circumstances give grounds for concern that the holder has declared such an intention as a pretext or that, because the substance or object was not originally produced or generated for that purpose, the intended use may entail the release of pollutants. No strict requirements need be satisfied in order to justify this initial suspicion. It suffices that the factual or legal circumstances permit a presumption that the original purpose has been lost (used objects are stored unsafely on premises for a long time) or that a substance or object is merely a by-product of a process which was not primarily intended to produce it. The broad scope of the presumption of waste character can be justified in view of the general aim of a high level of protection and is appropriate, given that, at the same time, the definition itself also limits that scope, in accordance with its aims and functions, in the form of the "negative" features precluding the presumption.

A sufficient probability of use can be demonstrated, in particular, by proof of a market value. In accordance with recent ECJ case-law on the distinction between waste and raw material, the test of "economic value as a product" (Case C-9/00 – Palin Granit, paragraphs 34/35; Case C-457/02 – Niselli, paragraph 44) should be regarded as the crucial factor in determining whether the presumption can be rebutted. Neither the absence of a constant market for certain types of substance nor a certain potential for fraud (sham agreements, etc.) can be used as an argument against taking account of market value as evidence of economic utility.

Since the absence of probable use is the decisive factor justifying application of waste-law instruments, the question whether an object is to be defined as waste must necessarily be answered dynamically in the light of the needs and demands of the economic process. Waste cannot be defined as a "static" feature which, depending on certain substance properties, is either given or lacking in each case. Conformity with product specifications may indicate a specific utility and a high probability of use, particularly in the case of a by-product. Nevertheless, whether such a use will ever be made of it remains essentially dependent on demand.

Given that long-standing markets exist and trade values are constantly quoted for virtually all basic secondary raw materials, the risk of fraud occasionally feared appears to be confined to marginal cases and can to a large extent be ruled out, given that, naturally, only convincing evidence of a market value, in the sense of marketability, can be accepted. Above all, the scope offered by the proposed definition of waste for establishing a market value by fraud remains within acceptable bounds, because proof of such value only will not suffice to rebut any initial presumption that the object is hazardous.

(c) That the planned secondary use will have no harmful effect on the environment or human health may be gathered, in particular, from the fact that the substance or object poses no problem in terms of its form and composition because it has been shown that it contains no harmful substances which could be released by the intended use. However, even where the substance or object contains harmful substances or its composition is unknown, this need not constitute a risk relevant to waste law. Controls under waste law are unnecessary where the potentially harmful effects of the planned processing or use are already covered by relevant provisions on installations or products and those provisions rule out the possibility of harmful emissions. Provided that this has been established, the substance or object will not be captured by the definition of waste, even if the relevant use has yet to take place. It will often be possible to establish that such provisions already apply where the composition of the substance in question is essentially similar to the substituted primary raw material or product. However, if it cannot be shown that there are adequate controls, the definition of waste will come into play, which means that, in accordance with Article 4, the relevant requirements for harmless recovery will be determined and, where necessary, enforced under waste law.

(d) The definition of waste proposed here takes no account of other aspects discussed by experts and partly touched on by the ECJ, because they are either inconsistent with a systematic functional delimitation of the need for regulation by waste law or contribute little to clarifying the definition.

(aa) When ruling on the classification of usable by-products, the ECJ has applied the test of whether the substance can be used "without any further processing" (Case C-9/00 – Palin Granit, paragraph 37; C-457/00 – Niselli, paragraph 45 et seq.). Such a restrictive test has deliberately not been included in the present proposal. It appears inappropriate inasmuch as, in some cases, the mere use of waste volumes or even certain types of reuse (e.g. used tyres as a weight for tarpaulin, etc.), despite the fact that

they may well involve no substance-altering treatment, can nevertheless pose a considerable risk to the environment as a result of that very secondary use and therefore must, where necessary, be prohibited under waste law. On the other hand, treatment may be regarded as a processing of raw materials or recycling where the facts or the applicable standards exclude the possibility that it will give rise to particular environmental or health risks.

(bb) It is equally unhelpful to base the classification of by-products on their comparability with primary raw materials or products, in particular those to be substituted by the secondary use. It is true that such a comparison may help to demonstrate that there is a high probability of use; however, the market value appears in most cases to offer more meaningful evidence and to be more relevant to the definition of waste. Given the specific protective aim of the waste-law provisions, a product comparison can provide evidence for or against their application only in so far as it is assumed that the reference substance or object likewise carries no potential risks prohibited under the applicable provisions.

(cc) Finally, a vague reference to product specifications likewise appears to be unsuitable for delimiting the scope of the waste-law rules in line with their aims and function. Like the criterion of comparability with primary raw materials and products, compliance with product specifications may serve as additional evidence of a probability of use. However, reference to product standards is suitable for ruling out "waste-relevant" risks only if those standards relate to environmental soundness. To that extent, account is taken of the comparability test and product specifications in the definition proposed here. However, for definition purposes, reference can be made only to mandatory standards and not private standards lacking binding effect. In the absence of such binding effect, private standards cannot function as an equivalent to controls under waste law.

(dd) Even though they do not form part of the definition, the above criteria for limiting the scope of the term waste can be used in cases of doubt to interpret and apply the requirements of the definition, provided that they do not run counter to the aim of linking, on the basis of an extensive presumption, both designation as waste and the duration of such character to the questions whether a sufficient probability of use has been proven and whether it has been established that it is unnecessary to apply waste law to control the risks posed by a substance and its use.

Thus, the guidelines to be drawn up pursuant to Article 4, in particular, and, where necessary, special directives and national implementing provisions should clarify cases of doubt by imposing specific standards in relation to the relevant secondary raw materials and products. The most important loopholes in the requirements to be met by recovery methods should be removed by these guidelines and standards and, as far as possible in that context, it should be specified, for each case (or group of cases) and in line with the aims and functions of waste law, in what circumstances it can be assumed that substances and recovery procedures or the materials or products produced by them no longer present any "waste-relevant" risks requiring the application of general waste-law controls. In accordance with the general definition, such risks are not posed where they are already adequately regulated by standards relating to processes and products (see also the reasons given below in relation to Article 4: recovery standards).

(f) Finally, it is proposed to provide for an express general exclusion of immoveable objects from the scope of waste law and thus correct the ECJ's ruling in van de Walle in so far as it was held that contaminated soil is, in principle, also covered by the definition of waste. The version of the WFD presently in force already rightly states, at least in the recitals, that EC waste law should apply only to movable property (see the 6th recital in the preamble to the WFD). Neither the waste-law provisions nor the waste-management practice of the Member States provide sufficient answers to the question under what conditions priority action is required in respect of soil contamination, remedial action must be ordered and soil must be excavated and recovered or disposed of in a non-hazardous manner. If at all, these questions are partly addressed by the Liability Directive (2004/35/EC) but not by waste law. This should be acknowledged and the impression should not be conveyed that a European solution to the problem of contaminated sites has already been found.

2. Article 1(e) and (f): definitions of "recovery" and "disposal"

(a) The terms "recovery" and "disposal" are defined and distinguished in Article 1(e) and (f). In

conformity with ECJ case-law on the law currently in force, recovery should be defined in express broad terms which, in principle, permit treatment and intermediate treatment with a double function to be classified as recovery. For the purpose of defining a process as recovery, the sole decisive factor is whether any significant use is made of parts of the waste to extract secondary raw materials, products or energy. By contrast, disposal covers only the permanent discarding of waste, in particular by landfill, pre-treatment incineration or similar methods leading solely to a definitive removal from the cycle of production. In relation to the key field of energy recovery, the distinction is clarified in line with the broad scope of the term recovery, although, following on once again from the ECJ's case-law (Case C228/00 – Belgian Cement Factories), it is necessary that incineration be substituted for the use of primary energy sources or that energy is generated from the waste itself and used as heat or electricity predominately outside of the incineration process. However, in contrast to the ECJ's Luxembourg decision (C-458/00), it is made clear that modern waste incineration plants can also carry out energy recovery if they derive energy from the waste to a significant degree and dedicate that energy predominately to, for example, use as district heating.

(b) This definition picks up the thread of the ECJ's case-law and takes it a logical step further. In view of the proposal to fashion the "recovery priority" as a requirement to make the most extensive use possible (Article 3), the "environmental objection" (Waste Shipment Regulation) and the household-waste clause (Article 5(3)), the triple aim of waste law will be achieved more effectively, efficiently and with greater legal certainty than heretofore:

(aa) The broad definition of recovery offers legal certainty because its criteria are already fulfilled where there is proof that any significant recycling or energy use is derived from the waste and because it covers all stages of treatment which contribute to deriving that use. As a result, disposal ultimately covers only landfill and similar methods of discarding waste which have the effect of definitively removing the substance from the production cycle. These include the processing steps which serve pre-treatment for landfill and do not generate recyclable substances or energy to a significant extent.

Such a distinction between recovery and disposal is consistent with the aim of a framework waste law under which the aims of a high level of environmental protection throughout Europe and of the greatest possible exploitation of the recycling and energy potential of waste enjoy priority over spatially limited self-sufficiency of disposal, at least in so far as this does not lead to manifest bottlenecks in the environmentally sound disposal of waste.

(bb) A high level of environmental protection can and should be required throughout the Community, in particular in the form of relevant recovery and disposal standards to be expressed in as specific terms as possible (see Article 4). Moreover, it should be safeguarded by permitting, as is now expressly provided for in the proposal for revision of the Waste Shipment Regulation, the prohibition of waste shipments destined for recovery or disposal abroad by methods which do not comply with the common standards or – where there are no specific Community standards – the stricter national standards of the exporting country.

(cc) The aim of resource efficiency, which is to make the greatest possible use of the recycling and energy potential of waste, can be achieved only by way of a broad definition of recovery which recognises the use even of only minor potential as recovery and promotes such use. It would run counter to the aim of greatest possible use if, on the contrary, waste were to be regarded as having to be disposed of and thus excluded from enjoying the recovery priority and from entering a pan-European system of recovery logistics simply because most of it cannot be used and it instead has only minor but nevertheless some potential for use. The aim of returning objects to the product cycle can be achieved on the basis of a distinction between recovery and disposal only if recovery is given a broad definition which expressly requires the greatest possible exploitation of all recycling and energy potential (see the relevant proposal for amendment of Article 3).

By comparison, a general "main-purpose clause" requiring an examination, in each case, of whether the main purpose of a measure is recovery or disposal is not a convincing option. Firstly, a provision distinguishing processes in that way is extremely vague, as is vividly illustrated by the protracted discussion in Germany on the main-purpose clause enshrined in the national law on cycle management and waste. Accordingly, such a clause can offer no significant benefit in terms of legal certainty. Secondly, such a clause is – and this is the most

important point – inconsistent with the environmental policy objectives pursued by EC waste law. The refusal to accept a use as recovery simply because most of the waste is unusable contradicts the principle of priority for recovery to ensure the greatest possible resource efficiency. It also runs counter to the WFD's Community-orientated management approach, which aims to secure as high a level of environmental protection as possible throughout the Community, to localise appropriate management facilities and thereby deny access to external management facilities which may be particularly environmentally sound or resource efficient. It thus seems essential not to base the distinction between recovery and disposal on a "main-purpose clause".

The risk of abuse of the proposed broad definition of recovery in that the recoverable components of a waste mixture could be used as a "holdall" for waste destined for deposit at a landfill site subject to lower standards can be countered by the rules on separating waste (see Article 5(3)) and the reservation of environmental and economical justifiability. This reservation can already be exercised under the existing law on shipment controls on the basis of the "disproportionality objection" (fifth indent of Article 7(4)(a) Waste Shipment Regulation). The environmental objection, which could already serve as the central "distinction criterion" in the Waste Shipment Regulation (and probably will, see Article 12(1)(c)(i) of the revision proposal[9]), is intended to prevent certain forms of recovery whereby "the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations".

Although this provision of the Waste Shipment Regulation, which even now makes sense only in conjunction with a broad definition of recovery such as that proposed here, is worded in vague terms, it already includes all the relevant factors which the competent authorities must take into consideration in order to exercise their discretion properly. The environmental objection has already been interpreted as such a discretionary clause by the ECJ and national courts and it seems appropriate to establish a management approach based on discretion in so far as general restrictions on recovery methods are unjustifiable. Whilst the Member States should be able to impose general bans on methods of recovery which, in general, cannot overcome the reservation of economic and environmental justifiability (see Article 4(1), sentence 4, of the proposal), preference should be given here to a Community law prohibition laid down in a directive, for which no special basis in the WFD is necessary.

(dd) By redrawing the boundary between recovery and disposal in favour of recovery, the definition proposed here modifies the aim of sufficient waste management capacity, together with its two "ancillary" aims of self-sufficiency and proximity of disposal, but gives them a more contemporary form, because

- it must be recognised that, given the present status of European waste management, the contribution made by spatially restricted management to safe disposal throughout Europe is rather small in comparison with that of functioning European markets, provided that an adequate level of protection is guaranteed by waste-management standards;
- in order to enforce a high level of environmental protection in the EU, spatial management must take account, first and foremost, of compliance with strict EU management standards,
- the spatial management of waste destined for landfill in accordance with the principle of self-sufficient disposal can be adequately guaranteed by the environmental objection (fifth indent of Article 7(4)(a) Waste Shipment Regulation), as an anti-abuse provision, and by the possibility of imposing duties to separate waste; and
- the existing service structures in the field of household waste will, in future, be detached from the distinction between recovery and disposal and the revised Waste Shipment Regulation (see Article 3(5)of the proposal for revision of that regulation as agreed in the Common Position (EC) No 28/2005 of 24 June 2005) and the revision of the WFD proposed here (Article 5(3)) will introduce a general public-sector management option for household waste.

(c) All in all, the distinction and the system of rules proposed here provide the greater degree of legal certainty demanded by the Commission in its

9 As approved by Common Position (EC) No 28/2005 of 24 June 2005, Official Journal C 206 E, 23/8/2005 p 1 ff.

communication on recycling strategy. The proposal is, essentially, influenced by the ECJ's case-law but it also supplements and partly corrects that case-law (recovery in waste incinerations plants).

3. Article 3: Priority of recovery – separation

The objective of the recovery priority laid down in Article 3(1)(b) is worded more specifically to make clear that the aim is not just mere recovery but, rather, recycling or energy recovery of as much of the waste as possible. This clarification serves the consistent implementation of the objective of resource efficiency and is necessary because recovery, as opposed to disposal, must be defined broadly for the reasons set out above (Parts II.7 and IV.2) and, in principle, cover any process whereby waste is used, even if the actual energy or recycling potential is not fully exploited.

Whilst this clarification reinforces the principle of resource efficiency, it does not constitute a general requirement of "high-quality" recovery. What is needed is simply extensive use of waste volumes. It is therefore a question of ensuring that, as far as possible, all recoverable parts of waste are actually used rather than of regulating how they are recovered. Where, in the light of the objective of resource efficiency, it is appropriate to impose requirements as to the method of recovery in relation to individual waste types and management processes (e.g. recycling quotas), these should continue to take a form other than general quality requirements (see reasons in the general part, under Part II.6) and should be laid down, only where absolutely necessary, in special directives such as those on end-of-life vehicles, waste oils, waste electrical and electronic equipment and packaging.

Only in so far as a general legal framework can help to prevent the frustration of high-quality recovery options before or on production of waste should it lay down the conditions necessary to allow the market to opt for high-quality recovery methods. In practice, the possibility of high-quality recovery is frequently made impossible or considerably more difficult a priori because waste or waste substances are mixed or not immediately separated. It therefore seems necessary to permit the Member States, as proposed in the second sentence of Article 3(1)(b), to require that certain regularly recoverable materials be separated and to accept any restrictive effects on the market which result from such a requirement.

4. Article 4: recovery and disposal standards

(a) A precondition for greater legal certainty in European and national waste law is, as has been explained on several occasions, the setting of further standards, in particular at Community level. Accordingly, the revised Article 4(1) provides for more comprehensive and more specific legislative obligations on the Member States than is presently the case (see (b) below). Article 4(2) places the Commission under a legal and political obligation to achieve greater harmonisation of waste-law standards in the EU. Only then can the waste market be opened up more widely, as is desired by businesses in particular, in a way which is nevertheless compatible with protection of the environment and health. More extensive legislation at Community level would also be consistent with the principle of subsidiarity in Article 5(2) EC, as the aim is to prevent counterproductive competition between sites in the various Member States by achieving a reasonable level of harmonisation of the framework conditions applying to the European waste market under environmental law (see (c) below):

(b) The revised Article 4(1) contains two additional clarifying provisions on the legislative action to be taken by the Member States in the field of the waste management. The new second sentence makes clear that the necessary regulation of waste management must cover recovery procedures and products, whether under waste law itself or in the context of other fields of environmental and economic law. Like the rest of the Community's environmental legislation, such as the IPPC Directive, the new third sentence requires a high technical standard of waste recovery and disposal. Finally, the new fourth sentence authorises the Member States to prohibit generally certain methods of recovery which are unjustifiable in the light of resource efficiency because of a disproportionate relationship between the benefits of use and environmental soundness.

(c) It is preferable to set the supplementary waste management standards at Community level rather

than by way of national legislation by the Member States. In accordance with the strategic structure of the present proposal for revision, the new Article 4(2) distinguishes three legal policy routes for this:

1. Priority must be given to expanding Community law by the necessary directives on installations, substances and products. This is in keeping with the subsidiary nature of the standard-setting function of the waste-law scheme.
2. Where regulation in the form of a directive is unnecessary or cannot be realised for the time being, the Commission should, by way of guidelines set out in a new Annex III, clarify the duty of non-hazardous recovery to the extent necessary to establish generally the circumstances in which various types of waste can be regarded as secondary raw materials or products so that waste law need not be applied and regulation can be entrusted to other rules relating to installations and products (second indent).
3. In the third indent, the Commission is called upon to make proposals for subsidiary directives to the WFD which impose installation, substance and product standards in relation to important recovery methods so as to ensure a high level of environmental protection.

With regard to the general prohibition of recovery methods which cannot be justified economically or environmentally, it has already been explained in Part IV(2)(b)(cc) that, here, preference should be given to regulation by Community directives which create a standard "basis for business" on the common waste-management market and that no special basis for such regulation need be included in the WFD.

(d) The second subparagraph in Article 4(2) makes clear that even the standards set in the guidelines constitute legally binding standards of Community law within the meaning of the proposal for revision of the Waste Shipment Directive. In the terms of that proposal, this means that a Member State may object to a shipment of waste for recovery purposes if the recovery does not meet the standards set in the guidelines. However, it also follows that stricter standards of the exporting State do not entitle that State to object, on the basis of the proposed new provision on objections (Article 12(1)(c)(i) of the proposal for revision of the Waste Shipment Regulation), if the planned recovery satisfies the more lenient standards in the guidelines. Thus, the guidelines should, in addition to the formal directives and regulations, form a complete basis for transactions on the Community waste-management market.

5. Article 5: the spatial management principles

An option to order separation of waste should be added to the spatial management principles (Article 5(3)). Such an option to order the separation of certain generally non-recoverable waste types will enable the Member States, in conjunction with the environmental objection, to enforce spatial management of waste for disposal to a limited extent compatible with the current state of progress in waste management and environmental law in the transitional phase towards a management system guided by environmental standards. In light of the broad definition of recovery, it may be necessary for this purpose to require producers of trade and industrial waste to manage certain generally non-recoverable waste materials separately and, where necessary, to dispose of them near to the site of their production. Separation can then serve to prevent a situation arising at the site of production or as a result of subsequent sorting whereby mixing leads to such non-recoverable materials being "mobilised" as usable waste for the transboundary recovery market (e.g. in a mixture of waste with a high calorific value destined for incineration in a cement factory).

6. Article 5(a): in particular, management of household waste

In order to ensure that the increasing opportunities for recovery of household waste do not jeopardise the functioning waste-management systems of those Member States which have organised household-waste management as a public-sector activity, restriction of the free-market principle in relation to the recovery of household waste should not be based solely on the relevant objection rights under the Waste Shipment Regulation (see proposal for revision of that regulation). This significant departure from the general regulatory scheme applicable to the waste-management market should also be enshrined in the WFD. The proposed Article 5(a) thus lays down a separate authorisation to manage

household waste, which is independent of the principles of self-sufficiency and proximity. Such a provision ensures that Member States are not compelled to liberalise their system of household-waste recovery but may retain a system of public-sector collection services. Similarly, the other Member States will not be compelled to manage all household waste, inclusive of recoverable fractions, in this way. It must and should not be compulsory for recoverable household waste to be managed in accordance with the principles of self-sufficiency and proximity. The alternative proposal occasionally put forward to extend the principles of self-sufficiency and proximity to all household waste – so as to include recoverable waste also – would therefore be inappropriate.