

## UNICE PROPOSAL FOR AN AMENDMENT TO COUNCIL DIRECTIVE 91/156/ECC AMENDING DIRECTIVE 75/442/EEC ON WASTE

### Summary

#### 1. Introduction

The European Community has adopted a large number of directives and regulations on waste, thereby creating a comprehensive legal framework for the management and disposal of waste. The most important legal texts in this field are

- Council Directive 91/156/EEC *amending Directive 75/442/EEC on waste*
- Directive 91/689/EEC *on hazardous waste*
- Regulation (EEC) 259/93 *on the supervision and control of shipments of waste within, into and out of the European Community.*

However, although the debate seeking a clear definition of the terms 'waste' and 'product' has been going on for twenty years, there is still no satisfactory definition of the point at which recovered waste once more becomes a product. We also lack clear criteria to distinguish between activities carried out to recover waste and activities carried out to dispose of waste.

#### 2. The need for reform

Demands for a reform of European waste legislation have been called for over a long period. In its Resolution of February 24, 1997 *on a Community strategy for waste management*, the Council of the European Communities recognised the need for unambiguous terms. The Council therefore expressly tasked the Commission with working towards the creation of more closely aligned definitions with a view to achieving greater harmonisation. In several communications and reports, the most recent of which was published on 10.01.2000, the Commission complained that the Member States were failing to adequately transpose waste legislation. It attributed this deficit to a number of factors including the lack of **sufficiently clear definitions**. The differences in the transposition of EC waste legislation by the Member States have in the Commission's opinion created barriers to trade and distortions of competition for recyclable substances in particular. In its Resolution of 16.09.1998, the European Parliament deplored the **defective and careless application and implementation of Directive 75/442** in the Member States and mentioned the need for a **new definition of waste** to be laid down in a regulation.

### 3. Community objectives and practical consequences

In order to meet the Community's objectives of encouraging the recovery of waste and the recycling and re-use of waste as raw material, it is important to define **clear and practical criteria to distinguish between waste on the one hand and secondary raw materials and fuel and recycling products on the other hand**. This Community objective can only be achieved if **substances and objects extracted from waste in the course of recovery processes are not subjected to obligations and costs under waste legislation for longer than is necessary to protect the environment**, as this would harm the competitiveness of the recycling industry and the economic viability of recovery as a whole. Furthermore, the Community objective of reducing both the volume and the hazardous properties of waste intended for disposal, can only be achieved by a more precise definition of waste recovery and waste disposal.

### 4. Aim of the proposal

Much of the content of this proposal to clarify definitions of terms used in waste legislation is drawn from existing Community legislation and the case law of the European Court of Justice in this area. In view of the Community's existing international obligations to apply the Basel Convention, **it is not proposed that completely new rules be drafted**. However, one of the aims of the proposal is **to amend and complete the definitions of the terms 'discard' (Art. 1 letter a), 'recovery' (Art.1 letter e) and 'disposal' (Art. 1 letter f) contained in Directive 75/442**.

### 5. Principles behind the proposal

This proposed clarification of the definition of 'waste' is based on the interpretation supported by decisions handed down by the ECJ according to which **the concept of 'discarding', which is an important part of deciding whether a substance is 'waste', refers both to disposal and to recovery (Art. 1 letter a sentence 2)**.

This means that the **wording used to describe recovery (Art.1 letter e)** takes on a central significance for distinguishing between different processes and activities:

- Firstly, it is essential **to distinguish between waste recovery processes and conventional industrial and commercial manufacturing processes**,
- and **to define the point at which substances and objects undergoing a recovery process cease to be waste**.
- The second distinction that needs to be drawn is **that between recovery processes, in accordance with the scope of the term 'recovery', and disposal processes**.

### 6. Proposed provisions

Art. 1 letter a sentence 3

The need **to distinguish between recovery-related discarding operations that are subject to waste regulations on the one hand and other cases in which substances and objects are used in the economic circuit** is dealt with in the new provision laid down by Art. 1 letter a sentence 3. This clearly states that **discarding does not take place when substances, objects, products including by-products, intermediate products or secondary products are suitable in their existing form to be put to further use in the economic circuit**. Substances and objects that can be used without being altered – i.e. without undergoing any prior transformation process with a view to their recovery – are therefore not subject to Community waste legislation.

#### Art. 1 letter e sentence 1 and sentence 3

A decisive element in the term 'recovery', which is so important in Community waste legislation, is the requirement according to the new provision of Art.1 letter e sentence 1 that a **transformation** process has to take place in which waste is deliberately used to produce secondary raw materials or fuels or to manufacture (recycling) products or generate energy. **The abstract description of recovery given in Art. 1 letter e sentence 1 should serve as a model for the required clarification of the exemplary list of recovery processes contained in Annex II A (previously II B).** **The Commission is now expressly authorised to draw up this list (Art. 1 letter e sentence 3).**

#### Art. 1 letter e sentence 4

The new Article 1 letter e sentence 4 gives the first ever clear definition of **the point at which a substance or object ceases to be waste**. This is defined as the point at which the recovery process is complete; from this point on the substance or object is no longer subject to waste regulations.

#### Art. 1 letter e sentence 5

The new provision contained in Art. 1 letter e sentence 5 defines **the point at which a recovery process is complete as the point when secondary raw materials or fuels have been extracted or (recycling) products have been manufactured**. Whether or not the substance or object produced subsequently actually enters the economic circuit or is actually used is of no relevance. At the point when under this proposal a substance or object ceases to be waste, the remainder of this proposal fulfils the protective objectives of Directive 75/442. This is because the new proposal states that a substance will only be recognised as a secondary raw material, fuel or (recycling) product if it has been designed, manufactured etc. in such a way as to provide a high level of protection for health and the environment.

#### Art. 1 letter e sentence 6 in association with Annex III

In the light of Community product safety legislation and the Directives on technical safety, **the new proposal simply states that substances and objects produced in a recovery process must meet fundamental safety requirements in terms of protecting health and the environment** (Art. 1 letter e sentence 6 in association with Annex III). They must be shown to respect these requirements by means of regular inspection for compliance with technical specifications. Few harmonised Community standards have been developed to date for products made by recovery processes. Independent standardisation bodies will be responsible for drafting these standards. This means that the new provisions also help to **strengthen and expand European standardisation in the field of recycling**. Any existing national specifications, or in their absence quality standards and technical standards that are generally recognised and used throughout the industry in question, will be taken into consideration only in the absence of harmonised technical standards and during the transitional period until such harmonised standards are published.

#### Art. 1 letter f

While 'waste recovery' as defined by Art. 1 letter e of the new proposal is aimed at retaining the substance or characteristics of the waste within the economic circuit, the purpose of this clause is to distinguish that concept from the concept of 'disposal'. Accordingly, the new version of Art. 1 letter f defines **disposal as a method of discarding waste in such a way that it is definitively removed from the economic circuit**. Along the same lines as Art. 1 letter e, the provisions of Art. 1 letter f expressly indicate **that the general descriptive clause will be clarified and completed by an open-ended demonstrative list of disposal processes carried out in practice (Annex II B, formerly II A)**.

---

21 November 2000

<p style="text-align: center;"><b>UNICE PROPOSAL FOR AN AMENDMENT TO COUNCIL DIRECTIVE 91/156/EEC AMENDING DIRECTIVE 75/442/EEC ON WASTE</b></p>
--

## REASONS FOR THE PROPOSAL

### 1. Introduction

The European Community has adopted a large number of directives and regulations on waste, thereby creating a comprehensive legal framework for the management and disposal of waste. The most important legal texts in this field are

- Council Directive 91/156/EEC *amending Directive 75/442/EEC on waste*
- Directive 91/689/EEC *on hazardous waste*
- Regulation (EEC) 259/93 *on the supervision and control of shipments of waste within, into and out of the European Community.*

The decisions on waste legislation taken by the European Court of Justice (ECJ) can serve as guidelines in shaping the measures taken by the Community and by individual states in the area of waste legislation.

However, although the debate seeking a clear definition of the terms 'waste' and 'product' has been going on for twenty years, there is still no satisfactory definition of the point at which waste that is recovered once more becomes a product. We also lack clear criteria to distinguish between activities carried out to recycle waste and activities carried out to dispose of waste.

**This proposed amendment has two aims:**

- (1) One of the objectives of the proposal is **to clarify the definition of the term 'waste' as used in Community law**. A more precise definition is needed so that Member States can clearly decide whether a substance is (still) covered by the scope of Directive 75/442 and its system of permits and controls.
- (2) The other objective is to specify **the conditions under which the treatment of waste is to be considered as a recovering activity or a disposal activity**.

This distinction is important because it determines whether specific measures apply; these are measures which apply only to disposal (e.g. in accordance with Article 5 of Directive 91/156 in reference to the need to guarantee proximity to waste disposal installations and self-sufficiency in waste disposal), and whether specific permit and control requirements have to be adhered to (e.g. in accordance with the EC Waste Regulation 259/53).

### 2. Existing Community rules

### On the definitions:

The term '**waste**', as used in Community waste legislation, is defined in Article 1 letter a of Directive 75/442 on waste. The definition reads as follows in Directive 91/156:

... "any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard..."

The aforementioned Annex I of Directive 75/442 contains a list of types of waste which are described in detail in categories Q 1 to Q 15, but the last group listed in category Q 16 merely states:

"Any materials, substances or products which are not contained in the above categories."

The term '**disposal**' is defined in Article 1 letter e of Directive 91/156 as "any of the operations provided for in Annex II A". Annex II A lists disposal operations that are carried out in practice in points D 1 to D 15.

The term '**recovery**' is defined in Article 1 letter f of Directive 91/156 as "any of the operations provided for in Annex II B". Annex II B lists recovery operations that are carried out in practice in points R 1 to R 13.

### Objective of Community rules:

Article 3 paragraph 1 of Directive 91/156 states that the Member States shall take measures to encourage:

" a) firstly, the prevention or reduction of waste production and its harmfulness,...

b) secondly

- i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or
- ii) the use of waste as a source of energy."

Article 4 paragraph 1 of Directive 91/156 states that the 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, ...".

Article 5 paragraph 1 of Directive 91/156 instructs the Member States to take measures "to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. This 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, ...". Article 5 paragraph 2 specifies that this 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".

Article 2 letter a) of Council Regulation 259/93 (EEC) *on the supervision and control of shipments of waste within, into and out of the European Community* contains the same definition of waste that is given in Article 1 letter a) of Directive 91/156. The terms "disposal" (Article 2 letter i) and "recovery" (Article 2 letter k) are also defined in the same way as in Directive 91/156. However, in title II (shipments of waste between Member States), title IV (exports of waste), title V (imports of waste into the Community) and title VI (transit of waste), the Regulation draws a distinction between transport activities carried out on waste

intended for disposal and transport activities carried out on waste intended for recovery. The Regulation lays down different notification and control rules for the two types of activities.

### **3. European Court of Justice case law on the definition of the term 'waste' in Community law**

The ECJ has handed down several decisions dealing with the issue of the interpretation of the term 'waste' as used in Community law.

In the judgements reached on 28.03.1990<sup>1</sup> the Court of Justice clearly indicated that the term 'waste' as used in Article 1 of Directives 75/442 and 78/319 in principle also refers to substances and objects, which can be re-used to economic benefit. In addition, the usage of the term 'waste' in Community law does not imply that the holder who is discarding a substance or object wishes to prevent someone else re-using it to economic benefit.

In the judgement reached on 10.05.1995<sup>2</sup> the ECJ confirmed this interpretation and pointed out that neither the amendment to Directive 75/442 nor the abolition of Directive 78/319 undermined the principles established in the decisions reached on 28.03.1990.

According to the subsequent decision of the ECJ reached on 25.06.1997<sup>3</sup>, the usage of the term 'waste' in Community law cannot be understood to exclude substances and objects that can be re-used to economic benefit, even if these substances or objects may be the subject of a legal transaction or a listing in official or private stock market quotations. The Court of Justice also states that inertisation processes<sup>4</sup>, the disposal of waste in landfill sites and waste incineration are all methods of disposal and recovery that are covered by the scope of Community waste legislation. The Court of Justice considers it immaterial in this context that substances are classified as re-usable residues even if their composition and intended use is not known. The same principle applies to the decision of the ECJ on the crushing of waste.

In its judgement reached on 18.12.1997<sup>5</sup> the Court of Justice also decided that a substance is not excluded from the definition of 'waste' in Directive 75/442 as amended by Directive 91/156 simply because it is directly or indirectly involved in an industrial production process. It is also explicitly stated that the expression "to discard" used in Directive 75/442 covers both disposal and recovery of a substance or object. The ECJ also points out the need to make a distinction between the recovery of waste within the meaning of waste legislation and normal industrial treatment of products that are not waste, however difficult it may be to draw such a distinction.

In the aforementioned decisions, the ECJ has clarified circumstances which do not stand in the way of substances or objects being classified as waste. But there is still no universal positive description of what constitutes waste. The ECJ judgement reached on 18.12.1997 also failed in its conclusion to draw the distinction between waste recovery and the normal industrial treatment of products which is considered to be so important. In these judgements the ECJ has also not fundamentally addressed the detailed defence presented by Advocate General Jacobs<sup>6</sup> aimed at limiting the scope of waste legislation and defining the distinction between 'waste' and 'product'.

---

<sup>1</sup> ECJ, joined cases C-206/88 and C-207/88, Criminal Proceedings against G. Vessozzo and G. Zanetti, Slg. 1990 I, 1461 et seq.; cases C-359/88, Criminal Proceedings against Zanetti and others, Slg. 1990 I, 1509 et seq.

<sup>2</sup> ECJ, case C-422/92, Commission of the European Communities against the Federal Republic of Germany, Slg. 1995 I, 1097 et seq.

<sup>3</sup> ECJ, joined cases C-304/94, C-330/94, C-342/92 and C-224/95, Criminal Proceedings against Euro Tombesi and others, Slg. 1997 I, 3561 et seq.

<sup>4</sup> Process aimed at rendering harmless hazardous substances contained in waste.

<sup>5</sup> ECJ case C-129/96, Inter-Environment Wallonie ASBL against Région wallone, Slg. 1997 I, 7411 et seq.

<sup>6</sup> Closing speech in the joined cases C-304/94 et al., dated 24.10.1996, Slg. 1997 I, 3564 et seq., and closing speech in the case C-129/96, dated 24.04.1997, Slg. 1997 I, 7413 et seq.

Finally, in its most recent judgement reached on 15.06.2000<sup>7</sup> the ECJ did not give an unambiguous response to the questions submitted by the *Nederlandse Raad van State* as to whether certain treated substances (LUWA-Bottoms) and crushed wood residues from building and demolition work, which are incinerated in the cement industry or used as fuel for the generation of electricity, are to be considered as primary raw materials or are (still) to be classified as waste. It is true that this decision considers different criteria as the basis for determining whether or not a substance should be classified as waste. However, the ECJ takes the view that all the circumstances have to be taken into account when deciding whether a substance truly constitutes 'waste' as defined in the Directive; consideration must also be given to the objective of Directive 75/442 and the need to ensure that its effectiveness is not impaired.

#### 4. The need for reform has already been established

The existing Community definition of the term 'waste', together with the interpretation of this term handed down in ECJ judgements, forms an important step towards the creation of an integrated waste management system within the internal market. However, the current Community definition is a long way from resolving the whole problem of differentiating between 'waste' and 'product' and waste for recovery as opposed to waste for disposal. The Council and the European Parliament have on several occasions drawn attention to this point and called for reform.

For example, in its Resolution of 24.02.1997 *on a Community strategy for waste management (97/C 76/01)*<sup>8</sup>, the Council recognised the need for unambiguous terms. It urged the Commission, in association with the Member States and bearing in mind the work that has already been done in international bodies, to intensify its efforts to

- create agreed terms and definitions
- and thereby to achieve a greater degree of harmonisation in the application of Community rules.

The Commission has also been asked to set up a Community-wide, reliable system for collecting data on waste. This system should be based on common terms, definitions and classification criteria and should not impose an excessive cost burden on the public and private sectors.

In its communication to the Council and the European Parliament (COM (97) 23 final) of 27.02.1997 on the application of Directives 75/439, 75/442, 78/319 and 86/278 dealing with waste management, the Commission noted that transposition of Directive 75/442, particularly as regards the definition of waste, had taken place late, incompletely or not at all in some Member States and that some Member States were not applying the Directive correctly. It concluded that the use of non-standardised terminology was detrimental to transparency and the secure conduct of business, and also created problems for economic players and administrations.

In its Resolution of 16.09.1998 on the aforementioned communication from the Commission, the European Parliament deplored the defective and careless transposition, application and implementation of Directive 75/442. The Parliament also noted that it was high time for the European definition of waste to be laid down in a regulation.

---

<sup>7</sup> ECJ, joined cases C-418/97 and C-419/97, Arco Chemie Nederland Ltd against Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer: Vereniging Dorpsbelang Hees, Stichling Werkgroep Weurt, Vereniging Stedelijk Leefmilieu Nijmegen and De Groenen Regio Gelderland against Directeur van de dienst Milieu en Water van de provincie Gelderland. On these cases see also the closing speeches made by Advocate General Alber on 08.06.1999.

<sup>8</sup> EC OJ No. C 76 dated 11.03.1997, p. 1.

In its communication on the *competitiveness of the recycling industry* (COM (98) 463 final) to the Council, the European Parliament and the Economic and Social Committee, the Commission stressed the major difficulties created for companies in the recycling industry by the definitions of terms relating to waste contained in Community legislation. The differences in the transposition of EC waste legislation by the Member States have, according to this communication, created barriers to trade and distortions of competition for recyclable substances in particular. The Commission concluded that a transparent and stable legal framework in general and clear, practical definitions of terms in particular were of fundamental importance in encouraging innovation and a good climate for investment in the recycling sector. Finally, it again referred to the task it had been given on 24.02.1997, namely to work together with the Member States in order to create agreed terms and definitions which would allow a greater degree of harmonisation in the application of Community rules.

In its communication to the European Parliament and the Council on the *internal market and the environment* (COM (99) 263 final) of 12.08.1999, the Commission also complained that the use of varying definitions of waste by the Member States was hindering the harmonised application of Community legislation. The Commission particularly regretted the lack of a clear definition of waste for recovery, especially as regards the incineration of waste to produce energy.

At the same time it indicated that a solution might be found as a result of ongoing discussions on ways of improving this situation within relevant framework programmes, such as the Technical Adaptation Committee on Waste Legislation and the newly created Recycling Forum.

Finally, in its report to the Council and the European Parliament *on the transposition of Community waste legislation between 1995 and 1997* (COM (99) 752 final) of 10.01.2000, the Commission stated that progress made in the transposition of Directives 75/442, 91/689 and 75/439 was unsatisfactory. The Commission recognised that a great deal of work remained to be done in order to harmonise waste definitions and lists and to set up reliable databases to enable efficient waste management in accordance with the priorities that have been laid down.

## 5. Key problems in the application of the existing definitions

- (1) With regard to the definition of waste, it has not yet been possible to **reach an unambiguous clarification of the meaning of the term 'to discard'**. It is true that in its judgement of 18.12.1997 the ECJ stated that 'discard' referred both to disposal (as defined in Annex II A) and recovery (as defined in Annex II B) of a substance or object. However, it appears doubtful whether and to what extent a substance can automatically be characterised as waste simply because it undergoes one of the processes referred to in Annex II A or II B. This appears dubious because certain descriptions of processes can also apply to the use of primary raw materials and fuels in manufacturing (for example, R1 can apply to the use of coal, fuel oil etc.). Directive 91/156 is also silent on the issue of whether products such as by-products, intermediate products and secondary products are waste, and if so under what conditions they have to be produced.
- (2) With regard to the distinction between waste and non-waste (product), it has not yet been possible to reach a satisfactory conclusion on the issue of **when and where appropriate under what conditions 'waste' which is recovered becomes a 'product' and so is no longer subject to waste legislation**.
  - On this point it has often been stated that a substance ceases to be 'waste' once the recovery process has been completed. However, there is as yet no consensus on when this point is reached.



- An alternative interpretation which is often preferred is that a substance is a 'product' if it has an economic (commercial) value.
- Some people take the view that a substance only ceases to be waste if it has been deliberately manufactured or (at least) is created as a by-product or secondary product in the context of the manufacturing process.
- Others are of the opinion that a substance only ceases to be waste if it meets certain product or quality requirements or if it can be used as a secondary raw material or secondary fuel in a subsequent industrial manufacturing process, possibly as a replacement for a primary raw material or primary fuel.
- In addition, a substance could cease to be waste only if it meets several of the aforementioned criteria or other criteria (prior and subsequent treatment, impurities etc.) Many individual cases have been assessed by considering several of these criteria, which may or may not all point in the same direction.
- A further point to be borne in mind is whether the substance presents a potential danger that is typical of waste; in this case, it would appear essential to monitor or continue monitoring its recovery.

(3) With regard to the distinction between operations in the course of which waste is disposed of and recovered, the list of disposal and recovery processes contained in Annexes II A and II B of Directive 91/156 cannot be said to resolve the issue. Consequently, additional measures that are not expressly referred to in the annexes can also be considered as disposal or recovery processes. The annexes do very little to clarify the distinction. The processes are described in very vague terms. For example, it is unclear whether and if so under what conditions the disposal of waste in disused mines can fall into categories R2, R3, R4 of Annex II B (recovery processes) or into categories D1, D3, D5 or D12 of Annex II A (disposal processes). There is also a need for clarification as to whether and if so under what conditions thermal treatment of waste should fall into category R1 of Annex II B (recovery) or categories D 10 or D11 of Annex II A (disposal).

The proposed clarifications to the definition of the term 'waste' should help resolve these problems.

## THE PROPOSAL

### 6. Guiding principles

Much of the content of the proposal is drawn from the existing provisions of Directive 75/442 as amended by Directive 91/156 and the provisions of the EC Waste Transport Regulation (No. 259/93) and the Basel Convention of March 22, 1989 *on the control of transboundary movements of hazardous wastes and their disposal*. It also takes account of ECJ case law on Community waste legislation.

In view of the ECJ's international undertaking to implement the Basel Convention there would be no point in adopting a completely new set of regulations in an attempt to resolve the difficult issues of distinguishing between 'waste' and 'product' and between waste disposal operations and waste recovery operations. The disadvantage of this approach is that it would require a fundamental change in the practice of waste legislation as carried out by the Member States. However, one of the aims of the proposal is **to amend and complete some aspects of the definition of the terms used in Directive 75/442 as amended by Directive 91/156.**

In attempting to **clarify the definition of 'waste'**, the proposal starts from the interpretation supported by the decisions of the ECJ that the term 'discard', which is an essential element

in deciding whether or not a substance constitutes waste, covers both 'disposal' and 'recovery'. This means that the words used to describe recovery are a key factor in drawing the distinction:

- Firstly, we need to distinguish between waste recovery processes on the one hand and normal industrial and commercial manufacturing processes on the other hand.
- Secondly, it is essential to determine the point at which substances or objects that are undergoing a recovery process cease to be waste.
- Thirdly, recovery operations must be distinguished from disposal operations on the basis of the words used to delimit the scope of the term 'recovery'.

**The revised version of article 1 letter e of the proposal gives a more comprehensive description of recovery, reflecting its central significance.**

In addressing the important question of distinguishing between 'waste' and 'product' and the transition from waste to product at the point when a substance ceases to be waste, the proposal starts from the assumption that a deliberate treatment must take place. This criterion follows implicitly from the wording of the new Article 1 letter e, sentence 1, in which deliberate recovery is aimed at producing secondary raw materials and fuels, manufacturing (recycling) products etc. The criterion of deliberateness also applies to the manufacture of by-products, secondary products and intermediate products. If these substances and objects are produced deliberately, the first criterion for deciding that they are not waste is met. However, there is also an additional requirement in that the substances and objects produced by a recovery process (secondary raw materials and fuels and recycling products) must also respect fundamental health and environmental safety requirements. They must be shown to respect these requirements by means of regular inspection for compliance with technical specifications. Few harmonised Community standards have been developed to date for products made by recovery processes, but many Member States already apply national specifications to a wide range of substances and objects produced by waste recovery processes.

The proposal does not incorporate any of the additional criteria that have been discussed as possible ways of determining the point at which a substance ceases to be waste. Because of the fluctuating market prices both for primary raw materials and fuels and for secondary raw materials and recycling products, incorporating the economic (commercial) value of a substance in the legal definition would create new problems and would not make efficient waste management easier to achieve; on the contrary, it would only exacerbate the situation. It would also not be sensible to introduce the idea that a substance can be considered to have ceased to be waste if it can no longer pose a threat in terms of pollutants or risks that are typical of waste. Such an imprecise and moreover tautological criterion would lead to continued discrimination against substances and objects produced by recovery processes compared with primary raw materials and products. Those who consider the presence of pollutants to be a potential hazard that is typical of waste forget that primary raw materials can also present a substance-specific potential hazard that continues to exist in products made from them. The use of such products is subject to general Community product safety legislation and the general regulatory schemes of the Member States which deal with the hazards associated with their use. Imposing stricter health and environmental protection requirements on secondary raw materials and fuels and (recycling) products produced from recovery processes would amount to unfair discrimination. Therefore, the proposal merely states that secondary raw materials and recycling products must comply with the fundamental safety requirements laid down in general product safety regulations set up to protect health and the environment. The specific content of the fundamental safety requirements is a matter for technical specifications to be drawn up by independent standardisation bodies. These bodies should be free to determine the appropriate requirements to be imposed in each individual case, taking account of the intended use and the potential threat to health or the environment; the requirements may be more or less strict than those laid down in product standards. The criteria referred to here rule out the situation that could arise in the event of a different interpretation being placed on the continued

existence of a potential hazard that is typical of waste in the case of an object that no longer has any value for its owner with the consequent greater likelihood of mishandling causing a threat to the environment. This is because the substances and objects have the necessary intended use following deliberate treatment in accordance with technical specifications.

In order to achieve proper waste management and waste management control it is also essential to distinguish more clearly than in the past between waste recovery operations and operations as a result of which waste is definitively removed from the economic circuit without being re-used for any purpose. A clear distinction is particularly important in order to ensure correct implementation of the EC Waste Shipment Regulation because the Regulation lays down different rules on supervision, control and notification for the shipment of waste intended for disposal and the shipment of waste intended for recovery. For this reason it is proposed that the revised version of the definitions contained in Directive 75/442 as amended by Directive 91/156 to which reference is made in the EC Waste Shipment Regulation should be incorporated into an amended regulation, which is not described in more detail in this proposal. As soon as such a regulation on the application of Article 2 letters a), i) and k) of the EC Waste Regulation 259/93 enters into force, the amended definitions in the scope of the EC Regulation on the Transboundary Movement of Waste would immediately apply to the benefit and detriment of undertakings and individuals concerned. There is no need for further action by the Member States to transpose this regulation. This solution would at the same time meet the request of the European Parliament for a European Regulation to be adopted laying down more precise definitions in order to achieve more effective application in the Member States. A more comprehensive decree-law clarifying the definitions in a European legal regulation is however not considered appropriate since this would have to entail a thorough revision of Directive 75/442 as amended by Directive 91/156.

## **7. On the detailed provisions (amendments to Directive 91/156):**

### Article 1 letter a

Sentences 2 and 3 are added to complete the existing Article 1 letter a. Sentence 2 draws its inspiration from the judgement of the ECJ handed down on 18.12.1997 and clarifies that the term 'discard' as used in Community waste legislation and in sentence 1 is not restricted to the meaning in everyday speech, i.e. to abandon or get rid of a substance or object. Rather, the term 'discard' covers both disposal processes and recovery processes. This interpretation is in line with the usage of the term 'waste' in the Basel Convention of 22.03.1989 *on the control of transboundary movements of hazardous wastes and their disposal*. In this text 'disposal' rather than 'discarding' is considered as the critical operation which indicates that a substance is deemed to be waste.

As the European Economic Community resolved to join the Basel Convention on 01.02.1993, the usage of the term 'waste' in Community legislation must be in harmony with that of the Basel Convention.

The proposal for an amendment assumes, in the light of prior experience, that substances or objects that have been removed from the economic circuit or incinerated without recovery can in general certainly be regarded as having been 'discarded' in the sense of disposal (Article 1 letter f). To this extent there is no need for any addition to the existing provision. However, where a substance or object is to be (re-)used in the economic circuit it is essential to confirm that

- not every process which a substance or object undergoes as part of normal industrial or commercial (production) processes
- not every operation in which a substance or object is passed on to another stage of production or trade or in the context of re-sale or any other operation in which products that have already been used are passed on to a third party

is governed by the term 'discard' as used in Community legislation and therefore subject to the application of waste legislation.

The necessary **distinction between recovery operations undertaken when discarding a substance or object, that are subject to waste legislation, and other operations in which a substance or object is re-used in the economic circuit, that are not subject to waste legislation, must be based on whether the operation in question is covered by the term 'recovery' as defined in Article 1 letter e.** Only in the latter case can it be assumed that the substance or object is being 'discarded' within the meaning of waste legislation. The new definition of 'recovery' and the recovery operations referred to in Article 1 letter e are based on the assumption that substances and objects first undergo transformation processes as a result of which they are in a fit state to be re-used in the economic circuit. To clarify this, the new provision contained in Article 1 letter a sentence 3 states that substances, objects and products, including by-products, intermediate products and secondary products, cannot necessarily be assumed to have been discarded if they can be re-used in the economic circuit in their present form, i.e. without undergoing any prior transformation processes with a view to their recovery. This applies, but does not need to be explicitly stated in the text of the Directive, both to substances and objects that are passed on to third parties and those that can be re-used without undergoing such transformation processes within a facility, and are therefore not subject to Community waste legislation.

Although the wording of Article 1 with the addition of the new sentences 2 and 3 appears to apply only to actual discarding, it should also be considered to apply to the intent to discard as described in sentence 1. This is because the subjective elements in discarding acquire legal meaning only when the intent to discard is expressed in an actual discarding operation. However, this proposed amendment makes no change to the objective fact of 'being required to discard' in sentence 1, which refers to the varying requirements to discard in Community legislation and in the legislation of the Member States.

#### Article 1 letter e

The change in Article 1 letter e **places the concept of recovery before the concept of disposal, described in Article 1 letter f**, in the hierarchy of objectives under Community waste legislation. This new position underlines the central importance of the concept of recovery because the definition helps clarify the distinction between recovery and disposal as well as the distinction between products that are subject to waste legislation and those which are exempt from it.

#### (Sentences 1 and 3)

The **new definition of recovery** in Article 1 letter e sentence 1 has been drafted in the light of experience with the inability of the current Annex II B to draw clear distinctions. Merely listing the recovery processes carried out in practice, though important for the purposes of illustration, is not sufficient to adequately resolve the problem of distinction. For this reason the proposed amendment **contains a universally valid and abstract general clause describing the key concept of 'recovery'**. This description is intended to serve as an introduction to the necessary clarification of the recovery processes that have up till now been listed as a demonstration in Annex II B. The Commission is now expressly empowered by Article 1 letter e sentence 3 to issue an open-ended, exemplary list of recovery processes including their preparatory stages (e.g. collection, mixing, pre-treatment) – which will now become Annex II A – as a procedure under Article 18 and to examine this list at regular intervals. **The advantage of inserting an abstract general clause is that, provided that the conditions are met, it allows individual atypical or novel processes which are not**

**covered by the demonstrative list of recovery processes to be classified as recovery operations.**

A key element in the concept of recovery as used in waste legislation is that the substance or object in question must undergo **a transformation process (i.e. physical, thermal, chemical or biological treatment, including sorting)** which is deliberately aimed at

- producing secondary raw materials or fuels from waste or its component parts
- manufacturing (recycling) products by transforming or treating waste or its component parts.

This also includes transformation processes in which consumer waste, i.e. waste from consumer durables and consumer goods for immediate consumption, are turned into goods for the same original purpose or rendered fit for other purposes. **As a transformation process is a prerequisite, cleaning or repair operations that involve no further transformation are excluded from the recovery processes as defined under waste legislation and so are entirely excluded from the scope of waste legislation.** Finally, recovery processes also include the processes referred to in Article 3 para. 1 letter b) ii) in which waste is used to generate energy.

(Sentence 2)

Recovery processes are now fully described in Article 1 letter e sentence 1; the aim of the new Article 1 letter e sentence 2 is to exclude spurious recovery. The wording of the **abuse clause** is based on the provision for objection against a shipment contained in Article 7 para. 4 letter a, 5th indent of the EC Waste Shipment Regulation no. (EEC) 259/93. The provision is to be interpreted strictly as an exemption clause. It may apply, for example, to mixed waste in which only a very small part of the total volume of waste can actually be recovered, while by far the larger part is to be disposed of. In this case the abuse clause may be called on if the recovery of the very small part of the total volume of waste is to be carried out at unacceptably high economic and environmental costs when compared with disposal methods. **Under the terms of Article 1 letter f sentence 2, these fake recovery processes are classified as disposal processes.**

(Sentence 4)

**The new Article 1 letter e sentence 4 addresses the issue of when a waste submitted to a recovery process ceases to be waste for the first time.** The point at which this occurs is defined as the point at which the recovery process is complete; from this point on, the substance no longer falls under waste legislation. This provision is needed to take due account of encouraging recovery as a key priority of European waste policy; this priority follows in particular from the sixth clause in the preamble to Directive 91/156 which states "whereas it is desirable to encourage the recycling of waste and re-use of waste as raw materials; whereas it may be necessary to adopt specific rules for re-usable waste". Given the goal of Community legislators to encourage recovery, they could not want waste intended for recovery to remain subject to waste legislation for longer than is necessary. Continuing to consider a substance as waste for longer than is necessary from the point of view of environmental protection would undermine the goal of encouraging recovery. The associated duties and costs would have the effect of endangering the economic viability of waste recovery in general.

(Sentence 5)

In accordance with the above, the new Article 1 letter e sentence 5 determines the point at which the recovery process is complete, which is also the point at which a substance or object ceases to be waste. According to the new Article 1 sentence 5 option 1, the recovery

process is complete when no further measures are necessary to enable a substance or object to be put to immediate use as a secondary raw material in industrial and commercial (production) processes. This point is in line with the provision laid down in Article 3 para. 1 letter b) i) in which the Member States are required to take appropriate measures to encourage "the recovery of waste ... with a view to extracting secondary raw materials". The consequence of this is that the recovery process is complete as soon as the secondary raw materials have been extracted, rather than at the later stage when they are introduced into the economic circuit. Other parts of the proposed amendment (sentence 6 in association with Annex III) assume that at this point the objective contained in Article 4 of Directive 91/156 (ensuring that human health and the environment are protected) is met.

(Sentence 6 in association with the new Annex III)

Article 1 letter e sentence 6 in association with the new Annex III states that a substance can only be recognised as a secondary raw material if high standards of health and environmental protection were met in its design, manufacture etc. in view of its intended use in the economic circuit. The same principles apply to the extraction of secondary fuels and the production of (recycling) products.

The proposed clause defining the point at which a substance intended for recovery ceases to be waste does not contradict the judgement handed down by the ECJ on 18.12.1997, as that decision deals only with the question of when substances used in a production process are to be considered as waste.

The new Article 1 letter e sentence 6 in association with the new Annex III is to be incorporated into Directive 91/156 irrespective of the fact that once secondary raw materials and fuels and (recycling) products lose their property of 'waste' they are not waste and therefore these substances and objects are not subject to the other provisions of Community waste legislation. The reason for this is that an objective relationship with recovery is an important reason for incorporating this provision into Directive 91/156 because it can resolve the difficult issue of distinguishing between 'waste' and 'product' (non-waste). Following the example of Community product safety legislation and Community Directives on technical safety, the new provision is of course based on the definition of fundamental requirements for health and environmental protection. These fundamental requirements are binding on the Member States. Free trade within the Community will be guaranteed for secondary raw materials and fuels and for (recycling) products that comply with the Directives. There will be no need for primary Community legislation as the detailed provisions will be laid down in technical specifications. The drafting of these specifications is a matter for the European standardisation organisations, which will consult the committee set up under Article 18 where appropriate. The standardisation organisations will be free to draft the requirements for each secondary raw material, fuel and (recycling) product on the basis of the generally recognised criteria for raw materials, fuel and products and may also deviate from this general principle by basing requirements on a specific use e.g. of recycling products. In each case **the specifications must be drafted so as to ensure a high level of protection for health and the environment**. This means that the new provisions also help to strengthen and expand European standardisation in the field of recycling. Any existing national specifications, or in their absence quality standards and technical standards that are generally recognised and used throughout the industry in question, will be taken into consideration only in the absence of harmonised technical standards and during the transitional period until such harmonised standards are published. It is important to point out here that such specifications and other standards are not binding. Manufacturers are free to apply them if they wish; this means that in the case of novel (recycling) products for example, compliance with binding fundamental safety requirements can be demonstrated by other means.

Article 1 letter f

The new provision contained in Article 1 letter f sentence 1 **defining disposal** consists of a **two-part categorisation in the form of a general descriptive clause** together with an **open-ended demonstrative list of disposal processes that are carried out in practice** (in the new Annex II B); this is the same approach as taken to recovery in the new Article 1 letter e sentence 1. The abstract definition of disposal has been derived essentially in the light of the previous Annexes II A and B and – as a means of exclusion – Article 3 para. 1 letter b: it indicates that the purpose of waste recovery is to retain the substance or characteristics of the waste within the economic circuit. Disposal of waste is defined as a method of discarding waste in such a way that it is definitively removed from the economic circuit, e.g. by destruction via incineration without the production of energy (see [Arg.] Article 3 para. 1 letter b) ii) [a.E.]).

It is not thought necessary to incorporate a specific statement on the point at which waste intended for disposal ceases to be waste because a substance or object can clearly be seen to no longer be waste when it is immobilised in the case of tipping or dumping and when it is destroyed as a movable object in the case of incineration.

---

## PROPOSAL

for a

## COUNCIL DIRECTIVE

amending Directive 75/442/EEC on waste  
as amended by Directive 91/156/EEC

## THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty establishing the European Community, and in particular Article 175 paragraph 1 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having consulted the Economic and Social Committee and the Committee of the Regions,

in accordance with the procedure laid down in Article 251,

1.

Whereas Directive 91/156/EEC amending Directive 75/442/EEC on waste, taking account of the Council Resolution on waste policy adopted on May 7, 1990, laid down the legal framework for a modern waste management policy for the Community to meet the Community's objectives with regard to waste prevention, waste management and waste disposal. It must be amended in the light of experience gained in the implementation of this Directive by the Member States, while ensuring a high level of environmental protection;

2.

Whereas, mindful of the observations made by the Commission on the continued failure of the Member States to adequately transpose waste management directives, the Council recognised the need for clearer definitions of terms in its Resolution of February 24, 1997 on a Community waste management strategy (97/C 76/01)<sup>9</sup>. Whereas the European Parliament adopted a Resolution on September 16, 1998<sup>10</sup> in which it deplored the defective and careless transposition, application and implementation of Directive 75/442 and expressed the need for a redefinition of the term 'waste';

3.

Whereas more efficient waste management in the Community is dependent on a common terminology and a more tightly drawn definition of the term 'waste', including a clear distinction both between 'waste' and 'product' and between activities in the course of which waste is recovered and activities in the course of which waste is disposed of;

4.

---

<sup>9</sup> EC OJ No. C 76 dated 11.03.1997, p. 1.

<sup>10</sup> Document 820/98 of the Upper House of the Federal German Parliament dated 05.10.1998.



Whereas in order to achieve the Community's objectives set out in the preamble to Directive 91/156/EEC of encouraging the recycling and re-use of waste as raw materials it is important to lay down clear and practical criteria to distinguish between waste on the one hand and secondary raw materials and fuels and (recycling) products on the other hand. Whereas this Community objective can only be achieved if substances and objects extracted from waste in the course of recovery processes are not subjected to obligations and costs under waste legislation for longer than is necessary to protect the environment, as this would harm the competitiveness of the recycling industry and the economic viability of recovery as a whole;

5.

Whereas the objective laid down in Directive 99/31/EEC on waste landfills of encouraging the re-use and recovery of waste and the use of recovered materials and energy in the interests of preserving natural resources and rational land use can only be achieved with the help of more accurate definitions of terms. Whereas the objective of this Directive, to encourage the recovery of waste in order to reduce both the volume and the hazardous properties of waste intended for disposal, can only be met by an accurate definition of waste recovery and waste disposal;

6.

Whereas it is important for the Community that secondary raw materials and fuel and recycling products recovered or produced as a result of recovery processes comply with fundamental safety requirements in terms of health and environmental protection. Whereas harmonised technical specifications should be drafted for secondary raw materials and fuels and recycling products in the Community in order to achieve this objective;

7.

Whereas proper waste management and waste management control is dependent on achieving a clearer distinction than in the past between waste recovery processes and activities as a result of which waste is definitively removed from the economic circuit without being used for any further purpose;

HAS ADOPTED THIS DIRECTIVE:

## Article 1

Directive 91/156/EEC is hereby amended as follows:

Art. 1 is worded as follows:

Art. 1 letter a **sentences 2 and 3**:

Discarding substances and objects according to the present directive comprises recovering and disposing of them.

Discarding does not take place when substances, objects, products including by-products, intermediate products or secondary products are suitable in their existing form either to be used in industrial and commercial (production) processes or to be placed on the market for further use or consumption.

Art. 1 letter e:

"Recovery":

- all processes generating secondary raw materials and fuels by using waste or its component parts by means of physical, thermal, chemical or biological treatment, including sorting;
- all processes producing (recycling) products by means of transforming or processing waste or its component parts;
- all processes recycling or re-using waste materials by means of treatment; in addition, all processes using waste to produce material products or generate energy.

Processes in which the proportions of recoverable and non-recoverable waste, the estimated value of the substances that can in fact be recovered or the costs of recovery and the costs of the non-recoverable proportion do not justify recovery from an economic and environmental point of view are excluded.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up a demonstrative list of recovery processes that are carried out in practice including preparatory operations (Annex **II A**); this list will be periodically reviewed and, if necessary, revised by the same procedure.

Substances and objects that are recovered cease to be waste at the point when the recovery process is complete.

The recovery process is complete when no further measures are necessary to enable a substance or object to be put to use as a secondary raw material in industrial (production) processes, as a secondary fuel to generate energy or after manufacture to be placed on the market as a (recycling) product for use or consumption.

Secondary raw materials, secondary fuels and (recycling) products must comply with the fundamental requirements laid down in Annex III.

Art. 1 letter f:

"Disposal": processes other than those referred to in Art. 1 letter e) sentence 1 that are carried out with a view to definitively removing waste from the economic circuit without any further use being made of it, or incinerating it without producing energy.

The processes referred to in Art. 1 letter e) sentence 2 are also disposal processes.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up a demonstrative list of disposal processes that are carried out in practice including

preparatory operations (Annex ***II B***); this list will be periodically reviewed and, if necessary, revised by the same procedure.

The following Annex III is added:

**Annex III:** Fundamental requirements of secondary raw materials and fuels and (recycling) products

1.

The fundamental requirements laid down in this Directive are binding.

The fundamental requirements are to be interpreted and applied in such a way that they take account of the state of the art and practice at the time when the recovery process is carried out and of technical and economic considerations while providing a high level of protection for human health and the environment.

2.

Raw materials that are produced by a recovery process (secondary raw materials), fuels that are produced by a recovery process (secondary fuels) and products that are made from waste or its component parts by a recovery process (recycling products) must be designed, manufactured, inspected, used or placed on the market in such a way that, when they are put to a normal or reasonably foreseeable use, they present either no risk or a minimal risk that is compatible with their use and does not undermine a high level of protection for human health and the environment.

3.

Harmonised European technical specifications would help to prove compliance with the fundamental requirements; such specifications should address the design, manufacture, inspection and use of secondary raw materials or fuels and (recycling) products and should be drafted in such a way that secondary raw materials or fuels or (recycling) products that comply with them can be deemed to fulfil the fundamental requirements. The harmonised European technical specifications will be drafted by the bodies responsible for such specifications and must remain optional. With regard to standardisation issues, the Commission should be assisted by the committee set up under Directive 83/189/EEC and where appropriate should seek the advice of the committee set up under Art. 18 of this Directive.

4.

In the absence of specific European technical specifications as described in point 3, the compliance of a secondary raw material or fuel or (recycling) product with the fundamental safety requirements will be assessed in the light of the national standards or other technical specifications of the Member State in which the secondary raw material or fuel is used or in which the (recycling) product is placed on the market.

5.

In the absence of specific European technical specifications as described in point 3 and in the absence of national technical specifications as described in point 4, the compliance of a secondary raw material or fuel or (recycling) product with the fundamental safety requirements will be assessed in the light of quality and technical standards that are generally recognised and used throughout the industry in question.

## Article 2

(1) This Directive is addressed to the Member States.

(2) The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than (date). They shall forthwith inform the Commission thereof. They shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Brussels, (date)

*For the Council  
The President*

