

Mr Stavros Dimas
Member of the European Commission
Rue de la Loi 200
B-1049 Brussels

14 November 2005

THE SECRETARY GENERAL

Dear Commissioner,

Re: Thematic Strategy on the Prevention and Recycling of Waste and the revision of the Waste Framework Directive (WFD)

We understand that a decision by the college of Commissioners will be taken towards the end of November, regarding the above mentioned issues. In that context, the press has given information on the proposal in preparation for the revision of the WFD. UNICE welcomes the plans of the Commission to revise the WFD as a long waited move in the right direction and strongly encourages the Commission to adopt the proposal within a short timeframe. Many elements of this draft proposal reflect what industry has been considering and proposing in the past years. For industry, the following key objectives should be pursued in the revision: to clarify unclear legal terms in order to improve legal certainty for companies, and to encourage the use of secondary raw materials contributing to a resource-efficient sustainable economy. I am pleased to give you hereunder UNICE's detailed recommendations on how to reach these objectives.

Specific comments on the distinction between waste and non-waste materials

UNICE has for years worked for better practices in the distinction between materials and substances which are waste and those which remain in the economic circuit without becoming waste because they are not discarded. This is in particular relevant for industrial by-products. UNICE sees a real failure of good governance and functioning of the internal market if the same material, managed and used with identical processes, is considered to be a waste in a Member State and a product in another, which does occur under the present legislation. UNICE welcomes the Commission's proposal, which 15 years after the issue of the last revision of the WFD, should provide clarification on what is waste and what is product and when waste ceases to be waste. On the basis of the current definition of waste, the European Court has published a number of rulings which draw a clear line between non-waste materials/by-products and wastes. In particular, in the rulings C-9/00, C-114/01 and – most recently – C-146/02 and C 121/03, the Court, on the appeal of the Commission has established criteria for non-waste materials which unfortunately are generally not applied in many Member States. Please find a summary of these criteria in the short note attached.

Specific comments on the end of waste and on secondary raw materials

UNICE continues to advocate linking the question of when waste ceases to be waste with criteria for secondary raw materials. We would like to emphasise the need for a comprehensive, flexible and transparent system. Although industry agrees with the idea to follow a case-by-case (materials-by-materials) approach, any system developing criteria for secondary raw materials must, in the meantime, accept all those criteria already in use and established via national regulations or guidelines, standardisation bodies, voluntary commitments or other national initiatives. Otherwise, there is risk of a lack of regulation until new criteria are developed for all the materials concerned. This would inevitably cause new confusion in industry and in the Member States. Industry traditionally recovers secondary raw materials and this practice cannot be interrupted without risking the raw material supply for numerous important European industries. In addition, the success of the forthcoming resources strategy would be endangered.

Furthermore, criteria for secondary raw materials would encourage companies to contribute to the development of secondary raw materials and recycled products which meet high environmental standards and which are competitive under market conditions. In addition, such a system would reduce the delay between the entry into force of the revised Waste Framework Directive and the final adoption by the Commission of environmental and quality criteria. In order to achieve the objective of reducing the impact of waste on the environment, it is of paramount importance to facilitate existing or even to create new markets for recycled materials. Therefore, measures should neither be limited to specific materials or wastes nor should they focus on existing markets for secondary raw materials.

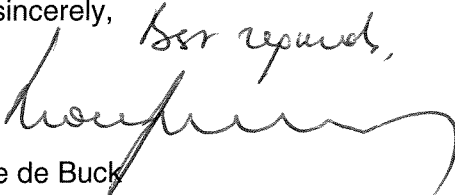
Specific comments on unexcavated contaminated soil

UNICE supports the exclusion of unexcavated contaminated soil from the scope of the Waste Framework Directive. However, we would like to reiterate that such exclusion does not solve the problem in a comprehensive manner. Indeed, other fixed items such as buildings or installations also need to be covered. Ideally, a wording should be found which clarifies the term "waste" as defined by the Waste Framework Directive.

European industry looks for better competitiveness and in this context the question what is waste and what is a product is most important. The definition needs better legal clarity, which will provide industry the much needed security over this matter, and also a level playing field with its main competitors in America and Asia.

I thank you for the consideration you might give to the issues touched upon in this letter. UNICE remains at your disposal for any exchange of views you might wish to hold on these issues in the near future.

Yours sincerely,

Best regards,


Philippe de Buck

EUROPEAN COURT OF JUSTICE
CASE NOTE ON EU WASTE LEGISLATION
Cases C-416/02 and C-121/03

On 8 September 2005, the ECJ issued two waste related rulings in which the Court had the opportunity to clarify two questions of central importance for the qualification of a material as waste or as by-product and for the identification of the applicable waste legislation.

1. The Court clarified under which conditions a material has to be qualified as a by-product and not as a waste in which case the good/material falls outside the scope of Directive 75/442 (in the given cases the material is pig slurry).
2. The Court clarifies that even if a material has to be qualified as “waste” it is not necessarily Directive 75/442 which is applicable if “other” waste management related legislation exists on national or EU level (in the given cases on animal carcasses).

1. Qualification of a material as waste or as by-product:

The ECJ recalls that the scope of the term “waste” turns on the meaning of the term “discard”.

Under the following conditions a good, material or raw material has to be considered not as a waste but as a **by-product** to which the provisions of Directive 75/442 (hereafter WFD) do not apply, even if the good/material results from an extraction or manufacturing **process**, the **primary aim** of which is **not the production of that item** (by-product):

1. the undertaking does **not seek to discard** the material but **intends to exploit or market** it in a subsequent process,
2. the good/material has an **economic value** as products **without any further processing** prior to reuse as part of the **continuing process of production**,
3. the good/material is subject to the **legislation applicable to those products**,
4. provided that such **reuse** is not a mere possibility but a **certainty**;
5. even if the by-product meets the needs of economic operators other than that which produced it (**no identity between producer and re-user required**).
6. The inclusion of a material in the **European Waste catalogue** is **not decisive** for the qualification of a material as waste as it does not take all relevant conditions of the use of the material into account. If the criteria of a by-product are fulfilled the substance therefore remains a by-product even if it is listed in the EWC.
7. Once a good/material is qualified as by-product, **it remains a by-product even in the case of failure to comply with certain regulations or good practices**. Such disregard of regulations or practices constitutes a mere infringement of the latter provisions but this does not change the qualification of the material as a by-product.

2. Which (waste related) legislation is applicable to a material qualified as “waste”?

The Court also held that even if a material has to be qualified as “waste”, this finding does not necessarily lead to the conclusion that this waste category is covered by the WFD 75/442. This finding is based on Article 2 (1) (b) (iii) of the WFD which excludes from the scope of the directive materials that are **“already covered by other legislation”** under the condition that:

“this other legislation relates to the management of that waste as such and that it results in a level of protection of the environment at least equivalent to that aimed at by the WFD.”

If such “other legislation” - be it Community or national legislation - can be identified for the waste category in question, it is this “other” legislation which is applicable and not the WFD.