



DRAFT GUIDANCE ON THE INTERPRETATION OF KEY PROVISIONS OF DIRECTIVE 2008/98/EC ON WASTE

16 September 2011

INTRODUCTION

1. The UK Environmental Law Association (**UKELA**) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study and formulation of environmental law in the UK and the European Union. UKELA attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Waste Working Party.
3. UKELA wishes to make the following comments on the Draft Guidance on the interpretation of key provisions of Directive 2008/98/EC (**Guidance**).

GENERAL COMMENTS

4. UKELA welcomes the European Commission's decision to produce guidance on the interpretation of Directive 2008/98/EC (the revised Waste Framework Directive (**revised WFD**)). The authors of the Guidance, who UKELA understands were appointed by the European Commission, have made a good effort to provide clear guidance on a highly complex area of EU law. That said, UKELA has a number of concerns about key aspects of the Guidance, which if not addressed, will significantly undermine the usefulness of the Guidance to EU Member States.
5. The Guidance should seek to clarify key concepts by direct reference to legislation and clarify areas where Member States and their regulatory authorities have discretion. It should explain *how* to interpret the law, and not seek to interpret the law within the Guidance, as the interpretation of the law is for the European Commission, the CJEU and the national courts of the EU. The main concerns UKELA has with the Guidance are three-fold:
 - (a) the Guidance fails to provide an accurate summary of CJEU case law;
 - (b) it is misleading in its explanation of the terms of the revised WFD; and
 - (c) the Guidance should define the areas where Member States have discretion with respect to the implementation of the revised WFD.
6. UKELA strongly recommends that the content of the Guidance should involve contributions from legal professionals, and should at the very least be peer reviewed by legal professionals before it is published in its final form if it is to have any meaningful application to Member States of the EU.

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THE GUIDANCE FAILS TO PROVIDE AN ACCURATE SUMMARY OF CJEU CASE LAW

7. UKELA acknowledges that the Guidance is a document produced to clarify and provide a guide to Member States on the interpretation of key provisions of the revised WFD. However, general observations on the Guidance are that it:
 - (a) fails to provide an accurate summary of CJEU case law. It is confusing for Member States and their regulators where the Guidance conflicts with or fails accurately to reflect established CJEU case law on interpretation of the key terms of the revised WFD;
 - (b) uses examples in a way which is inappropriate for EU-level guidance. Direct examples, sometimes from CJEU case law and sometimes not, are cited to demonstrate the meaning of key concepts. The examples given are frequently arguable as to whether they are correct in law, and are likely to cause confusion rather than clarify matters;
 - (c) does not take the opportunity to explain different areas of interplay between waste law and other areas of law; and
 - (d) lacks certainty, and therefore does not enable regulators and industry in Member States to best achieve the goals of the revised WFD.
8. UKELA sets out below a number of examples of the above. This list is non-exhaustive and UKELA has noted more.
 - (a) The final paragraph of section 1.1.2.1 contains a list of “clarifications” regarding the concept of discarding as provided by the CJEU. A number of important cases are missing from the list of key principles of CJEU case law. For example, the list should include a reference to C-188/07 Commune de Mesquer v Total France SA and Total International Ltd, which is an important example of where discard can be accidental; and C-129/96. Inter-Environnement Wallonie, which importantly clarifies that an object is only discarded when it ceases to be required for its original purpose.

Other important principles missing from the list include:

 - i The definition of discard is not to be interpreted restrictively, and each situation has to be considered on a case by case basis (C-418/97 and 419/97 Arco Chemie and numerous other cases).
 - i The significance of other issues where guidance is available in CJEU case law, for example, the presence of contaminating substances (C-444/00 Mayer Parry; Arco Chemie); where a substance or object is commonly regarded as waste (C-235/02 Saetti); where a substance or object is subject to a recovery or disposal operation (C-418/97 and 419/97 Arco Chemie).

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Section 1.1.2.3 should be entitled “practical examples of “discard” rather than “waste and non-waste”, and “waste” should be replaced with “discard” in the sentence beneath.

- (b) In the second paragraph of section 1.1.2.1 with regard to the intention to discard it is noted that “*the CJEU has recognised that the holder’s intention is to be inferred from his/her actions in the light of the aims of the WFD and having regard to factors provided by the Court*”. It would be helpful if the Guidance clearly stated that the test is an objective test rather than a subjective test. This is supported by paragraph 25 of the C-9/00 Palin Granit judgment and paragraph 109 of the AG’s opinion in case C-444/00 Mayer Parry. The confirmation of the test as objective would provide explicit clarity for users of the Guidance and serve to promote the objectives of the revised WFD.
- (c) The third bullet point in section 1.1.2.2 of the Guidance refers to a person who deposits clothing at a clothing collection point in a civic amenity site. The Guidance considers such items as waste “*since the clothing is discarded*”. This example, which does not appear to have any basis in CJEU case law, is arguable as to whether it is correct in law, and its inclusion is therefore inappropriate. Please see further section 3 below.
- (d) There is no clarification in the Guidance of the interplay with different areas of law, such as waste law and the International Convention on Civil Liability for Oil Pollution Damage. The third paragraph of section 1.1.2.4 fails to address how this affects the position under international law; for example, under the Convention, liability is placed on a ship operator. If the Guidance does not clarify this, UKELA queries the point of the third paragraph of section 1.1.2.4, as it merely repeats the CJEU judgment and raises more questions than it answers.

THE GUIDANCE IS MISLEADING IN ITS EXPLANATION OF THE TERMS OF THE REVISED WFD

- 9. Various parts of the Guidance repeat and confirm the law as set out in the revised WFD. Whilst UKELA considers it is useful to summarise the different requirements or meanings in the revised WFD, there are examples of where the revised WFD is not completely or accurately cited or where explanations are misleading.
- 10. There are examples used in the Guidance where certain provisions are missed out, and definitive lists of activities in the revised WFD are given as a list of examples, suggesting that other activities may qualify. Whilst the Guidance is not legally binding, it could create confusion for the regulators of Member States who refer to the Guidance. Clearly it is not the purpose of the Guidance to go beyond the law, and where the law is stated it must be done so accurately, as otherwise the Guidance is counter-productive.
- 11. UKELA sets out below a number of examples of the above. This list is non-exhaustive and UKELA has noted more.

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- (a) Section 2.6 provides guidance on the dredging sediments exclusion, referred to at Article 2(3) of the revised WFD. At section 2.6.1, the Guidance provides a list of purposes where non-hazardous dredging sediment is excluded from the scope of the revised WFD where it is put elsewhere within surface waters. The list of purposes is based on the definitive list of purposes provided in Article 2(3) of the revised WFD. This list is given in the Guidance as a list which is by way of example as opposed to being a definitive list of purposes for which the exclusion applies, as the wording in Article 2(3) provides. One of the specific purposes listed in Article 2(3) is that of “land reclamation”. This purpose is not included in the list in the Guidance which is misleading. This should be included in the list, and the Guidance should make clear that the exclusion only applies where the non-hazardous dredging sediment is put elsewhere within surface waters if it is for the purposes as provided in Article 2(3).
- (b) The first two paragraphs of the Guidance are misleading and confusing on the definition of waste. In the first paragraph, the example given (transfrontier movements of waste) is an example of an exclusion of Directive waste from other regimes, not the exclusion of certain types of substances / objects from the definition of waste. The definition of waste does not have any exclusions, although there are exclusions from the scope of the revised WFD (which is a different point). In the second paragraph, the phrase “*through not meeting the criteria set in the definition*” is also confusing, as there are no criteria as such to the definition of waste.
- (c) In section 1.1.2 the phrase “*the concept of waste is not restricted to the shape of the object*” is incomplete, as it should include “*the concept of waste is not restricted to the shape or characteristics of any particular substance or object*”. UKELA also queries whether, in the following paragraph, it is correct to say that the legislator has “*sharpened the concept of waste*” –it would be more accurate to say that the legislator “*has provided more legislative detail on the meaning of waste*”.
- (d) The Guidance is also misleading and inaccurate on “End of Waste” issues:
- i In the first paragraph of section 1.3.1 the Guidance states that the revised WFD introduces the end of waste as a “new concept” – it is not a new concept in itself, but was not addressed in the previous WFD.
 - i The first paragraph of section 1.3.2 is misleading. The explanation provided makes it sound as if Articles 6(1)(a) to (d) apply to all wastes, and if the criteria are not satisfied, the substance / object does not cease to be waste. This is not an accurate explanation, because the revised WFD provides a mechanism for “end of waste” criteria to be developed for particular waste streams. This will provide certainty in relation to those waste streams, but should not preclude “end of waste” from being demonstrated by reference to the relevant principles in the absence of such waste-specific criteria.

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- i In section 1.3.3 there is no explanation in the Guidance in relation to wastes which are not covered by specifically developed criteria, either at an EU or national level. The Guidance should clarify that a substance can still cease to be waste in such circumstances.
- i In the 10th paragraph of section 1.4.4, the Guidance simply makes the point that such operations can be recovery operations, but the point which needs to be clarified and has not been addressed is that recovery can be complete and the substance in question can cease to be waste once it has been prepared for reuse, not only after it is used.
- i In the second paragraph of section 1.4.5 the Guidance omits the point that the material ceases to be waste once it has been prepared for reuse.
- i In the 4th paragraph of section 1.4.6, the Guidance is confusing, particularly the sentence *“processing of waste which results in a waste, which is then submitted to other waste recovery steps, would not be considered recycling, but pre-treatment prior to recovery. Such an operation would be categorised as “preparation prior to recovery or disposal” or “pre-processing prior to recovery”*. This explanation does not reflect the sophistication of the revised WFD, or the difference between recycling and other forms of recovery. UKELA refers to paragraph G3.88 of the UK Department for Environment, Food and Rural Affairs’ Draft Guidance on the Legal Definition of Waste as an example of a more appropriate explanation. It is quite clear that, for example, scrap metal which undergoes treatments like those listed in 4th paragraph of section 1.4.6 of the Guidance, ceases to be waste before it is used in the blast furnace. This is now confirmed in law – see EU Regulation No 333/2011.

THE GUIDANCE SHOULD DEFINE THE AREAS WHERE MEMBER STATES HAVE DISCRETION WITH RESPECT TO THE IMPLEMENTATION OF THE REVISED WFD

12. UKELA understands the Guidance is being prepared at EU level, rather than at national or individual operator level. Therefore, where possible, the Guidance should clearly identify where the revised WFD allows Member States and regulatory authorities a level of discretion. This should be achieved by giving an accurate account of the position of CJEU case law within the framework provided by the revised WFD. In UKELA’s view it is not appropriate that the Guidance gives specific and contentious examples of interpretation of the law where they are not supported by CJEU case law, as these are areas where Member States are entitled to exercise discretion in accordance with encouraging options that deliver the best overall environmental outcome.
13. Member States and their regulators have, in many cases, been taking cautious decisions in this area of law because of the legal complexity and they often lack the confidence to take decisions which are within their discretion. This undermines the achievement of the UK Environmental Law Association: making the law work for a better environment

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- objectives of the revised WFD, such as the encouragement of resource efficiency. Effective guidance should take a higher level view of the law, and encourage and enable Member States and their regulators to act within their discretion to make decisions and provide their own examples and guidance.
14. To achieve its purpose and provide useful and effective guidance within the law, the Guidance should clearly set out the law and provide parameters or assistance for the Member States' regulatory authorities to exercise their discretion.
 15. For example, the discretion of Member States is identified in the revised WFD in Article 4(2) which requires that, when applying the waste hierarchy in Article 4(1), "*Member States shall take measures to encourage the options that deliver the best overall environmental outcome*". In the appropriate circumstances it may also be helpful for the Guidance to define the parameters of that discretion to clearly identify the scope of a Member State's discretion in practice. The definition of "discard" within the revised WFD is reviewed in the Guidance and is a key definition for determining when a substance or object becomes waste and subject to the requirements of the revised WFD.
 16. Example 2 in Section 1.1.2.3 of the Guidance uses refillable bottles which are "*collected, cleaned and refilled*" as an example of where an object does not become waste. This is not an appropriate example, as whether it is a valid example depends on the circumstances. Clearly in some scenarios waste bottles may be collected and prepared for reuse, in which case they would start that process as waste. The Guidance should not be providing an example of where an object does not become waste where such a decision is for the Member States and their regulators by reference to the facts of the case. A Member State must take measures to apply the waste hierarchy to encourage the option which delivers the best environmental outcome. It is therefore within each Member State's discretion to determine whether the actions required to such bottles mean that the bottles are treated as waste and are therefore being prepared for reuse or whether the action is a means of waste prevention.
 17. Guidance in this particular area has already been issued by the UK Government's Department for Environment, Food and Rural Affairs¹. Paragraph G3.91 of this guidance provides contrasting examples of milk bottles and chemical drums. The milk bottles are reused as a waste prevention measure as they are "*designed or used in such a way as to enable reuse*" – though clearly to reuse the bottles requires actions which could be interpreted as being within preparation for reuse. In contrast, chemical drum containers which require recovery operations to remove contaminating materials and prepare the drum for reuse are cited as being reused following a recovery operation. This is an example of a Member State regulator exercising the discretion granted to it under the revised WFD and illustrates why providing examples is not something that is appropriate for this Guidance.

¹ Draft detailed guidance on the legal definition of waste and its application was published in January 2010 by the UK Department for Environment, Food and Rural Affairs.



18. Another instance where the Guidance seeks to give an example where in fact it should be confirming that a Member State has discretion is in the third practical example of items being discarded at 1.1.2.2 and the counterexample to Example 1 at 1.1.2.3. The European Commission's statement that "*a person deposits clothing at a collection point in a civic amenity site*" is not a practical example of where an object is "discarded". This statement is inconsistent with the definitions in the revised WFD, the waste hierarchy and recent case law in the English courts.
19. The CJEU decision in C-129/96, Inter-Environment Wallonie provides that an object is only discarded when it ceases to be required for its original purpose. This is another area of interpretation of the revised WFD which, in the absence of CJEU case law, should remain in the discretion of the Member States in their application of the waste hierarchy in line with the aims of the revised WFD. Indeed, there is case law on the interpretation of this area of the revised WFD in English law. The case of Environment Agency v Thorn International UK Ltd [2008] provides an interpretation of the meaning of "discard". The judge was not satisfied that the return of electric goods, which were being repaired and sold for reuse, constituted "discarding". He concluded that "*there is nothing to be found within the purposes of the WFD or the actions of the consumer to dictate a conclusion that such an item must be waste*". The judge also held that to regard items as discarded "*every time a consumer no longer wishes to keep such an item*" is "*far too extreme a view and stringent a rule*".
20. Another English case which provides an interpretation of recital 10 and the definition of "waste" in the revised WFD, Environment Agency v Inglenorth Ltd [2009], concluded that if the holder of an object does not intend to "*get rid of*" something, he does not discard it. This case established the importance of the intention of the holder of waste even where materials have the characteristics of waste and are intended to be subject to a recovery operation and are therefore arguably being "discarded" in a technical legal sense.
21. In the absence of any specific CJEU case law on the issue of taking clothing (or other items such as bicycles, toys etc) to civic amenity sites, it is neither appropriate nor correct for the Guidance to refer to used clothing being deposited at a clothing collection point in a civic amenity site as a clear or helpful example of where an object has been discarded.

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