



With the support by the EACEA, The EU Commission, Grant Decision 2013 - 2877 / 001 - 001

The University of Maribor Jean Monnet Centre of Excellence

Working Paper No. 30/2016

Rules on waste in the EU

Prof. Dr. Rajko Knez
University of Maribor, Faculty of Law, Slovenia
The University of Maribor Jean Monnet Centre of Excellence

July 2016

Rules on waste in the EU

Prof. Dr. Rajko Knez
University of Maribor, Faculty of Law
The University of Maribor Jean Monnet Centre of Excellence

Table of Content

I.	Introduction.....	2
II.	Is there a systemic and doctrinal approach in the area of waste regulation?	4
III.	The hierarchy and Member States' obligations.....	9
	III.1. Extended producer responsibility.....	10
	III.2. Control over the waste treatment.....	11
	III.3. Managing plans.....	12
III.	Conclusion.....	13

Abstract:

This paper aims to analyse how much doctrinal approach is applied on the area of waste regulative in the EU. This is an area with huge amount of rules, embodied in the directives, also in some regulations. Whenever we are faced with different acts, rather comprehensive acts, the question of doctrinal approach is present. It is present also in other cases, but dealing with different directives, and cover directive like framework directive, the question of doctrinal approach arises at the outset. At the same time, also in connection with the first question, the second question was discussed into article, i.e. what is left to Member States to regulate. The author concludes that there is certain level of doctrine applied in this area, especially in relation to definition of waste, by-product, end-of-waste status and there is also considerable level playing field giving to the Member States to regulate management of the waste.

Keywords:

waste, waste framework directive, waste management, definition of waste, by-product, end of waste status, illegal dumping, extended producer responsibility, management plans, waste disposal

I. Introduction

Modern society generates enormous amounts of industrial and commercial waste, some of which is very dangerous to human health and poses a serious threat to the environment. The modern legal response to the problem of waste has been to adopt a holistic approach first to minimise the generation of waste by, for example, encouraging efficient technology and reducing packaging; by providing incentives for recycling and reuse of materials; and finally by setting strict environmental controls for disposing of waste.¹

¹ M. Sunkin, D. M. Ong, R. Wight, Sourcebook on Environmental Law, 2nd Ed., Cavendish Publishing, 2002, p. 343.

One can read the Commission statement: »Over the past decades the European Union (EU) has put in place a broad range of environmental legislation.² As a result, air, water and soil pollution has significantly been reduced. Chemicals legislation has been modernised and the use of many toxic or hazardous substances has been restricted. Today, EU citizens enjoy some of the best water quality in the world and over 18% of EU's territory has been designated as protected areas for nature. However, many challenges persist and these must be tackled together in a structured way.«³ How to handle waste is one among such challenges. In Europe, we currently use 16 tonnes of material per person per year, of which 6 tonnes become waste. Although the management of that waste continues to improve in the EU, the European economy currently still loses a significant amount of potential 'secondary raw materials' such as metals, wood, glass, paper, plastics present waste streams. In 2010, total waste production in the EU amounted to 2,5 billion tons. From this total only a limited (albeit increasing) share (36%) was recycled, with the rest was landfilled or burned, of which some 600 million tons could be recycled or reused.⁴

Just in terms of household waste alone, each person in Europe is currently producing, on average, half of tonne of such waste. Only 40 % of it is reused or recycled and in some countries more than 80% still goes to landfill.⁵

Turning waste into a resource is one key to a circular economy.⁶ Improved waste management also helps to reduce health and environmental problems, reduce greenhouse gas emissions (directly by cutting emissions from landfills and indirectly by recycling materials which would otherwise be extracted and processed), and avoid negative impacts at local level such as landscape deterioration due to landfilling, local water and air pollution, as well as littering.

The EU's approach to waste management is based on the "waste hierarchy" which sets the following priority order when shaping waste policy and managing waste at the operational level: prevention, (preparing for) reuse, recycling, recovery and, as the least preferred option, disposal (which includes landfilling and incineration without energy recovery).⁷

² Until the 1970s, Member States regarded waste disposal as essentially a matter for local or regional action. Greater public concern about the environmental consequences of uncontrolled waste disposal operations and an increasing shortage of waste disposal facilities led to some States deciding to adopt strategic plans for dealing with the everincreasing bulk of industrial and domestic waste generated by modern societies. The EU has now in place a comprehensive set of measures addressing the problem of waste which apply in all Member States. See M. Sunkin, D. M. Ong, R. Wight, *idibem*, p. 380.

³ See European Commission web page on Environment: <http://ec.europa.eu/environment/action-programme/> (12.7.2016).

Since the mid-1970s, EU environment policy has been guided by action programmes defining priority objectives to be achieved over a period of years. The current programme, the seventh of its kind, was adopted by the European Parliament and the Council of the European Union in November 2013 and covers the period up to 2020. Through this Environment Action Programme (EAP), the EU has agreed to step up its efforts to protect our natural capital, stimulate resource-efficient, low-carbon growth and innovation, and safeguard people's health and wellbeing – while respecting the Earth's natural limits. It's a common strategy that should guide future action by the EU institutions and the Member States, who share responsibility for its implementation and the achievement of its priority objectives. See European Commission, *Living well, within the limits of our planet*, 7th EAP — The new general Union Environment Action Programme to 2020, doi:10.2779/57220.

⁴ European Commission, Waste, <http://ec.europa.eu/environment/waste/index.htm> (13.5.2016)

⁵ source: Environmental Data Centre on Waste, Eurostat, <http://ec.europa.eu/eurostat/web/environment/waste/main-tables> (13.6.2016)

⁶ The objectives and targets set in European legislation have been key drivers to improve waste management, stimulate innovation in recycling, limit the use of landfilling, and create incentives to change consumer behaviour. If we re-manufacture, reuse and recycle, and if one industry's waste becomes another's raw material, we can move to a more circular economy where waste is eliminated and resources are used in an efficient and sustainable way.

⁷ See Art. 4 of the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008.

In line with this the 7th Environment Action Programme sets the following priority objectives for waste policy in the EU:

- to reduce the amount of waste generated;
- to maximise recycling and re-use;
- to limit incineration to non-recyclable materials;
- to phase out landfilling to non-recyclable and non-recoverable waste;
- to ensure full implementation of the waste policy targets in all Member States.

The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources, and favour the practical application of the waste hierarchy.⁸

This paper aims to analyse the structure of the rules in the area of waste in the EU, especially it tries to answer whether the approach to regulate this area is doctrinal, and consequently, what it is left to Member States to regulate. These two questions will be in the main stream of the paper.

II. Is there a systemic and doctrinal approach in the area of waste regulation?

Based on the above facts, one can imagine, rather easy, that EU approached rather extensively to regulate waste. It is not only that there are different directives adopted (also readopted due to the systematic changes and due to the need to clarify EU Court of Justice (ECJ) approaches and decisions), but waste is also considered as goods according to Art. 34 of the Treaty on Functioning of the EU (TFEU). The comprehensiveness of rules regarding waste is therefore understandable and also acceptable.⁹

The most important acts on waste in the EU are:

- *Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste*¹⁰
- *Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste*¹¹
- *European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste*¹²
- *Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE)*¹³
- *Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste*¹⁴
- *Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles*¹⁵

⁸ Par. 6 of the preamble of the Directive 2008/98/EC.

⁹ Compare J. H. Jans, H. B. Vedder, *European environmental law*, European law publishing 4th edition, 2012, p. 473.

¹⁰ OJ L 312, 22.11.2008, p. 3–30.

¹¹ OJ L 182, 16.7.1999, p. 1–19.

¹² OJ L 365, 31.12.1994, p. 10–23.

¹³ OJ L 197, 24.7.2012, p. 38–71.

¹⁴ OJ L 190, 12.7.2006, p. 1–98.

¹⁵ OJ L 269, 21.10.2000, p. 34–43.

- Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC¹⁶
- Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC¹⁷
- Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.¹⁸

Whenever we are dealing with comprehensive legislation, with huge influences to national law, market, public interest, public law, human health, nature protection, etc. ... there is a question present, whether the approach is doctrinal, systematic, well and profoundly regulated.¹⁹ It is from this reason rather obvious, at the outset, that EU adopted a framework directive, which forms a kind of umbrella approach, which is doctrinal in its fundament, also for other directives mentioned above. The Waste Framework Directive replaced Directives 75/439/EEC, 91/689/EEC and 2006/12/EC are previously regulating waste in the most general and doctrinal way. The concept currently in force was developed only by EU legislator, especially by the Commission, but also by ECJ.

The main question in waste regulation is relating to a definition, what exactly waste means. This starting point was seen, rather for the early beginnings, as also the main issue of doctrinal approach to regulate waste.²⁰ It is not only, that certain term shall be uniformly applied across the EU by Member States and their authorities, but it is more; In this case the definition of waste enshrines also some other effects. In the late 1990 cases from national courts that reached ECJ, also criminal proceedings, offered a rather clear picture, what exactly is in the foreground of waste regulation. ECJ was faced with different cases, but all of them ended up with a fundamental question, what exactly waste is. Namely, there is a constant conflict in interests of the industry at the one hand and the protection of the human health and the environment on the other hand. The industry would like to see certain products not being waste, being for instance by-products or materials which might be reproduced or which might be used for other purposes (like producing energy) and those materials and by-products will not be seen as a waste.²¹ On the other hand, for instance, large or used oils which might still generate energy, can be seen, from the environmental protection purposes as a waste.

This can be clearly demonstrated by joint cases *Tombesi et al.*²² E. and A. Tombesi are the proprietors of a firm which works marble. They were charged, inter alia, with the offence of

¹⁶ OJ L 266, 26.9.2006, p. 1–14.

¹⁷ OJ L 102, 11.4.2006, p. 15–34.

¹⁸ OJ L 190, 12.7.2006, p. 1–98.

¹⁹ See for critics P. Sands, J. Peel, *Principles of International Environmental Law*, 3rd Ed., Cambridge 2012, p. 575.

²⁰ This is recognized also by the Waste Framework Directive under points 18 and 19 of the preamble: »Definitions of prevention, re-use, preparing for re-use, treatment and recycling should be included in this Directive, in order to clarify the scope of these concepts.«

»The definitions of recovery and disposal need to be modified in order to ensure a clear distinction between the two concepts, based on a genuine difference in environmental impact through the substitution of natural resources in the economy and recognising the potential benefits to the environment and human health of using waste as a resource. In addition, guidelines may be developed in order to clarify cases where this distinction is difficult to apply in practice or where the classification of the activity as recovery does not match the real environmental impact of the operation.«

²¹ By-product is a substance or object, resulting from a production process, the primary aim of which is not the production of that item. By-products can come from a wide range of business sectors, and can have very different environmental impacts. An incorrect classification could be the cause of environmental damage or unnecessary costs for business.

²² Joint cases C-304/94, C-330/94, C-342/94 and C-224/95, Reference for preliminary ruling in the criminal proceeding Euro Tombesi and Adino Tombesi (C-304/94), Roberto Santella (C-330/94), Giovanni Muzi and others (C-342/94) and Anselmo Savini (C-224/95), ECLI:EU:C:1997:314.

discharging without authorisation marble rubble and debris from worked marble. R. Santella was charged with producing without authorisation toxic and dangerous waste consisting of pitch obtained from the emissions produced by electro-static filters used in cooking ovens. G. Muzi and others were charged with the offence concerning olive oil residues. A. Savini was charged with the offence of having transported, without authorisation, unsheathed copper left over from the manufacture of copper windings, fragments of cable, ferrous material, ferrous scrap and mixed scrap. All defendants argued in court that the materials involved were no longer regarded as waste, but had to be considered as products.

Community legislation on waste states defined (at the material time, *Dir. Directive 91/689 on hazardous waste*²³ which stipulates under Art. 1(3): “The definition of ‘waste’ and of the other terms used in this Directive shall be those in Directive 75/442/EEC”) waste as “any subject or object in the categories set out in Annex I which the holder discards or intends or is required to discard”.

As the Italian courts were in doubt whether the Italian provisions concerning the definition of waste were compatible with EU legislation, they asked the ECJ for a preliminary ruling. The ECJ, in par. 54 of the judgment concluded: “The answer to the questions referred to the Court must therefore be that the concept of “waste” in Article 1 of Directive 75/442, as amended, referred to in Article 1(3) of Directive 91/689 and Article 2(a) of Regulation 259/93 is not to be understood as excluding substances and objects which are capable of economic reutilisation, even if the materials in question may be the subject of a transaction or quoted on public or private commercial lists. In particular, a deactivation process, merely to render waste harmless, landfill tipping in hollows or embankments and waste incineration constitute disposal or recovery operations falling within the scope of the Community rules. The fact that a substance is classified as a re-usable residue without its characteristics or purpose being defined is irregular, in that regard. The same applies to the grinding of a waste substance.”

The question when a material is to be called a “product” and when “waste” has occupied the ECJ on several occasions.²⁴ The Community adopted first in 1975 a directive on waste which defined waste as “any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force”. “Disposal” was defined as “the collection, sorting, transport and treatment of waste as well as its storage and tipping above or underground;—the transformation operations necessary for its re-use, recovery or recycling”.²⁵ This definition was slightly amended by Directive 91/156, due also to international developments: the Basel Convention on the shipment of waste²⁶ understood the notion of “disposal” as covering disposal and recovery operations.

As Krämer observes, in conclusion, it is thus clear and without doubt that the EU definition of “waste” also includes wastes which are capable of or destined for economic recycling or recovery. In particular, economic operators accuse this notion of being too large; it is claimed that materials

²³ [1991] OJ L377/20.

²⁴ Ludwig Krämer, *Casebook on EU on environmental law* Oxford 2002, p. 378.

²⁵ Directive 75/442, Art. 1.

²⁶ Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, of 22 March 1989. The Community adhered to this Convention by Decision 93/98 [1993] OJ L39/1. As all Member States were also members of OECD, the EU was of the opinion it desirable to align its legislation as much as possible to the OECD provisions. Therefore, it introduced two different notions, “disposal” operations which were further specified in Annex IIA and “recovery” operations which were further specified in Annex IIB to the Directive. The common denominator to these activities became the notion “discard”, in order to avoid the notion “disposal” being used as the common denominator and at the same time as the determining notion for operations which led to the final disposal of waste (IIA operations). See more about it in the comments of this case, Ludwig Krämer, *Casebook on EU on Environmental Law* Oxford 2002, p. 378.

which, in one way or the other, are used or capable of being used for economic recovery operations should not be considered as waste, but rather as “secondary raw materials”, “secondary products”, “by-products” or obtain a similar classification. The legal problem with this argument seems obvious: the notions of “economic value”, economic reutilisation” or similar notions based on economic considerations are not notions which are linked to any specific national legal order. The “economic value” of material is independent from national borders, the EU or industrialised countries. This means that each waste material has, somewhere in the world, some economic value. Thus, the consideration of “economic value” would lead to the deletion of the notion of “waste” altogether.²⁷

At that time the notion of “waste” was not very precise.²⁸ Cases which followed, like *Inter-environment*²⁹, *ARCO Chemie*³⁰, *Palin Granit*³¹, *AvestaPolarit*³², *Mayer Parry*,³³ offered a lot of clarity to definition. Definition is now clarified in the form of Art. 5 of the Waste Framework Directive. According to this provision a substance resulting from a production process, the primary of which is not the production of that substance of might not be waste, but rather a by-product if the following cumulative conditions are met:

- further use of the substance or object is certain;
- the substance or object can be used directly without any further processing other than normal industrial practice;
- the substance or object is produced as an integral part of a production process; and
- further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

Art. 5 needs to be narrowly interpreted. Basically, Art. 5 is an exception from Art. 4. It is also true that exceptions, under the EU law are narrowly interpreted. *Jans* and *Vedder* observe this exception for by-products relate to the facts that the directive contains what has been called two layers of prevention that can be identified in the waste hierarchy (Art. 4). The first layer tries to prevent

²⁷ Ibidem, p. 379. Also, incineration with energy recovery is, in legal terms, a recovery operation. Consequently, all materials that burn will have to be considered as “capable of economic reutilisation”. Again, this would lead to abandoning the notion of waste altogether. Nor is it possible to restrict the notion of “economic value” to economic activities in Member States or in industrialised countries.

²⁸ The meaning of ‘waste’ in the context of EC (now EU) legislation has not been easy to establish. Clearly, some means of identifying waste is necessary because the regime created by the Directives discussed below only applies to materials categorised as waste. An initial question is whether the distinction between waste and non-waste serves any useful purpose. Since the basic purpose of the waste regime is to protect human health and the environment, and since all materials pose a greater or lesser threat if disposed of or handled recklessly, then why must the regime apply only to materials which satisfy the amorphous definition of waste? The answer is that there is a tendency to deal with waste material in ways which pose an increased threat to the environment or human health precisely because the holder or producer may have no financial self-interest in ensuring that it is disposed of responsibly. Waste is therefore subject to a special regulatory regime which compensates for the possible indifference of those charged with its disposal. See M. Sunkin, D. M. Ong, R. Wight, *ibidem*, p. 381.

²⁹ Case C-129/96, *Inter-Environnement Wallonie ASBL v Région wallonne*, ECLI:EU:C:1997:628.

³⁰ Joined cases C-418/97 and C-419/97, *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (C-418/97)* and *Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v Directeur van de dienst Milieu en Water van de provincie Gelderland*, ECLI:EU:C:2000:318.

³¹ Case C-9/00, *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, ECLI:EU:C:2002:232.

³² Case C-114/01, *AvestaPolarit Chrome Oy*, ECLI:EU:C:2003:448.

³³ Case C-444/00, *The Queen, on the application of Mayer Parry Recycling Ltd, v Environment Agency and Secretary of State for the Environment, Transport and the Regions, and Corus (UK) Ltd and Allied Steel and Wire Ltd (ASW)*, ECLI:EU:C:2003:356.

waste from being produced in the first place, and the second (regulatory) layer, tries to prevent an environmental damage from occurring once waste has been produced. It is the second layer which leads to a very wide concept of waste and those a wide scope of waste legislation to ensure that such by-products do not harm the environment. As Art. 4 essentially codifies existing case law, these cases might also be used explained elements of these exceptions (by exception it is meant when certain waste is not waste but by-product).³⁴

This might be clearly seen from the case *Saetti*,³⁵ where ECJ classified the petroleum coke as one of the many fuels intendancies to be produce in the refining process and those excluded it from the definition of waste, if its use a fuel as fuel is certain. This reasoning has been clarified also in *Palin Granit*³⁶ and *AvestaPolarid*³⁷ cases. In *Palin Granit* regularly shaped granite blocks which were stored near to the quarry, waiting for the answer in use (for instance for embankments, construction of roads, etc.) were for the ECJ not sufficient. Namely, the uncertainty, whether the left over stones will indeed constitute a product (in indefinite period of time) was not enough to constitute by-product, but rather a waste.

In the case *Mayer Parry*,³⁸ the ECJ also confirmed that something might be waste but with the recycling processes or with the proper use might become a by-product or product; meaning that waste might cease to be considered waste. This is now qualified in the form of the Art. 6 of the Waste Framework Directive. This article confirms that certain waste shall cease to be waste when it has undergone recovery, including recycling, operation and complies with specific criteria to be developed in accordance with the following conditions:

- the substance or object is commonly used for specific purposes;
- a market or demand exists for such a substance or object;
- the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
- the use of the substance or object will not lead to overall adverse environmental or human health impacts.

In order to harbouring no confusion between the various aspects of the waste definition, and that appropriate procedures should be applied, where necessary, to by-products that are not waste, on the one hand, or to waste that ceases to be waste, on the other hand, the Waste Framework Directive clarifies:

- when substances or objects resulting from a production process not primarily aimed at producing such substances or objects are by-products and not waste. The decision that a substance is not waste can be taken only on the basis of a coordinated approach, to be regularly updated, and where this is consistent with the protection of the environment and human health. If the use of a by-product is allowed under an environmental licence or general environmental rules, this can be used by Member States as a tool to decide that no overall adverse environmental or human health impacts are expected to occur; an object or substance should be regarded as being a by-product only when certain conditions are met. Since by-products fall into the category of products, exports of by-products should meet the requirements of the relevant EU legislation; and

³⁴ Jans, Vedder, Ibidem, p. 477.

³⁵ Case C-235/02, Criminal proceedings against Marco Antonio Saetti and Andrea Frediani, ECLI:EU:C:2004:26.

³⁶ Case C-9/00, *Palin Granit Oy* and *Vehmassalon kansanterveystyön kuntayhtymän hallitus*, ECLI:EU:C:2002:232.

³⁷ Case C-114/01, *AvestaPolarit Chrome Oy*, ECLI:EU:C:2003:448.

³⁸ Case C-444/00, *The Queen, on the application of Mayer Parry Recycling Ltd, v Environment Agency and Secretary of State for the Environment, Transport and the Regions, and Corus (UK) Ltd and Allied Steel and Wire Ltd (ASW)*, ECLI:EU:C:2003:356.

- when certain waste ceases to be waste, laying down end-of-waste criteria that provide a high level of environmental protection and an environmental and economic benefit; possible categories of waste for which 'end-of-waste' specifications and criteria should be developed are, among others, construction and demolition waste, some ashes and slags, scrap metals, aggregates, tyres, textiles, compost, waste paper and glass. For the purposes of reaching end-of-waste status, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria.³⁹

The above cases offer us a clear picture, that the definition of waste is in the hard-core of the doctrinal approach on waste regulation. Many other questions, which are also dressed by the waste framework directive, are left to the Member States to implement them and there the need of uniform approach is not so urgent. What is left to the Member States in order to implement waste framework directive is not so easy to answer. Namely, Art. 4 which defines hierarchy of the waste management is not so easy to understand. And this is not the only thing. There are also other articles in the directive which needs to be implemented *de iure* and *de facto*. What is clear, is that the definition of waste needs to be followed according to the directive and to the case law, but how to fulfil the aim of the directive by way of waste management, how to include rules on recovery, disposal, the use of extended producer liability, on management plans, on self-sufficiency, principle of proximity, supervision on waste handling and waste management, etc. ... all these are to be – to certain extend – on the Member States to regulate. The above issues shall be addressed below.

III. The hierarchy and Member States' obligations

As mentioned above, Art. 4 stipulates the waste hierarchy and at the same time demands from Member States to obey objectives:

The waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:

- (a) prevention;
- (b) preparing for re-use;
- (c) recycling;
- (d) other recovery, e.g. energy recovery; and
- (e) disposal.

When applying the above waste hierarchy, Member States shall take measures to encourage the options that deliver the best overall environmental outcome. This may require specific waste streams departing from the hierarchy where this is justified by life-cycle thinking on the overall impacts of the generation and management of such waste. Member States shall also ensure that the development of waste legislation and policy is a fully transparent process, observing existing national rules about the consultation and involvement of citizens and stakeholders. In addition, Member States shall take into account the general environmental protection principles of precaution and sustainability, technical feasibility and economic viability, protection of resources as well as the overall environmental, human health, economic and social impacts.⁴⁰

³⁹ Point 22 of the Waste Water Directive (preamble).

⁴⁰ In order to implement the precautionary principle and the principle of preventive action enshrined in Article 191 TFEU, it is necessary to set general environmental objectives for the management of waste within the EU. By virtue of those principles, it is for the EU and the Member States to establish a framework to prevent, reduce and, in so far as is possible, eliminate from the outset the sources of pollution or nuisance by adopting measures whereby recognised risks are eliminated. Point 30 of the Waste Water Directive (preamble).

The waste hierarchy makes waste prevention the first objective followed by recovery of waste. Disposal of waste should be the last option. However, article explains that certain waste streams a departure from the hierarchy, may deliver better overall environmental outcomes.⁴¹

Problematic, at least legally, aims are recovery and disposal. For instance, is it certain material used from incineration as a fuel a recovery or not. In case ASA⁴² the court held that the combustion of waste constitutes a recovery operation where its principle objective is that the waste can fulfil a useful function as a means of generating energy, replacing the use of source of primary energy which would have had to been used to fulfil that function.⁴³ Waste co-incinerators will those only qualified as recovery operation only if they meet the energy efficiency criteria. A waste co-incineration that falls to meet the criteria will be placed on equal footing with land filling, which is cheaper but environmentally less advantages.⁴⁴

III.1. Extended producer responsibility

This approach, also called principle, is in a close connection with polluter-pays principle. The polluter-pays principle is a guiding principle at European and international levels. The waste producer and the waste holder should manage the waste in a way that guarantees a high level of protection of the environment and human health. The basic of this principle is that a person, entity, which causes future waste, like producer of certain material, product, is liable also for waste which will be reality at the end of the day. This approach helps to achieve objectives of Art. 4 (hierarchy). Namely, if a certain producer is liable for product which will once become a waste, it is clear that the producer will try to minimise the cause with such a waste, perhaps to assure recovery or recycling. The introduction of extended producer responsibility in the Waste Framework Directive is one of the means to support the design and production of goods which take into full account and facilitate the efficient use of resources during their whole life-cycle including their repair, re-use, disassembly and recycling without compromising the free circulation of goods on the internal market.⁴⁵

As OECD observes, faced with increasing amounts of waste, many governments have reviewed available policy options and concluded that placing the responsibility for the post-consumer phase of certain goods on producers could be an option. Extended Producer Responsibility (EPR) is a policy approach under which producers are given a significant responsibility – financial and/or physical – for the treatment or disposal of post-consumer products. Assigning such responsibility could in principle provide incentives to prevent wastes at the source, promote product design for the environment and support the achievement of public recycling and materials management goals. Within the OECD the trend is towards the extension of EPR to new products, product groups and waste streams such as electrical appliances and electronics.⁴⁶

On the other hand, such approach requires certain follow-ups. This is especially true for packaging (waste packaging). Also, economic/financial burdens/incentives might be use like special taxes for the purpose for removing waste, for recycling costs, etc.⁴⁷ For instance, special tax for cars and

⁴¹ Jans and Vedder, *Ibidem*, p.479.

⁴² Case C-6/00, *Abfall Service AG (ASA) v Bundesminister für Umwelt, Jugend und Familie*, ECLI:EU:C:2002:121.

⁴³ C-228/00, *Commission v. Germany*, ECLI:EU:C:2003:91.

⁴⁴ See Jans, Vedder, *ibidem*, p. 480.

⁴⁵ Point 27 of the Waste Water Directive (preabmle).

⁴⁶ OECD, <http://www.oecd.org/env/tools-evaluation/extendedproducerresponsibility.htm> (15.5.2016).

⁴⁷ Economic instruments can play a crucial role in the achievement of waste prevention and management objectives. Waste often has value as a resource, and the further application of economic instruments may

their recycling; when the car is first sold, as a new one, a special tax can be imposed and the funds so accumulated can be used for recycling of old cars. Such economic instruments as taxes might not be in favour for consumers, but rather released producers from obligations. Producers will not be charged with the taxes, but rather buyers, consumers. If taxes are structured this way, this will not be in line with the extended producer responsibility.⁴⁸ To release producers from the obligations, is not appropriate. Producing waste is not only a consequence of the end users, buyers, consumers, etc. but of all, subject in a production–trade–use chain. They all participate in producing waste at the end of the day. It is up to the Member States to find legal solutions which would include them as a responsible and liable subjects. However, such regulation shall not go beyond rule on free movement of goods (Art. 34 TFEU). Rules have to be non-discriminatory and proportional; meaning that certain national measure shall not be advantageous for the domestic products, neither, even if non-discriminatory, they shall not be un-proportional, meaning that measures which are less burdensome, but still capable to achieve the goal, shall be applicable.

III.2. Control over the waste treatment

As noted above, there is considerable level playing field given to the Member States to regulate the area of waste management in order to achieve objectives of Art. 4 of the Waste Framework Directive. Member States should provide for effective, proportionate and dissuasive penalties to be imposed on natural and legal persons responsible for waste management, such as waste producers, holders, brokers, dealers, transporters and collectors, establishments or undertakings which carry out waste treatment operations and waste management schemes, in cases where they infringe the provisions of this Directive. Member States may also take action to recover the costs of non-compliance and remedial measures, without prejudice to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.⁴⁹ Practices among the Member States are therefore rather different, and regulations might be adopted on the state or on the municipal or region level. In any case, whatever the legal framework is, it will impose certain obligations to producers, traders, also consumers.

It is impossible to handle waste and to be inefficient in waste management without imposing different kind of obligations and burdens to those subjects. It depends from obligations, but usually they would require certain financial or other kind of burden. It is therefore rather obvious, that avoiding those obligations is also a reality. This is also why the so called green criminal is developing.⁵⁰ It is of course easier to illegally dump waste in comparison to legal waste management and proper disposal. Organising appropriate supervision on how the waste management rules are being obeyed is therefore part of the *facto* implementation of the Waste Framework Directive. This is not part of the directive rules and it is up to Member States to find proper solutions. Art. 34 indeed defines that establishments or undertakings which carry out waste treatment operations, establishments or undertakings which collect or transport waste on a professional basis, brokers and dealers, and establishments or undertakings which produce hazardous waste shall be subject to appropriate periodic inspections by the competent authorities. This is, however, meant for a control, which can be directed towards mentioned subjects in their premises, factories. However, illegal treatment of waste, like illegal dumping of waste, is subject to

maximise environmental benefits. The use of such instruments at the appropriate level should therefore be encouraged while stressing that individual Member States can decide on their use. Point 42 of the Waste Water Directive (preabmle).

⁴⁸ See more analysis of EPR in

⁴⁹ Point 45 of the Waste Water Directive (preabmle).

⁵⁰ K. Ana, G. Meško: Kriminološki vidiki mednarodne trgovine z odpadki, v: Revija za kriminalistiko in kriminologijo, 62 (2011) 1, str. 50–63.

Art. 36 of the directive. Member States shall take the necessary measures to prohibit the abandonment, dumping or uncontrolled management of waste. Illegal dumping is rather different situation. Control there is not easy one, since this area defers a lot from any other area of legal supervision. What makes it different is the fact that waste can be dumped basically anywhere, it can be dumped rather quickly, in non-urban areas, at the sea, etc. The territorial element is of huge importance. It is impossible to be covered by competent authorities, like inspections, alone. This is the most distinct element. Namely, a supervision of certain industry, company, etc. can be done in their premises, factories, etc. and in those cases territorial element can be limited and it is known in advance. However, once we are faced with much wider, unpredicted, undefined territory, the difficulties to locate, but even more importantly, to identify the liable person, are much bigger. General rules on supervision, burden of proofs, privacy rules, etc. are not sufficient and they cause problems. They make supervision even more difficult. Take as for an example a video surveillance of illegal dumping sites. There are cases in Slovenia, known to me, where cameras were put on illegal dumping sites to monitor them.⁵¹ This has been done by municipalities. The measure, although municipalities reported that being effective, were seen as illegal since being illegal, being not proportional and therefore effecting rights on privacy to heavily⁵². Cameras were installed in parts of the forests, where illegal dumping sites existed. The information commissioner (IC) was of the opinion, that, if allowed, every forest can be under surveillance of video cameras. This is disputable, since cameras were located, as noted above, only on certain spot, i.e. only on spots of the illegal dumping. It is to be agreed, that anything beyond that should not be proportional, but as long as there are limited to illegal dumping sites, they shall be considered as allowed. Namely, finding liable persons any other way is indeed difficult, unreasonable costly (by way of identifying waste and connecting certain waste with potential liable person). As noted above, the surveillance of illegal dumped waste is much different from any other surveillance and control on obeying certain legal framework. Since these circumstances are different, they also justify different approaches and different measures to control, *de facto*, obeying the rules. As different media reports certain municipalities are still persistent in video surveillance of the illegal dumping site.⁵³

III.3. Managing plans

Another feature which is known to the area of waste management is *ex ante* planning. Namely, waste framework directive stipulates, under Art. 28, waste management plans. The waste management plans shall set out an analysis of the current waste management situation in the geographical entity concerned, as well as the measures to be taken to improve environmentally sound preparing for re-use, recycling, recovery and disposal of waste and an evaluation of how the plan will support the implementation of the objectives and provisions of the Waste Framework Directive. The waste management plans shall so contain, as appropriate and taking into account the geographical level and coverage of the planning area, at least the following:

- (a) the type, quantity and source of waste generated within the territory, the waste likely to be shipped from or to the national territory, and an evaluation of the development of waste streams in the future;
- (b) existing waste collection schemes and major disposal and recovery installations, including any special arrangements for waste oils, hazardous waste or waste streams addressed by specific Community legislation;

⁵¹ A. Lozar, V. Bučan, I. Lipuš, A. Kavčič, G. Mohar, A. Odar, Prijavi divje odlagališče (Pošljimo odpadke v pravo smer!), Ljubljana, maj 2015, p. 10. This is practice also in Croatia: http://www.glasistre.hr/vijesti/pula_istra/vodnjansnima-sporkulje-i-prijavljuje-ih-519215 (10.8.2016)

⁵² N. P. Musar, Videonadzor gozdov: Bodo smeti odnesle zdravo pamet?, <https://www.dnevnik.si/1042513887/mnenja/mnenja/1042513887> (16.8.2016).

⁵³ <http://sobotainfo.com/novica/lokalno/ko-stari-televizor-odvrzes-kar-v-gozd/122638> (15.8.2016).

- (c) an assessment of the need for new collection schemes, the closure of existing waste installations, additional waste installation infrastructure,
- (d) sufficient information on the location criteria for site identification and on the capacity of future disposal or major recovery installations, if necessary;
- (e) general waste management policies, including planned waste management technologies and methods, or policies for waste posing specific management problems.
- (f) organisational aspects related to waste management including a description of the allocation of responsibilities between public and private actors carrying out the waste management;
- (g) an evaluation of the usefulness and suitability of the use of economic and other instruments in tackling various waste problems, taking into account the need to maintain the smooth functioning of the internal market;

Management plans shall therefore take into account principle of self-sufficiency and proximity, polluter pays principles, etc. Namely, a proper waste management shall not react only once waste is produced, but its shall be known in advance how to handle waste. Another aspect is that the competent authority knows how the waste is handled, what kind of waste is produced, whether the hierarchy is obeyed, how is responsible, are there any measures necessary, etc. Waste management plans need to be approved. The management plans are the first step in the waste management. It does not mean that they will actually be followed, therefore the control under surveillance is necessary, but without them the competent authorities cannot get to the starting point and necessary data that can trigger the further action. Therefore, they are crucial and, rather obviously, regulated on the EU level. They eliminate *ex post* actions which are to be considered insufficient in the field of waste management.

III. Conclusion

The answer to the initial question, how doctrinal are rules regarding waste management, cannot be given straight forward. What is rather unique is the fact that most doctrine is related to definition of waste and by products. Close to these definitions is also end-of-waste status provision (Art.6). Basically all other provisions of the Waste Framework Directive are either help or they meant for further *de iure* and *de facto* implementation obligations of the Member States. For instance, Art. 7 which regulates list of waste can be regarded as an appropriate help to make distinction between hazardous and non-hazardous waste.⁵⁴ Rules on extended producer responsibility (EPR), prevention of waste, recovery, re-use and recycling, disposal, waste management plans, etc. are mostly rules which impose Member States *de iure* and *de facto* implementation. As it is discussed in the article, much space has been given to the Member States to implement the waste framework directive. I think that there is a very well chosen equilibrium between the rules on approximation (almost unification if one considers a very detailed definition of waste and by products) at the one hand and on the other hand, to the competences of Member States how to regulate, from national point of view, area of waste. This is one of more defined directives from the point of view, what

⁵⁴ It is rather logically, that the list, although refer as a tool in this article, needs to be uniform across the EU. Only this way it can serve its purposes. This is close to the definition of waste. It is the same logic. If the definition is not uniformly applied, it cannot work. Something that is considered as waste in one Member State, would not be considered the same in another Member State. This would, of course, be a huge obstacle in applicability of the directive, as well as Art. 34 TFEU. The same is true for the list of hazardous and non hazardous waste. There is however, regulated that a Member State may consider waste as hazardous waste where, even though it does not appear as such on the list of waste, it displays one or more of the properties listed in Annex III of the Waste Framework Directive. The Member State shall notify the Commission of any such cases without delay. It shall record them in the report provided for in Article 37(1) and shall provide the Commission with all relevant information. In the light of notifications received, the list shall be reviewed in order to decide on its adaptation. Art. 7(2).

Member State needs to implement. The level playing field is rather comprehensive. Solutions adopted by Member States can be original there. Even in those cases where the directive offers certain approach, is this considered only as an option. For instance, even EPR is only an option for Member States and not an obligatory mechanism. On the other hand, where the Commission can achieve certain objective easier than Member States, the action is attributed to the EU. For instance, under Art. 9 the Commission is competent to submit to the European parliament and to the Council measures in support to the prevention of waste.

One of the biggest particularity, at least at my opinion, is a question of supervision, i.e. control over the waste, especially in cases in illegally dumping. There are, again, at least on my opinion, two main features handling waste:

- cases, where waste is legally treated, but perhaps wrongly;
- cases, where waste is illegally treated.

In the first case, the supervision is much easier from the case of the illegal treatment of waste, i.e. illegal dumping. As discussed, illegal dumping is hard to be located (territorial element), and also hard to be proved (subjective element). Due to these two elements control over the illegal dumping, which is left to the Member States, can be different from other types of control and supervisions, where these two elements are different. Certain interference with privacy rules could be possible, if principle of proportionality is obeyed.