

Policy Department
Economic and Scientific Policy

The Proposed Directive on Waste

**An assessment of the Impact Assessment
and the Implications of the Integration of the
Hazardous Waste Directive into the existing
Waste Framework Directive**

(IP/A/ENVI/FWC/2006-172/LOT 1/C1/SC1)

This study was requested by the European Parliament's Committee on the Environment, Public Health and Food Safety.

Only published in English.

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Acknowledgements: The authors would like to thank the various stakeholders to whom they spoke in the course of the research for this report.

Manuscript completed in December 2006.

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GLOSSARY OF TERMS

For the purposes of clarity within this report the following phrases and abbreviations will be used as references in order to ensure consistency of understanding.

- WFD** The waste framework Directive originally adopted as 75/442/EEC, but republished as Directive 2006/12/EC to take account of subsequent amendments
- HWD** The hazardous waste Directive 91/689/EEC
- WOD** The waste oils Directive 75/439/EEC
- DoW** Refers to the proposed Directive on Waste (COM(2005)667), which would replace the WFD, and would integrate the WFD, HWD and WOD into one Directive
- IA** Refers to SEC(2005)6181, the impact assessment on the Thematic Strategy on the prevention and recycling of waste and of the immediate implementing measures (COM(2005)666)

EXECUTIVE SUMMARY

The current waste framework Directive¹ (WFD) was originally adopted in 1975 and has been amended many times. In December 2005, the European Commission adopted the Thematic Strategy on waste prevention and recycling², which was accompanied by a proposal to amend the waste framework Directive (herein referred to as the DoW), which is fundamental to the implementation of many ideas put forward in the Strategy³. Annexed to both the Strategy and legislative proposal was an Impact Assessment⁴ of both the Thematic Strategy and its immediate implementing measures (IA). The proposed DoW would update the text of the WFD considerably, adding important new provisions and integrating requirements previously dealt with by the hazardous waste Directive⁵ (HWD) and the waste oils Directive⁶ (WOD). The proposed DoW would replace both of these Directives, as well as the WFD.

The aim of this report was to undertake an assessment for the European Parliament of the following two aspects of the proposed DoW:

- The IA of the proposed DoW; and
- Selected potential changes to hazardous waste law resulting from the integration of the HWD into the proposed DoW.

These are addressed, respectively, in Part I and Part II of this report.

Part I – The Assessment of the IA

Impact assessments are intended to be aids to decision making, helping the implications of a particular policy option to be clearly understood. The systematic consideration of the sustainability impacts of a proposed policy is fundamental to the development of policy dossiers at EU level. However, there is no impact assessment exclusively devoted to the DoW; rather the IA assessed in this report is that accompanying the Thematic Strategy and the proposed DoW. It must be highlighted that this assessment does not attempt to fill any gaps in the assessment or pass judgement on the content of the DoW, more generally.

The IA is the only impact assessment to consider the DoW and it does not do so exclusively or systematically. The development of a DoW is considered in the IA only as an option for improving the waste regulatory framework, it is not the central focus of the assessment. The relationship between the DoW and the IA is, therefore, often unclear.

¹ Council Directive 75/442/EEC on waste, OJ L 194, 25.7.1975, p.39

² Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *Taking sustainable use of resources forward: A Thematic Strategy on the prevention and recycling of waste*, COM(2005)666

³ Proposal for a Directive of the European Parliament and of the Council on waste, COM(2005)667, 21.12.2005

⁴ Commission Staff Working Document SEC(2005)6181 *Impact Assessment on the Thematic Strategy on the prevention and recycling of waste and the immediate implementing measures*

⁵ Council Directive 91/689/EEC on hazardous waste, OJ L 377, 31.12.1991, p.20

⁶ Council Directive 75/439/EEC on the disposal of waste oils, OJ L 194, 25.7.1975

The WFD represents a fundamental pillar of the EU's waste policy. The DoW amends the text of the WFD, resulting in significant changes to definitions and approach to EU waste policy. Given the significance of the amendments it is unfortunate that no dedicated impact assessment was performed by the European Commission. This approach arguably runs counter to the spirit of the Commission's impact assessment system – although the approach may be justified based on the interpretation of wording in the Commission's guidance to such assessments.

While the Thematic Strategy and DoW share some important common themes, importantly they address the issues in very different ways. As a consequence their needs, in terms of an impact assessment, differ greatly. The IA itself states that it is 'very wide ranging'. This broad approach, while potentially appropriate for a strategic dossier, such as the Thematic Strategy, is inadequate to evaluate the detailed and significant changes set out in the DoW.

For example, the definition of policy options is fundamental to the content of any impact assessment; the options selected delineate the boundaries of any analysis subsequently completed. In the IA, the possibility of revising the WFD is only explicitly referred to as an option under two of the five objectives of the IA. The range of options selected in the IA clearly demonstrates that the primary focus of the document is strategic, i.e. informing the Thematic Strategy. Options do not present any detail on alternative approaches to a particular amendment of the WFD, i.e. how the definitions might be changed or on what basis the 'end of waste', i.e. when waste ceases to become waste, might be defined. This is not what might be expected in an impact assessment analysing the detailed revision of an existing and structurally important Directive, such as the WFD. The fact that the policy options set out in the IA are inappropriate for assessing the DoW and the lack of detail in terms of the options presented mean that the IA's ability to assess the impacts of changes to the WFD is severely limited.

The analysis conducted for this study concludes that the coverage by the IA of changes to the WFD is very limited and that the approach taken results in significant gaps in coverage. While certain amendments are mentioned in the IA, the evaluation of their impacts is often only partial. In total only four of the 23 amendments to the WFD proposed by the DoW are covered – at least in part – in the IA. These are:

- amending the definition of recovery and disposal;
- amendment of the WFD to clarify when waste ceases to be waste;
- altering requirements to regenerate waste oils; and
- the development of waste prevention programmes.

The evaluation of these issues is undertaken in detail in Section 4 of this report. The evaluation of the coverage of these four issues demonstrates that the extent of IA's evaluation of the impacts of these changes is insufficient. The analysis of the change in the definition of 'recovery' and when waste ceases to be waste is of particular concern.

The structure selected for the presentation of its conclusions and the broad definition of the IA's options substantially both limit the ability of the impacts of policy changes proposed by the DoW to be assessed. This has led to impacts being broadly defined. Causality between the impact and the policy option is poorly expressed; this is accompanied by a lack of clarity regarding the exact nature of the impacts.

Key objectives of the Commission's impact assessment process include inter alia that an impact assessment: aids political decision making; results in the potential economic, social and environmental consequences of all major policy proposals being assessed; identifies and assesses the problem and the objectives pursued; identifies the main options for achieving the objectives; and outlines the advantages and disadvantages of each option examining possible synergies and trade-offs. The analysis undertaken for this report concludes that the IA fails to meet all these objectives in relation to the proposed DoW.

Part II – The Assessment of the Impact of the proposed Integration of the HWD into the DoW

As noted above, Part II of the report deals with changes to EU Hazardous Waste law brought about by the merger of the Hazardous Waste Directive (HWD) with the WFD within the proposed DoW. This part of the report concentrates – in accordance with the European Parliament's request – on the following aspects of the proposed revision:

- **Repeal of Annexes I and II;**
- **Listing and De-listing;**
- **Concentration limits; and**
- **Changes to the mixing ban.**

As the HWD is based on Article 130s (now Article 175) of the Treaty establishing the European Community, making the Directive an 'environment-related' Directive, the environmental impacts of any changes to the law have been estimated. Given the framework of this study, it does not constitute an all-encompassing impact assessment of the merger of the HWD with the WFD. The study, instead, analyses the changes of law with regard to the aspects listed above. Consequently, it does not give any recommendations as to whether the provisions in the DoW should be adopted or not. In a more abstract manner, it was concluded that the approach of creating one Directive to treat regular waste, hazardous waste and waste oils can be considered as fostering streamlining and simplification of European waste law.

Repeal of Annexes I and II

The study examined the effects that a **repeal of Annexes I and II** of the HWD could have on the definition of hazardous waste in the DoW. The DoW states that waste shall be regarded as hazardous if it displays one or more of the properties listed in Annex III ('hazardous properties'). Annex III of the DoW is basically the same as Annex III of the HWD, and also refers to EU chemical law (Directive 67/548/EC, now a dynamic reference). Like the HWD, the DoW empowers the Commission to establish a list of hazardous wastes (in accordance with Annex III). However, unlike with Annexes I and II of the HWD, the DoW does not contain a reference to exemplary hazardous waste streams on which such a list should be based.

Annexes I and II were conceived to help the European Commission to establish the list of hazardous waste, which is included in the European Waste Catalogue (EWC), but – unlike Annex III – they do not have a purpose on their own, i.e. one that is independent of the EWC. Annex III has also been the decisive criterion for the definition of hazardous waste under the HWD, as also the European Court of Justice has found. Furthermore, the EWC can – under the HWD as well as under the DoW – be extended by the Commission to include other waste streams that have one or more of the properties of Annex III, if Member States request this (see Article 1 paragraph 4 second indent HWD and Article 14 of the DoW). **The repeal of Annexes I and II of the HWD will thus not have any negative effects on the definition of hazardous waste.**

Listing and De-listing

The analysis of **listing and de-listing of waste** goes hand in hand with the analysis regarding the repeal of Annexes I and II. The list established by the Commission (Article 13 of the DoW), i.e. the EWC, sets out what is to be regarded and treated as hazardous waste. Yet, the DoW recognises that this list might not be complete and can also at times incorrectly list some waste streams as hazardous. As in Article 1 paragraph 4 indent 2 of the HWD, the DoW allows Member States to additionally list waste streams not yet included in the list established by the Commission and treat them as hazardous waste if they display one or more of the properties listed in Annex III (Article 14). Jurisprudence from the European Court of Justice has supported this approach.

On the other hand, the DoW allows the Member State to **de-list** waste streams that are included in the hazardous waste list/EWC if they have evidence to show that a specific waste stream does not display any of the properties listed in Annex III (Article 15). These waste streams can then be treated as non-hazardous waste streams. The possibility of de-listing was not foreseen in the HWD, but does figure in Article 3 of the Decision of the Commission to establish the EWC. The EWC had to be implemented by the Member States, and de-listing has thus become a legal reality before the DoW was even proposed. ***The only change in the legal situation lies in the fact that de-listing is now also explicitly recognised by the Directive.***

Even though the text does not give clear indication as to what happens if a Member States de-lists a waste stream without enough evidence that it does not contain properties of Annex III, the DoW has set down minimum requirements within hazardous waste management, which suggests that Member States **may not de-list waste streams that feature one of the properties in Annex III** (in the case of mirror entries in a given concentrations, see below).

Concentration Limits

The EWC contains two types of hazardous waste ‘entries’: **Absolute entries**, which imply that the waste stream is hazardous regardless of its actual composition or the concentration of ‘dangerous’ substance contained in the waste; and **Mirror entries**, which reflect the recognition by the EWC that certain wastes have the potential to be either hazardous or non-hazardous depending on their composition and concentration.

The question of ‘concentration limits’ is therefore relevant for mirror entries of hazardous waste. The HWD and the DoW both empower the Commission to take into account the concentration of waste in establishing the list of hazardous wastes.

The characteristics of the dangerous substances have so far been generally defined in Annex III of the HWD and will be defined likewise in Annex III of the DoW, which refers to European chemical law (Directive 67/548/EEC as amended) for further clarification of the terms. Article 2 of the Decision of the Commission to establish a European Waste Catalogue sets out concentration thresholds for certain properties listed in Annex III of the HWD that render waste hazardous (H3-H8, H 10 and H11); for other potential properties of hazardous waste, Annex III of the HWD does not specify a concentration threshold. The proposed DoW does not provide any thresholds (concentration limits) in its definition of hazardous waste. Therefore, the thresholds contained in the EWC are not changed. The proposed DoW did not add any thresholds for those properties that have not yet been assigned a harmonised threshold either. *As a consequence, the current status quo of harmonised and non-harmonised concentration limits remains unchanged.*

Changes to the mixing Ban

One further aspect analysed in the study was the **change to the mixing ban** brought about by the DoW. Article 2 of the HWD put in place a general ban on mixing specific types of hazardous waste with other types of hazardous waste or other waste. Under strict conditions an exception could be granted. Article 2(3) stipulated that the mixing of hazardous waste with other hazardous waste or with other waste, substances or materials may be permitted only where the conditions laid down in Article 4 of the WFD were complied with and in particular for the purpose of improving safety during disposal or recovery.

The DoW **does not take up the mixing ban of the HWD**, but stipulates in Article 16 paragraph 1 conditions for the mixing of hazardous waste either with other hazardous waste (featuring other properties) or with non-hazardous waste or substances:

- (a) The mixing operation is carried out by an establishment or undertaking which has obtained a permit;

- (b) The conditions laid down in Article 7 DoW are complied with⁷;
- (c) The environmental impact of the management of the waste is not worsened; and
- (d) Such an operation conforms to best available techniques.

All of the conditions have to be fulfilled. The HWD generally banned mixing and formulates conditions for exceptionally allowing mixing, the consequence of which is that the conditions for its realisation have to be interpreted in a restrictive manner.

The DoW, on the other hand, basically allows the mixing of hazardous waste with other hazardous/non-hazardous waste under certain conditions, which might lead to a more generous approach to permitting.

While the HWD allowed mixing particularly when it **improved the safety** of recovery/disposal, the new Directive on waste requires that the environmental impact of the management of the waste is **not worsened**. This means that the environmental impact should at least be the same when one compares the isolated disposal/recovery of HW with the disposal of the mixed HW. Given the fact that the term ‘safety’ is not an environmental term, the legal situation under the HWD and the new situation under the DoW are hard to compare with regard to their environmental effects. It could even be concluded that the DoW provides stronger protection to the environment by clearly ruling out any worsening of the environmental effects.

Yet, many environmental agencies and other stakeholders are worried that giving up the mixing ban might in practice lead to an increased practice of mixing HW with other waste with the purpose to dilute waste and evade the stricter HW regime. This seems especially to be true when the conditions for allowing mixing are rather vague. The DoW requires that the mixing operation conforms to the Best Available Techniques (BAT). However, the identification of what is BAT for mixing could prove to be as tough for the permitting authorities as the estimation of whether a mixing activity brings about a worsening of the environmental impact.

As a result, it cannot be excluded that the change to the mixing ban will in practice lead to a loophole facilitating the mixing of HW with other waste streams, with the intent of diluting the waste, and consequently to a weakening of environmental standards in hazardous waste management.

⁷ Article 7 DoW states that Member States shall ensure that the recovery or disposal of waste is carried out as follows: (a) without endangering human health; (b) without using processes or methods which could harm the environment; (c) without risk to water, air, soil and plants and animals; (d) without causing a nuisance through noise or odours; (e) without adversely affecting the countryside or places of special interest.

1 INTRODUCTION AND BACKGROUND

1.1 Background to the Report

The Sixth Environmental Action Programme set out the requirement for the development of seven so-called Thematic Strategies to address key environmental challenges faced by the EU. These policy dossiers were intended to take a more holistic view of issues identified in order to develop more integrated solutions. On 21 December 2005, the European Commission adopted the Thematic Strategy on waste prevention and recycling (COM(2005)666). Published alongside the Strategy was a proposal to amend the waste framework Directive (COM(2005)667 (herein referred to as DoW); this proposal is fundamental to the implementation of many ideas put forward in the Strategy. Annexed to both the Strategy and legislative proposal was Commission Working Document SEC(2005)6181 - Impact Assessment on the Thematic Strategy on the prevention and recycling of waste and the immediate implementing measures (IA). The IA is very wide ranging, aimed at informing the institutions regarding the impact of: the Thematic Strategy itself, the DoW implementing aspects of the Thematic Strategy; and the revision of other legislation implementing the Strategy, specifically the waste oils Directive (WOD).

The current waste framework Directive (WFD) is one of the oldest pieces of European environmental legislation; adopted in 1975 the Directive has been amended repeatedly with a consolidated version adopted in 2006⁸. The WFD sets out the framework upon which the EU's more specific waste policies have built. Importantly it sets out definitions in relation to waste and guiding principles, i.e. the waste hierarchy, the need to protect the environment and human health, the requirement to permit waste installations and the need for Member States to develop waste management plans. The DoW would replace the WFD; it proposes to update the text of the WFD considerably, adding important new provisions and integrating requirements previously dealt with by the hazardous waste Directive (HWD) and the WOD.

1.2 Purpose of the Report and Method

The purpose of this report is to undertake an assessment of two aspects of the proposed DoW that were of particular interest to the European Parliament's Environment Committee. The report therefore undertakes:

- An assessment of the Commission's extended impact assessment on the revision of the WFD, i.e. the proposed DoW; and
- An assessment of the changes concerning hazardous waste law by the merger of the WFD with the HWD, i.e.

⁸ Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, 27.4.2006, OJ L 114/9

- The suppression of Annexes I and II;
- Allowing Member States to de-list hazardous substances from the list of hazardous wastes;
- The concentration limits relating to certain hazardous wastes; and
- The changes to the ban on mixing hazardous substances with non-hazardous substances.

These two assessments are dealt with in Part I and Part II of the report, respectively. The detail on the method employed in undertaking each assessment can also be found in each part of the report.

PART I – AN ASSESSMENT OF THE IMPACT ASSESSMENT

2 INTRODUCING THE IMPACT ASSESSMENT OF THE PROPOSED DIRECTIVE ON WASTE

2.1 Introducing Impact Assessment – the Commission’s Approach

According to the European Commission ‘*impact assessment is a process aimed at structuring and supporting the development of policies. It identifies and assesses the problem at stake and the objectives pursued. It identifies the main options for achieving the objective and analyses their likely impacts in the economic, environmental and social fields. It outlines advantages and disadvantages of each option and examines possible synergies and trade-offs*’⁹. It is an ‘*an aid to political decision, not a substitute for it*’.

The impact assessment process stems partly from the June 2001 Göteborg European Council at which Heads of State and Government called for the introduction of ‘*mechanisms to ensure that all major policy proposals include a sustainability impact assessment covering their potential economic, social and environmental consequences*’¹⁰. The impact assessment process is also a key element of the Commission’s better regulation agenda and is seen as important in terms of implementing the politically important Lisbon Agenda. In March 2006 the European Commission published revised guidelines for the implementation of impact assessment¹¹, it is upon this version of guidance that comment within the report is based.

The 2006 Guidelines set out a methodological approach to the completion of impact assessments by the European Commission, i.e. what and how issues should be considered. There are seven key elements to impact assessment with a chapter devoted to each in the guidelines. These are:

1. Procedural issues and consultation of interested parties
2. Problem definition
3. Objectives
4. Policy options
5. Analysis of impacts
6. Comparing the options
7. Monitoring and evaluation

⁹ European Commission, Secretariat General, Political Context of Impact Assessment, 30 November 2006, http://ec.europa.eu/governance/impact/index_en.htm

¹⁰ Presidency Conclusions, Göteborg European Summit, 15 and 16 June 2001, Paragraph 24 http://ec.europa.eu/governance/impact/docs/key_docs/goteborg_concl_en.pdf

¹¹ Impact Assessment Guidelines, 15 June 2005 with March 2006 update, SEC(2005)791 http://ec.europa.eu/governance/impact/docs/key_docs/sec_2005_0791_en.pdf

2.2 The Scope of this Assessment

There is no impact assessment that is exclusively dedicated to systematically assessing the impacts of the legislative changes proposed in the DoW. The conclusions in this report are based, therefore, on an analysis of the Commission Working paper SEC(2005)6181, i.e. the impact assessment for the waste Thematic Strategy and immediate implementing measures (referred to herein as IA).

Given that the changes proposed in the DoW are likely to have significant impacts, this is regrettable and runs counter to the spirit of the Commission's impact assessment system. The failure to undertake a dedicated impact assessment may be a reflection of the fact that the DoW does not appear as a separate item in the Commission's 2005 Work Programme¹². According to the Commission's Impact Assessment Guidelines, technically only proposals appearing in the work programme are required to undergo an impact assessment. However, since the launch of the system in 2003, a number of proposals not appearing in the annual work programme have nevertheless been subject to an impact assessment because of their significance; the DoW should have been treated similarly.

Alternatively, the failure to undertake a dedicated impact assessment might have arisen from an interpretation of the 'principle of proportionality' as set out in the Commission's revised Guidelines issued in June 2005¹¹. Here, the Commission suggests that a full impact assessment may not be necessary when a proposal takes the form of revisions to existing legislation, on the grounds that 'available evaluations of the existing legislation may already provide enough data for a proportionate analysis'. The Commission's description of the principle of proportionality has been criticised by several commentators for its lack of clarity, but it is particularly weak in regard to revisions of existing legislation. Given of the development of the *acquis*, the majority of Commission proposals now take the form of revisions to existing legislation, so the proportionality principle could be used as an excuse to exclude most of the annual work programme from impact assessment. Revisions are argued to be excluded because evaluations of the existing legislation are considered available as an alternative to a full IA. In the case of the DoW, this argument is weak since no systematic evaluations of the WFD have been undertaken.

¹² European Commission Work Programme for 2005, COM(2005)15, 26.1.2005, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0015en01.pdf

It should be noted that supplementary information has been made publicly available by the European Commission to support the IA. Importantly this includes the EPEC research¹³ designed to specifically support the development of an impact assessment for the Thematic Strategy (a summary on the role of this study and its relationship to the IA is presented in Annex 3), a letter from Commissioner Dimas to the European Parliament on the subject of waste incineration and its classification as either recovery or disposal,¹⁴ and the non paper on the development of proposals on energy recovery¹⁵. While these additional resources are of interest, and considered where relevant in this analysis, it must be noted that these are not considered to formally constitute part of the IA.

Given the breadth of the IA and the issues covered, it is vital to clearly set out the scope of this work in order for cohesive and appropriate conclusions to be presented. In summary this report is intended to support the European Parliament in the development of its position on the DoW; while the IA may consider broader impacts of the Thematic Strategy on waste this report will focus on only the elements that relate to the DoW. While this work may identify gaps and problems with the IA it will not attempt to fill these gaps with detailed analysis. Similarly, it will not directly judge the content or appropriateness of the DoW, any comments on impact will be in the context of evaluating the Commission's approach to assessment.

The detail of the methodological approach to this analysis can be found in Annex 1. This takes into consideration the limitations and challenges posed by the issues outlined above.

2.3 Key Amendments to the Waste Framework Directive

Apart from the points already made above, the proportionality principle is also important in so far as the 'depth and scope (of an IA) will be determined by the likely impacts of the proposed action'¹⁶. Additionally, the level of investigation and extent of quantification should vary depending on the nature of the action being put forward i.e. for detailed legislative measures it should be possible to provide greater depth and specificity in terms of on assessment, whereas for strategic policy measures only a broad, general analysis will be possible¹⁷.

¹³ Support in the drafting of an ExIA on the Thematic Strategy on the Prevention and Recycling of Waste, Final Report submitted by EPEC, authors James Medhurst, Andrew Jarvis, Geert van der Veen http://ec.europa.eu/environment/waste/pdf/epec_report_05.pdf

¹⁴ Letter of 24 August 2006 from Stavros Dimas to Karl-Heinz Florenz MEP responding to a letter on 23 June requesting information on the impacts of the Commission proposal to use an energy threshold to distinguish between municipal incinerators that are disposal or recovery installations, http://ec.europa.eu/environment/waste/pdf/energy_recovery.pdf

¹⁵ Non-paper on the background of the development of the Commission proposal on the distinction between energy recovery and disposal of waste in municipal incinerators, European Commission, DG Environment

¹⁶ From 2006 Commission guidance

¹⁷ Revised Impact Assessment Guidelines SEC (2005) 791 : Potential Implications for IQ Tools - Memorandum to the IQ Tools Steering Group

As demonstrated in Annex 2 of this report, there are numerous amendments to the WFD proposed in the DoW. While some changes clarify wording, some 23 of 39 articles are amended to an extent whereby the meaning is altered. For some of these a detailed presentation of impacts may not be necessary, but several fundamentally change the approach to waste policy or the policy landscape at EU level, inter alia:

- changes to recovery definitions, specifically the inclusion of efficiency criteria – Article 5 of the DoW;
- development of criteria for when waste ceases to be waste – Article 11 of the DoW;
- the addition of a definition of recycling – Article 3 of the DoW;
- an increased focus on waste prevention through the requirement to develop a waste programme – Articles 29-31 of the DoW;
- the increase in the level of responsibility placed upon the committee supporting the waste framework Directive in terms of decision making on technical but fundamental issues to the interpretation of the waste framework Directive – throughout the DoW; and
- The amalgamation of the WOD and HWD into the WFD, plus the dropping of requirements to regenerate waste oils – throughout the DoW but specifically referenced in Chapter IV Articles 12 - 18.

The nature of a change has been considered when drawing conclusions regarding the quality and appropriateness of the impact assessment.

3 ASSESSING THE APPROPRIATENESS OF THE COMMISSION'S IMPACT ASSESSMENT

3.1 The Relationship between the Proposed Directive and the Commission's Impact Assessment – Problem Definition and Objectives

While the IA is the only impact assessment to consider the proposed DoW, it does not do so exclusively or systematically. The development of a DoW is considered only as an option for improving the waste regulatory framework – it is not the central focus of the assessment. The relationship between the DoW and the IA is, therefore, often unclear.

The policy problems defined in section two of the IA are general and relate to the breadth of waste policy. As stated in the IA it is 'very wide ranging', aiming to inform the institutions about the impact of different types of initiatives, i.e. the Thematic Strategy itself, the DoW in the context of the implementation of the Strategy and the revision of specific legislation for immediate implementation, i.e. the WOD. The assessment is, therefore, structured around five broad objectives:

1. a sound knowledge base for developing policy, i.e. shift to Life Cycle Thinking;
2. harnessing the potential of waste prevention;
3. harnessing the potential of waste recycling and recovery;
4. improving the regulation of recycling and recovery; and
5. reducing the environmental impact of waste oils.

The DoW and the Thematic Strategy share some important common themes, i.e. the former addresses many of the issues identified in the latter. Importantly, however, they address the issues in very different ways, consequently, their needs in terms of an impact assessment differ greatly. The Thematic Strategy covers some issues not considered in the DoW. Meanwhile the DoW contains detailed and potentially significant changes to the EU's approach to waste. These changes are difficult to appropriately assess within an impact assessment of such broad remit and objectives. The lack of an impact assessment devoted explicitly to the DoW or a section dedicated to this in the IA means there is no clear and transparent dossier that formally assesses the impacts of the legislative changes put forward by the European Commission. ***It is, therefore, considered that the IA is not an adequate basis to inform policy makers regarding the impacts of the changes put forward in the DoW.***

3.2 The Coverage of the Impact Assessment – Setting out the Policy Options

3.2.1 Identifying the Policy Options

The definition of policy options is fundamental to the content of any impact assessment; the options selected delineate the boundaries of any analysis subsequently completed. In the IA policy options are presented for all five of the objectives (see Section 3.1), however, the possibility of revising the WFD is only explicitly referred to under objectives two and four.

The policy options selected in the IA clearly demonstrate that the primary focus of the document is strategic, i.e. informing the waste Thematic Strategy. Options consider higher order and abstract questions, for example, the need for a European level approach compared to Member State action, or the type of mechanism to be used, i.e. environmental agreement versus market based instruments. Assessments tend to be at a generic level, for example option 4.4 considers the theoretical impacts of amending the WFD in terms of definitions of recovery, disposal and when waste ceases to be waste. Options do not present detail on alternative approaches to a particular amendment of the WFD, i.e. how the definitions might be changed or on what basis the ‘end of waste’, i.e. when waste ceases to become waste, might be defined. The opposite approach would be expected in an impact assessment analysing the detailed revision of an existing and structurally important Directive such as the WFD. The fact that the policy options of the IA are inappropriate for assessing the DoW and the lack of detail in terms of the options presented means that the IA’s ability to assess the impacts of changes to the WFD is severely limited.

Some options considered in the IA are not necessarily alternatives but presented separately; they could be taken forward in parallel or as one part of an alternative option and this is not alluded to. For example, four options are presented relating to objective four – improving the regulatory environment. These options include: national standards; EU recycling society with the development of EU waste treatment standards; adopting guidelines to interpret waste legislation; and revising the WFD. Arguably, the final three options are not clear alternatives but could be part of complementary mechanisms or a system of change.

3.2.2 Comparing the Policy Options in the Impact Assessment to the Proposed Directive

As stated above, the definition of the policy options within the IA is vague and often very generalised. This lack of specificity makes it difficult to identify exactly what policy scenarios are being assessed. The matrix, presented in Annex 2 of this report, systematically considers the articles of the DoW. It explains the amendments made and presents an analysis of how changes to the WFD have been considered within the impact assessment.

The analysis conducted for this study concludes that the coverage by the IA of changes to the WFD is very limited. Only certain amendments are mentioned in the IA and the evaluation of their impacts is often only partial (see Section 5). Of the many changes proposed to be made to the WFD only the following amendments are, at least in part, covered by the options presented in the IA:

- Amending the *definition of recovery and disposal* – this is alluded to vaguely in terms of option 4.4 of the IA, although it is not clear what changes might be made or the specific sectors to be affected. There is no explicit reference made to efficiency standards, the use of these for incinerators or the method by which such standards should be set (see 5.2 of this report).
- Amendment of the WFD to clarify *when waste ceases to be waste* – this is clearly considered by option 4.4 of the IA, however, detail is not provided as to how this clarification should be achieved in the DoW. Alternative approaches to amending the WFD and achieving clarification are not presented. The policy assumptions upon which assessments are made are, therefore, unclear (see Section 5.3).
- Altering requirements to *regenerate waste oils* – objective five of the IA considers the need to reduce the environmental impact of waste oils presenting two options: no change; and focussing on collection, i.e. removing regeneration requirements (see Section 5.4). There is, however, no consideration of the impacts of incorporating the WOD into the WFD.
- *Prevention of waste* – objective two of the IA considers the harnessing of the potential for the prevention of waste. Option three relating to this objective considers the adoption of a framework for prevention policies, i.e. making it clear that waste policies must include a prevention programme (see Section 5.5). This is one of the most detailed options identifying that provisions in a revised WFD would provide guidance regarding the development of such policies and incorporate a reporting cycle.

In conclusion, the options selected and discussed in the IA are a poor fit for an impact assessment examining the DoW. The decision to select such options, while potentially appropriate for the Thematic Strategy, substantially limits the ability of the IA to address the key changes proposed. Even when an amendment is considered within the IA options, in all but the case of prevention programmes, the option definition is broad. The magnitude, nature or importance of a change is, therefore, not specified making it difficult to assess the resultant implications.

The scope and the approach taken in the IA to option definition are considered to be inappropriate for assessing the DoW. The breadth of issues the IA is asked to deal with is arguably too much for one impact assessment. This in turn means that defining a set of options appropriate to the different types of policy considered by the IA is impossible.

An alternative and preferable approach would have been to develop an additional impact assessment dedicated to analysing potential amendments to the WFD. It is concluded that the lack of a dedicated impact assessment for amendments to the WFD is a significant gap in the DoW's development process. This lack has led to the potential impact of important and substantial amendments to waste policy being considered only in a very generalised manner. Analysis in the IA is uninformative for the purpose of assessing the DoW, for example option 4.4 considers altering the definition of recovery but makes no reference to the introduction of efficiency criteria. Meanwhile, impacts of some significant changes to the policy process are not considered at all; for example there is no analysis of the impacts of combining three Directives together nor is the impact of a more substantial role for the comitology committee considered.

3.3 The Role of the Impact Assessment in the Development of the DoW

The impact assessment process was developed by the Commission as a tool for informing decision making in relation to European policy development⁹. The nature of the IA suggests that this was not a process that specifically and actively informed the development of the DoW. As outlined all amendments to the WFD are not considered by the IA. Additionally, options are broadly defined with conclusions presented being of limited use in terms of determining the actual impacts of the detailed changes proposed. While the IA may potentially have informed the development of the Thematic Strategy, arguably a further step would have been required to enable any conclusions to be drawn regarding impacts of the DoW. It has been commented by a representative of an environmental NGO that many amendments to the WFD were put forward late in the development process, hence not included in the IA. *While some elements of the IA are interesting and informative, importantly, it is not considered to provide a rigorous enough assessment to appropriately inform the European Parliament's deliberations on the DoW.*

3.4 Stakeholder Engagement and Transparency

The desire for stakeholders to be more actively involved in the development of EU policy making was one driver that led the Commission to develop impact assessment at the European level. Impact assessment is a key tranche of the Commission's activities on better regulation, an important element which is improving the transparency of policy making. While stakeholders were engaged regarding the development of the DoW, this was to a lesser extent than for the Thematic Strategy and at a later stage in the process. It was commented by an environmental NGO that access to the consultation process for the IA was more limited than for the development of other Thematic Strategies.

The IA cites a multi-stage stakeholder consultation process as helping to develop its conclusions. The relevance of many of the elements of this process is, however, of limited relevance to the DoW's development. Earlier stakeholder consultation events, primarily designed to influence the impact assessment, were arguably extensive, but foresaw a more limited role in terms amending the WFD. For example, the EPEC study summarises stakeholder input into the IA (see Annex 3).

Stakeholder input is framed by the questions posed in any consultation questionnaire. Within the work reported by EPEC the only question directly linked to the revision of the WFD is question 10c: “introducing to the WFD a provision allowing the exclusion from the definition of waste of materials complying with technical criteria – these could include aggregates and bio-diesel amongst others”. Consequently stakeholders inputting into such a consultation could not be considered to have comprehensively commented on the important amendments to the WFD.

There were three stages of consultation that related directly to the DoW: a consultation in early 2005 on aspects and options to be included in the WFD supplemented by a stakeholder workshop and meetings to elicit the views of Member States; specific consultations on the incorporation of the WOD and HWD into the WFD took place in August and September 2004 respectively. The questions considered within these consultations were very specific, not allowing stakeholders to comment on the general approach.

During the development of the DoW there appears to be a jump in the scale of stakeholder engagement. There is a disconnect between the very detailed approach specific to the DoW and the very general approach to inform the IA and Thematic Strategy. The later, DoW-specific, consultations do not appear to clearly link into the IA process in terms of their content. They are, however, very relevant to the DoW.

4 EVALUATING THE QUALITY OF THE IMPACT ASSESSMENT

This chapter considers the approach taken within the IA to examining the impacts of revising the WFD. The analysis of impacts in the IA is based around the options put forward. Within Section 5 of the IA, each option's environmental, economic and social impacts are assessed and briefly summarised with a + or – symbol used to indicate whether the impact is expected to be positive or negative. As outlined in Section 3.2 only four policy areas are considered to be covered by both the DoW and the IA options. These issues are as follows:

- Article 5 and 6: The revised definition of recovery and disposal.
- Article 11: When Waste Cease to be Waste.
- Article 18: Mineral Waste Oils.
- Articles 29-31: Waste plans and programmes.

Case studies on each of these issues are presented in the following sections; a more extensive assessment of the whole DoW can be found in Annex 2 organised by article number.

4.1 The Revised Definition of Recovery and Disposal (Articles 5 and 6)

The DoW would see the definition of recovery altered to refocus upon the substitution of resources. If adopted the DoW would also set up a system by which efficiency criteria are developed in order to define whether an operation is classed as recovery or disposal. Importantly Annex II of the DoW also proposes specific energy efficiency criteria to determine if incineration activities are classed as recovery. The definition of disposal is also altered. This is as a consequence of the changes to the definition of recovery, but also the wording of the Directive as to when disposal is appropriate would be strengthened compared to the wording in the existing WFD. These represent significant and detailed changes with potentially wide-ranging impacts for the management of waste.

Within the IA revising the definition of recovery and disposal is assessed within the broader option of revising the WFD (option 4.4). The option contains no detail on the changes proposed to the definitions. The definitional changes are only one element of option 4.4, hence the assessment of impacts upon the environment, economy and society pillars of sustainable development are dealt with in a generalised manner in Table 4 of the IA. The revised definition for recovery is only explicitly addressed under the environmental pillar of the assessment; the change is deemed positive due to the clarification of the regulatory environment and associated positive impact on recycling and recovery activities.

The broad, tabular analysis is accompanied by a detailed worked example (Example 4 of Section 5.4 of the IA) on the impact of using an energy efficiency threshold to define whether incinerators represent recovery or disposal. This is an interesting approach but it neither systematically identifies different alternative options nor the impacts of these. The example is not clearly linked back to the option definition or the broader assessments in Table 4. The worked example explains the reasoning behind the reclassification, and estimates the economic costs for the municipal incineration sector, due to the current classification of the overwhelming majority of waste incineration plants as disposal facilities, to be around €260 million a year between 2004 and 2008. The basis for this calculation and the base data used to define the figures are not referenced. The worked example does not address the comparable impacts of setting different efficiency criteria nor does it discuss the specifics of setting a formula for assessing whether an incinerator is classed as recovery or disposal.

In conclusion, the analysis of the impacts of Articles 5 and 6 of the DoW is oversimplified. The option definition is too broad, meaning that it is difficult to assess the specific impacts of these changes. There is poor consideration of the fundamental change to the definition of recovery. The worked example on energy efficiency and incinerators is considered to be insufficient in detail, scope and the coverage of issues to represent a useful tool for the analysis of the impacts of the change.

4.2 Defining when Waste ceases to be Waste (Article 11)

The impacts of waste ceasing to be waste have been analysed alongside the redefinition of recovery and disposal; these two important areas are assessed as one under option 4.4. In the case of waste ceasing to be waste, the environmental, social and economic impacts have been considered together for three of the four options proposed; they are considered 'common to the three alternatives'. This means that it is difficult to make use of the impact assessment as a decision making tool as there is no distinction in terms of impact; while this type of consolidation may be valid on some occasions, the IA provided little evidence to support this and the options put forward are perceived to be very different. Additionally, the approach makes it difficult to distinguish between the classes of impacts addressed and to determine if all three pillars of sustainable development have been appropriately considered. The assessment concludes that the new 'end of waste' definition is expected to have a largely positive economic, environmental and social impact and lists a reduced administrative burden and increased confidence in the material and competitive benefits as a consequence of a uniform standard. This represents one of the most generalised assessments within the dossier, and is not considered to be an appropriate basis for considering such a fundamental shift in policy represented by developing criteria to define when waste ceases to be waste.

A worked example supplements the analysis presenting the impacts of clarifying when waste ceases to be waste in the case of recycling construction and demolition waste. The worked example includes some quantitative assessments of the positive impacts on defining end-of-waste criteria for recycled aggregates in terms of reducing administrative costs for business. The analysis is based upon input by the Federation of International Recyclers (FIR). Only economic impacts are quantified.

While interesting, the worked example is too specific to allow a broader application, i.e. to other waste streams. It is also not clear upon which policy scenario the analysis in example 2 is based. Different approaches to defining when waste ceases to be waste are not considered but is simply stated that clarification would be useful. Example 2 is not, therefore, a good basis on which to inform decisions more broadly.

4.3 Mineral Waste Oils (Article 18)

The impacts of the changes to the Mineral Waste Oils Directive are comprehensively assessed in Annex 1 of the Impact Assessment and the impacts are summarised in Table 5 of the dossier. Within the table impacts are divided into economic, social and environmental costs based on “no policy change” and “focus on collection”.

In Annex 1 of the impact assessment the greatest focus is on environmental impacts with social impacts being least covered. Given the more specific nature of this analysis, it is possible to quantify the economic, social and environmental impacts of regeneration, the environmental impacts of incineration and economic impacts of collection. The figures used are based on previous research, but have been criticised by some. For example, a report¹⁸ by the Danish Topic Centre on Waste and Resources states that the high priority given to global warming leads to the overall environmental result being neutral, i.e. regeneration is no more environmentally beneficial than energy recovery. The analysis of the waste oil amendments, and more broadly the impact assessment, have also been criticised by an environmental NGO for failing to consider the implications of combining the waste oils, hazardous waste and waste framework Directives together.

The assessment of the impacts of mineral waste oils is proportionate and shows the benefits of dealing with the issues in hand on an appropriate level. The pitfalls of addressing detailed issues within a general strategy are avoided by increasing the specificity of the options and changes proposed. While there may still be criticisms of this approach, its level of analysis is more appropriate to the issues considered in the DoW than for other issues.

4.4 Waste Prevention Programmes (Article 29-31)

Waste prevention programmes and their inclusion in the WFD are assessed within the IA under objective 2, i.e. the potential of waste prevention to contribute to reducing the environmental impact of resource use. The development of a European framework of programmes (option 2.3) is evaluated against the impacts of the alternative options of “indicative prevention targets” or no policy change. The definition of the option 2.3 is more specific than for others (see Section 3.2.2) allowing a greater understanding of the types of changes being proposed.

¹⁸ Watson D (2006), *Dropping the requirement for waste oil regeneration - potential socio-economic impacts for Denmark*, Danish Topic Centre on Waste, 2006

Table 2 of the IA assesses the environmental, economic and social impacts of three options put forward under objective 2. The table sets out the impacts of the options, with clear sub categories put forward under the economic pillar of the assessment, i.e. costs to business, innovation and research and implementation costs. This breakdown is more detailed than in other analysis tables contained in the IA. A worked example (example 1 of section 5.2) is provided to support the tabular analysis. This example examines briefly the quantitative impact of food waste and cost of food loss in selected countries. The relevance of this example to the assessment of the relative merits of the policy options set out in the IA is limited. In relation to the evaluation of the options the selection of this one and only example in order to illustrate the issues surrounding prevention seems arbitrary. While it provides justification for action at a generic level, i.e. to prevent wastage, it does not provide evidence to support decision making as to what policy route would be preferable.

Despite the more detailed content of option 2.3's definition, in this case it has not lead to equivalent specificity in the analysis within section 5.3 of the IA. The assessment is considered not to be proportionate to the requirements needed to inform decisions regarding the DoW. This is considered to be an evaluation of a level useful to inform the Thematic Strategy but not informative enough to provide the information necessary to take decisions in relation to the DoW.

4.5 Conclusions

During the evaluation of the case studies, and the more extensive assessment set out in Annex 2, general themes and conclusions were identified regarding the coverage of impacts within the IA. These are summarised below.

4.5.1 Structure of the Assessments

In Section 5 of the IA, the impacts of different options are grouped by objective and presented in tabular form. These tables are a useful tool allowing impacts to be quickly identified and compared. The information provided is, however, at a very generic level of qualitative assessment. The tables are supplemented by worked examples for specific elements of an option. The use of worked examples is an interesting innovation and the information contained is enlightening; it appears that these are an attempt to combine strategic elements of impact assessment with more specific analysis of policy changes. This also represents a useful approach for a more strategic dossier, such as the Thematic Strategy, that allows potential changes to be visualised.

Unfortunately it is unclear on what basis the specific case examples were selected. Examples consider not only suggestions put forward within the options but also additional policy approaches. For example, the impact of clarifying the definition of recycling is not considered in any specific option of the impact assessment, however, worked example 3 in Section 5.4 of the IA outlines the implications of this for the plastics sector.

The usefulness of these examples is also limited as: the conclusions are not elaborated upon to allow their application more broadly; there are often no clear options presented; it is often unclear upon what basis statements are made, i.e. the information sources being utilised; and finally conclusions reached are vague meaning it is difficult to use these to develop an opinion regarding the amendment discussed. To effectively add value to the broader assessment the worked examples would need to be: supplemented by more substantial explanatory text; more clearly follow the structure of an impact assessment; and be better linked to the tabulated analysis of the options.

4.5.2 Limitations imposed by the Definition of Options

The nature of the definitions of the options, being in many cases broad and unspecific, limits the ability of the IA to undertake detailed analysis. This results in analysis that is also broad and unspecific. While appropriate for the Thematic Strategy's development, this lack of specificity limits its relevance to the DoW. This leads to the important conclusion that the definition of the options for consideration is fundamental to nature and usability of the impact assessment as a whole. The use of sub-options in the assessment, i.e. to allow a more detailed analysis of significant issues and alternatives, may have allowed the twin needs for both a broad and deep assessment to be more effectively achieved. Alternatively a separate impact assessment specifically dedicated to the DoW should have been undertaken to allow the clear consideration of issues and to better inform decision makers.

4.5.3 Coverage of Impacts

The analysis is divided between economic, social and environmental impacts, with sub-headings dividing these higher level themes into broad categories, i.e. social issues are divided into employment and health, and economic issues into competitiveness and implementation costs. The tabulation of the analysis makes the impacts easy to link to a specific option, while the use of '+' and '-' signs allows the overall direction of an impact to be quickly assessed. The summaries of the impacts are, however, very generalised. Few details are presented, for example, on the causality between the impact and the option being proposed; nor are the exact impacts specified, i.e. statements refer to emission reductions but do not clarify what precisely would be reduced. There is no clear way of comparing impacts, i.e. whether one would have a greater positive benefit than an alternative. More informative summaries of resulting impacts would be necessary in order for the IA to be of practical use in terms of aiding the understanding of the DoW by policy makers.

4.5.4 Coverage of related Areas and Issues

The impacts stated in the tables, given the limitations explained above, tend to focus on the direct and clear effects of a policy change. There is limited and only very simplistic consideration of impact chains, i.e. if 'x' changes then 'y' will result leading to 'z' being increased.

Linkages between the changes in the DoW and other areas of environmental policy, specifically natural resource use issues, are not consistently made. The consideration of this type of indirect impact is fundamental to the process of impact assessment. They are especially important in the context of assessing the changes to an existing legislative measure, such as the WFD.

PART II – THE IMPLICATIONS FOR HAZARDOUS WASTE LEGISLATION

5 ANALYSIS OF THE INTEGRATION OF THE HAZARDOUS WASTE DIRECTIVE INTO THE EXISTING WASTE FRAMEWORK DIRECTIVE

5.1 Introduction

5.1.1 The Integration of the Hazardous Waste Directive

As noted above, the proposed DoW would integrate the WFD, the HWD and the WOD into one single new Directive. The objective of this part of the study is to give a short overview of the changes to hazardous waste law that would arise from the merger of the HWD into the more general DoW. The study will – in accordance with the European Parliament's request – elaborate specifically on the following issues:

- **The suppression of Annexes I and II of the HWD;**
- **De-listing by Member States;**
- **Concentration limits; and**
- **Changes to the mixing ban.**

The study will not deal with waste oil.

5.1.2 Method

The assessment concentrates on the specific questions set by the European Parliament and – to that extent – outlines the legal changes to the hazardous waste law by the merger of the HWD with the WFD and the environmental consequences to be expected. It is therefore not an all-encompassing assessment of the new Directive on Waste as a whole.

As regards the methodology used for this report, the authors have first formed an opinion as to the answers to be given to the questions. They based their considerations on a strict comparison of the HWD and the proposed DoW by taking into account the results of the consultation launched by the EU Commission on the merger of the HWD into the WFD and other position papers and statements by Member States and Industry as well as judgements of the European Court of Justice with regard to the HWD.

After having worked out the solutions to the questions, the authors confronted several interview partners, predominantly from environmental authorities of the Member States. The opinions of the interview partners have been considered in finalising the document, sometimes the solutions have been slightly modified. Ecologic led on the drafting of this part of the study and was in contact with the experts at SYKE several times to exchange opinions on the different questions. SYKE did the final peer-reading of the study.

5.2 Purpose of the proposed Directive on Waste: Simplifying and Streamlining European Waste Law

The Commission's intention to unite the WFD and the HWD in one Directive on Waste is intended to contribute to the simplification and streamlining of European Waste Law.¹⁹ In the following, a short analysis is provided if the chosen method is suited to contribute to the streamlining and simplification of European waste law.

Both the WFD and the HWD can be considered to be "horizontal" directives. While the WFD applies to nearly all waste streams, the HWD applies to waste containing certain hazardous substances, which are of very diverse origin and content. The technical term "hazardous waste" includes a myriad of very different waste streams with regard to their origin and composition. As a consequence, "hazardous waste" is a waste category much less specific than other waste streams such as electronic waste, batteries, sewage sludge, etc.

In fact, many articles of the HWD just refer to "brother" articles of the WFD. Against this background it seems wise to produce one compact horizontal directive laying down the requirements for waste in general that includes a separate chapter containing the specific requirements for hazardous waste.

Result: The combination of the HWD and the WFD in a new Directive of Waste can basically be deemed an adequate and reasonable step to streamline and simplify European Waste Law.

5.3 Definition of Hazardous Waste

5.3.1 *Legal Situation so far: Hazardous Waste Directive*

Article 1 para. 4 indent 1 and 2 HWD lays down the criteria for the definition of hazardous waste. According to this Article hazardous waste is

- **wastes featuring on a list to be drawn up by the European Commission on the basis of Annexes I and II to this Directive. These wastes must have one or more of the properties listed in Annex III. The list shall take into account the origin and composition of the waste and, where necessary, limit values of concentration²⁰,**
- **any other waste which is considered by a Member State to display any of the properties listed in Annex III. Such cases shall be notified to the Commission and reviewed in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC with a view to adaptation of the list.**

¹⁹ http://ec.europa.eu/environment/waste/hazardous/hazardous_consult.htm (26 November 2006).

²⁰ The definition presented here does not reflect the full legal text but contains the information important for this study.

The HWD empowers the European Commission to set up a list of specific hazardous waste streams. The HWD itself only provides the abstract criteria upon which the list has to be completed, specifically the properties listed in Annex III and gives some indications as to which waste streams need to be considered when the Commission completes the list (Annexes I and II). Furthermore, the HWD implies that this list might not be complete with all existing hazardous waste streams so that Member States are invited to name any other waste which displays any of the properties listed in Annex III to the Commission.

In 1994, such a comprehensive list was finalised by the Commission (Hazardous Waste List 1994) along with the European Waste Catalogue enumerating non-hazardous wastes (EWC 1994). In 2000, the European Waste Catalogue was revised²¹ and from then on included non-hazardous waste and hazardous waste – the latter marked by a ‘*’. The EWC 2000 was amended in 2001.²² The European Waste Catalogue had to be implemented by the Member States on 1 January 2002. This list of hazardous waste is a transposing measure supplementing the definition of Hazardous Waste in the HWD and product of the comitology procedure (comitology decision). The Member States are obliged to transpose this decision, i.e. the EWC into their national laws.²³

5.3.2 *Future Legal Situation: Directive on Waste*

The new Directive on Waste defines hazardous waste as follows:

Hazardous Waste is waste which displays one or more of the properties listed in Annex III of the Directive (Article 12).

In Article 13 the DoW empowers the European Commission to establish a list of hazardous wastes, hereinafter “the list”. The list shall take into account the origin and composition of the waste and, where necessary, limit values of concentration (Article 13). The fact that the proposed DoW empowers the Commission to establish a list of hazardous waste **does not mean** that the current EWC has become obsolete and that the Commission has to set up a new list. Hence, **the proposed DoW does not produce a legal gap** but sort of implicitly “confirms” the EWC, giving the Commission the right to change it when it regards this as necessary, however also under observation of the procedural rules laid down in Article 36(2).

²¹ Commission Decision of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste

²² Most recently by COUNCIL DECISION of 23 July 2001 amending Commission Decision 2000/532/EC as regards the list of waste (2001/573/EC)

²³ The European Court of Justice has confirmed this in settled jurisdiction, see for instance judgement C-194/01, No. 37f., <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&dcjo=dcjo&numaff=C-194%2F01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100> (1 December 2006).

Result: With the proposed DoW in place, the EWC 2000 remains the legally valid waste list. The Commission is not obliged to strike up any new Waste Catalogue.

5.3.2.1 The Role of Annex III in categorising waste and the Repeal of Annexes I and II of the HWD

As a consequence, for the Directive on Waste the basic constitutive quality of hazardous waste is that it displays one of the qualities listed in Annex III of the Directive on Waste. With regard to the list to be taken up by the European Commission, Article 13 of the proposed DoW states that the Commission shall establish a list of hazardous wastes. The list shall take into account the origin and composition and, where necessary, limit values of concentration. Reading Article 13 together with Article 12 makes it clear that the European Commission may list only such waste streams as hazardous that display the properties of Annex III.

The properties listed in Annex III include general features as “irritant”, “harmful”, “toxic”, etc, a more precise categorisation of substances is provided in Annex VI of the Council Directive 67/548/EEC²⁴ as amended. The Annex III of the Directive on Waste is the unchanged Article III of the HWD with the exception of the references in Annex III to the Directive 67/548/EEC being clearly dynamic and insofar automatically adapting the definition of hazardous waste to any future changes in European chemical law. The Annex III of the HWD, by contrast, has so far statically referred to a specific updated version of the Directive 67/548/EEC. However, the European Waste Catalogue, which – as explained above – as a transposing measure document to the HWD includes the list of Hazardous Waste streams and is the principal document to identify hazardous waste for the EU Member States, already refers to Directive 67/548/EEC as amended (“dynamic reference”).²⁵ With the EWC being a document to be implemented by the Member States into their national laws, the updating of the Directive on Waste, which the European Waste Catalogue is based on, will not have a practical effect as regards the European Waste Catalogue.²⁶ In any case, the new wording of Annex III will not have a negative effect on European hazardous waste law.

²⁴ Council Directive of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (1967/548/EC).

²⁵ However, it has to be considered that the Directive 67/548/EEC has been amended many times. As for the allusion in Annex III of the DoW to Annex VI part I A and part II B of the Directive (67/548/EC), it has to be said that there is no part I A and II B any more. The design of this Annex has been completely revised (now the subsections of the Annex VI have numbers 1, 2, 3, etc.). One could consider referring to the relevant subsections of the Directive 67/548/EC by naming a specific edition of this Directive (e.g. Directive 67/548/EEC as amended by Directive 92/32/EC and further amendments).

²⁶ Member States reporting additional hazardous waste streams to the Commission, however, have to take notice of the definition of hazardous waste now including a dynamic reference to Directive 67/548/EEC.

The Annexes I and II of the HWD have not been taken up by the new Directive on Waste. The waste streams enumerated Annexes I and II of the HWD have only served as basis to guide the elaboration of the European list on hazardous waste, which is now included in the European Waste Catalogue. The Annexes I and II as such did not have to be transposed into national law by the Member States²⁷. The European Court of Justice has stated with regard to Article 1 paragraph 4 of the HWD that the decisive criterion, as regards the definition of ‘hazardous waste’, is whether the waste displays one or more of the properties listed in Annex III to Directive 91/689²⁸.

With this European Catalogue now established, the Annexes I and II of the HWD no longer have meaning of their own. The only relevant list at the European Level is the European Waste Catalogue – notwithstanding the fact that the Catalogue may be incomplete or label too many waste streams as hazardous, for which the instrument of listing and de-listing is employed by the Directive on Waste (see below).

Result: With the European Waste Catalogue in place, Annexes I and II of the HWD, which only offered guidance as to which waste streams should be considered while completing the European Waste Catalogue, no longer have any meaning of their own. Their repeal will not deteriorate the quality of European Hazardous Waste Law. The only relevant criterion for waste to be labelled hazardous waste is whether it features one or more of the properties enlisted in Annex III.

5.2.2.2 Listing and De-listing

The list established by the Commission (Article 13), i.e. the European Waste Catalogue 2000, provides a strong indication as to what is to be regarded and treated as hazardous waste. Yet, the Directive on Waste recognises that this list might not be complete and can also at times be faulty. Thus, the Directive on Waste allows the Member States to additionally list waste streams so far not enumerated in the list established by the Commission and treat them as hazardous waste if they display one or more of the properties listed in Annex III (Article 14). Insofar, the Member States have the same rights as under the HWD (see Article 1 paragraph 4 indent 2 of the HWD). The European Court of Justice has, moreover, extensively interpreted the right of Member States to additionally list hazardous waste streams as a mode to adopt more stringent protective measures in order to prohibit the abandonment, dumping or uncontrolled disposal of hazardous waste²⁹.

²⁷ This opinion is also reflected by the jurisprudence of the European Court of Justice: C-194/01, No. 78ff. (the judgement, however, states also that the Commission has failed to provide sufficient evidence why the Annexes I and II had to be transposed into national law). In this context see also a UK- Review of the Special Waste Regulations http://www.defra.gov.uk/Environment/waste/special/pdf/spwaste_review.pdf (26 November 2006).

²⁸ see European Court of Justice judgement C-318/98, No. 56f.

²⁹ See European Court of Justice judgement, Case C-318/98, No. 51; <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&do>

On the other hand, the Directive on Wastes allows the Member State to **de-list** waste streams that are included in the list established by the Commission if they have evidence to show that a specific waste stream does not display any of the properties listed in Annex III (Article 15). These waste streams can then be treated as non-hazardous waste streams. The possibility of de-listing was not foreseen in the HWD, but does figure in Article 3 of Decision of the Commission to establish an European Waste Catalogue³⁰. As mentioned above, the European Waste Catalogue had to be implemented by the Member States as a transposing measure to the HWD and, so the possibility of de-listing was also transposed into national laws (as for example in Germany). De-listing has thus become a legal reality before the Directive on Waste is passed. The only change of the legal situation lies in the fact that de-listing is now also explicitly recognised by the Directive on which the European Waste Catalogue is based.

Result (1): Given the fact that the Commission Decision to establish a European Waste Catalogue has introduced the possibility of de-listing by Member States, the de-listing option offered by the proposed DoW will not induce any practical changes and will not have any negative environmental effect compared to the status quo.

According to the new Directive on Waste, the Member State has – in both cases of listing and de-listing - to inform the European Commission and provide the evidence justifying its withdrawal from the list. The Commission then has to review the list in order to decide on its adaptation. Thereby, it has to observe the procedural rules laid down in Articles 5, 7 and 8 of the Council Decision 1999/486/EC³¹ laying down the procedures for the exercise of implementing powers conferred on the Commission.

Listing and de-listing is intended to contribute to a globally correct implementation of the requirements concerning hazardous waste. Member States have the possibility of correcting any oversight or other faulty estimation by the Commission.

[cjo=docjo&numaff=C-318%2F98&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100](#) (1 December 2006).

³⁰ Legally this should not be a problem given the fact that the Commission has been entitled by Article 1 paragraph 4 first indent of the HWD to set up a list of hazardous waste on the basis of Annexes I and II. **These wastes must have one or more of the properties listed in Annex III.** Given this definition, the Commission has to refrain from including waste streams that do not feature an Annex III property in the list of hazardous wastes. One could thus view the fact that the EWC allows Member States to de-list waste not featuring any of the Annex III properties as a sort of self-correction mechanism. This mechanism is provided for the case in which the Commission has erred in labelling a waste stream not featuring the Annex III properties as hazardous waste in the EWC and by this "exceeds the basic HW definition of the HWD". So de-listing could be viewed as a means to enforce the HWD definition of hazardous waste. In order to impede any abuse of de-listing, Article 3 of the EWC Decision requires that the Member States notifies the Commission, which can then take measures if it decides that the evidence presented by the Member State that the waste stream does not feature any Annex III property, is not sufficient. Basically, Article 3 of the EWC-Decision can be viewed to be in compliance with the basic definition of hazardous waste in the HWD.

³¹ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC).

This will lead on the national level to an inclusion of waste streams into the stricter hazardous waste regime of waste streams formerly not included in the list on the one hand, and the less strict handling of waste streams that do not display the Annex III properties but have still figured on the list.

It is true that the possibility of listing and de-listing can lead to a transitorily different handling of waste streams in the Member States, which runs counter to a harmonised European system, but this limited “gap” is justified as it helps correct faulty categorisation on the European level. The European Court of Justice has recognised the right of Member States to treat waste streams additionally listed by the Member State as hazardous waste independently of the approval of the European Commission.

When it comes to waste streams de-listed by a Member State, the Directive on Wastes does not give any direct hint as to what should happen if the Commission invalidates the evidence delivered by the Member States. Given the fact that the European Hazardous Waste Law sets a minimum of harmonised requirements and the DoW refers to the existence of the properties listed in Annex III in the various waste streams as constitutive quality of hazardous waste, waste that objectively contains any of those properties in a sufficient amount is to be regarded as hazardous waste.

Result (2): Both the HWD/DoW and the EWC lay down the minimum requirements for labelling waste hazardous waste. In the event that a Member State de-lists hazardous waste streams without sufficient evidence that the waste streams do not contain (a sufficient concentration) of Annex III properties, the European Court of Justice has to decide and condemn the respective Member State.

5.3.3 Problems in applying the Definition of Hazardous Waste: Concentration Limits

As outlined in the preceding sections, neither the HWD nor the Directive on Wastes establish a list of hazardous waste on their own but they delegate the establishment and the regular adaptation of such a list to the European Commission. The Decision that has established the European Waste Catalogue was a comitology decision.

The European Waste Catalogue contains two types of hazardous waste “entries”:

- **Absolute entry;**
- **Mirror entry.**

Absolute entries imply that the waste stream is hazardous regardless of its concrete composition or the concentration of “dangerous” substances contained in the waste. Absolute entries are marked with an “*” but there is no reference to a certain dangerous substance.

Mirror entries reflect the recognition by the EWC that certain wastes have the potential to be either hazardous or non-hazardous depending on their actual composition and the concentration of “dangerous” substances contained in the waste.³² These wastes are covered by two entries collectively called “mirror entries”, the hazardous entry marked with an “*”.

As a consequence, the question of “concentration limits” is only relevant for mirror entries of hazardous waste. The new Directive on Waste takes up this approach when it lays down in Articles 4 and 13 that the general waste list should include waste to be regarded as hazardous pursuant to Articles 12 to 15 taking into account the origin and composition of the waste and, where necessary, limit values of concentration. Hence, limit values of dangerous substances are only relevant for a specific kind of hazardous waste.

The characteristic of the dangerous substances have so far been generally defined in Annex III to the HWD and will be defined likewise in Annex III of the Directive on Waste (H1-H14) which refers to European chemical law (Directive 67/548/EEC as amended) for further clarification of the terms. Article 2 of the Decision of the Commission to establish an European Waste Catalogue sets out concentration thresholds for certain properties listed in Annex III of the HWD that render waste hazardous (H3-H8, H 10, H 11³³); whereas there are no thresholds set for the other hazardous properties (H1, H2, H 9, H 12-14) in the European Waste Catalogue. The method to deal with these properties (thresholds, etc.) has to be laid down on the national level.³⁴ The proposed DoW does not provide any thresholds (concentration limits) in its definition of hazardous waste. Therefore the thresholds contained in the EWC are not changed. The proposed DoW does not add any threshold for those properties that have not yet been assigned a harmonised threshold, either.

As a consequence, the current status quo remains unchanged.

Result: The proposed Directive on Waste does not in any way change the concentration limits / thresholds of dangerous substances. Yet, it keeps entitling the Commission to lay down these concentration limits / thresholds. The European Waste Catalogue fulfils the requirements of Articles 4 and 13 of the Directive on Wastes and lays down thresholds for some properties, for others not.

³² See for this chapter: Joachim Wuttke, German Federal Environmental Agency: http://www.basel.int/centers/conferencesworkshops/bratislava10/e_eu_waste_list2.pdf (5 November 2006)

³³ Enlisted in Annex III of the HWD.

³⁴ See e.g. for the UK example guidance note by the Scottish Environmental Agency: http://www.sepa.org.uk/pdf/guidance/waste/hazardous/WM2_intro_2005.pdf (5 November 2006), for Germany http://www.bmu.de/files/abfallwirtschaft/downloads/application/pdf/avv_erlaeuterungen.pdf (5 November 2006).

5.4 Changes to the Mixing Ban

The Hazardous Waste Directive stipulated in Article 2 a general ban of mixing specific types of hazardous waste with other types of hazardous waste or other regular waste. Under strict conditions an exception could be granted. Article 2(3) stipulated that “the mixing of hazardous waste with other hazardous waste or with other waste, substances or materials may be permitted only where the conditions laid down in Article 4 of Directive 75/442/EEC are complied with and in particular for the purpose of improving safety during disposal or recovery. Such an operation shall be subject to the permit requirement imposed in Articles 9, 10 and 11 of Directive 75/442/EEC.”

The Directive on wastes **does not take up the mixing ban of the HWD** but stipulates in Article 16 paragraph 1 that the “Member States shall take the necessary measures to ensure that the following conditions are met where hazardous waste is mixed, either with other hazardous waste possessing different properties or with other waste, substances or materials:

- (a) the mixing operation is carried out by an establishment or undertaking which has obtained a permit in accordance with Article 19;
- (b) the conditions laid down in Article 7 are complied with³⁵;
- (c) the environmental impact of the management of the waste is not worsened;
- (d) such an operation conforms to the best available techniques.”

These conditions (a to d, above) must all be fulfilled. While the HWD generally bans mixing and formulates conditions for an exceptional permit for mixing, the consequence of which is that the conditions for its realisation have to be interpreted in a restrictive manner, the Directive on Wastes basically allows mixing of hazardous waste with other hazardous/non-hazardous waste under certain conditions, which might lead to a more generous approach to permitting.

Nonetheless, Article 16 in combination with Article 19 requires a permit for an installation that carries out the mixing of hazardous waste with other hazardous/non-hazardous waste. Hence, the mixing process itself remains well subject to a permit, as Article 19 stipulates that permits specify the technical requirements for each type of operation permitted (see Article 19(1b)), the precautions to be taken (19(1c)) and the method to be used for each type of operation (19(1d)).

³⁵ Article 7 DoW states that Member States shall ensure that the recovery or disposal of waste is carried out as follows: (a) without endangering human health; (b) without using processes or methods which could harm the environment; (c) without risk to water, air, soil and plants and animals; (d) without causing a nuisance through noise or odours; (e) without adversely affecting the countryside or places of special interest.

While the HWD only allowed mixing when it **improved the safety** of recovery/disposal, the new Directive on waste requires that the environmental impact of the management of the waste is **not worsened**. This means that the environmental impact should at least be the same when one compares the isolated disposal/recovery of HW with the disposal of the mixed HW. Given the fact that the term “safety” is not an environmental term and there is not much jurisprudence defining the term any further, the legal situation under the HWD and the new situation under the DoW are hard to compare with regard to their environmental effects. One could argue that text of the DoW has even clearly stated that there may be no worsening of the environmental impacts due to the mixing of HW with other waste. Yet, many environmental agencies and other stakeholders are worried that giving up the mixing ban might in practice lead to an increased practice of mixing HW with other waste with the purpose to dilute waste and by this dodge the stricter Hazardous Waste regime.³⁶ The vague conditions to be fulfilled for mixing practices to be permitted might in practice weaken the enforcement of high environmental standards in hazardous waste management.

The Directive on Waste surely requires that the mixing operation conforms to best available techniques. This way, the Directive on Waste is streamlined with the IPPC Directive³⁷, which demands installations listed in its Annex I to be permitted according to the best available techniques. However, in fact this does not imply a major change or improvement of the legal situation and its environmental effects, because Annex I Nr. 5.1 of the IPPC Directive already includes

“Installations for the disposal or recovery of hazardous waste as defined in the list referred to in Article 1 (4) of Directive 91/689/EEC, as defined in Annexes II A and II B (operations R1, R5, R6, R8 and R9) to Directive 75/ 442/EEC and in Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (2), with a capacity exceeding 10 tonnes per day”.

Thus, most of hazardous waste installations are already subject to IPPC-permitting, which includes also the mixing operations. As far as the identification of the best available techniques is concerned, most Member States do not have general binding rules laying down BAT for each relevant sector. Instead, the permitting authorities have to identify BAT on a case-by-case basis, sometimes they are assisted by some kind of national BAT outlined in guidelines on the national level. The Best Available Techniques Reference Documents (BREFs) published by the European Commission provide valuable information helping identify what can be regarded to be BAT in the European Union.

³⁶ There has also been the argument that mixing should only be allowed if this led to an improvement of the environmental effects.

³⁷ Council Directive of 24 September 1996 concerning integrated pollution prevention and control (1996/61/EC).

The BREF on waste management, which is going to be published soon by the European Commission, does not at the moment include detailed information on best available techniques for blending and mixing of Hazardous Waste. Therefore, it will be up to the national authorities to design a universal approach and methodology outlining under what circumstances the mixing can be permitted.

As a result, the practical implications of the change to the mixing ban depend to a large extent on the way that the national authorities produce national guidelines on what is BAT in mixing and - independently of this - on how permitting authorities interpret and enforce the mixing requirements.

Result: Contrary to the provisions in the HWD, which generally banned the mixing of HW with other HW or non-HW and admitted exceptions under certain conditions, these mixing operations are generally allowed by the Directive on Waste if certain conditions are fulfilled. This change of concept/priority from general ban to general possibility (under certain condition) might per se lead to the fact that mixing is more generously permitted.

From a strictly legal view, the DoW requirements for allowing mixing are designed to prevent negative effects on the environment (i.e. no worsening of environmental effects). This wording even makes the requirement clearer with comparison to the HWD regulation, which stated that mixing was possible in particular if it improved safety during disposal or recovery. From a practical view, however, the question about whether Hazardous Waste legislation will be weakened or not by this change will depend largely on the way the permitting authorities interpret and enforce the requirements for allowable mixing (e.g. no worsening of environmental impact and BAT). The definition of BAT for mixing of HW with other HW/NHW either by the national authorities (in laying down national BAT) and/or by the permitting authorities in a case-to-case approach will be decisive in this context.

As a result, it cannot be excluded that the change to the mixing ban will lead to a loophole facilitating the mixing of HW with other waste (often with the intention of diluting waste and evading the HW regime) and consequently to a sensitive weakening of environmental standards in hazardous waste management.

PART III – CONCLUSIONS

6 CONCLUSIONS

The main conclusions relating to the assessment of the Impact Assessment (as set out in Part I of the report) are:

- The Impact Assessment accompanying the Thematic Strategy on waste prevention and recycling and the proposed Directive on waste does not provide a rigorous or comprehensive basis for the institutions to make decisions on the potential impacts of the proposed Directive. The Impact Assessment has a broad remit and objectives and is, therefore, well-suited to assessing the potential impact of the Thematic Strategy. However, the proposed Directive contains potentially significant changes, the impacts of which are not adequately considered in the Impact Assessment.
- In particular, the more general nature of the policy options outlined in the IA is better suited to assessing the strategic policy decisions made during the development of the Thematic Strategy than in assessing the more detailed changes of the proposed Directive. Hence, the IA does not assess the impact of key amendments to existing waste policy that are set out in the proposed Directive.
- Of the changes to existing waste legislation set out in the proposed Directive, only four are assessed in the IA: the revised definition of ‘recovery’ and ‘disposal’; the definition of when waste ceases to be waste; the treatment of mineral waste oils; and waste plans and programmes. Even for these, the extent of the IA’s evaluation of the impacts of these changes is insufficient. In particular, the IA’s analyses of the potential impacts of the changes in the definition of ‘recovery’ and of when waste ceases to be waste are causes for concern. Additionally, in the IA it is often unclear what impacts are linked to which policy options, which further limits the ability to assess adequately the impacts of the proposed changes.
- The IA, as it relates to the proposed Directive, does not meet many of the objectives of the impact assessment process that have been set by the Commission (see Section 2.1).
- It would have been desirable to have had a separate IA dedicated to the proposed Directive. The fact that the IA attempts to assess the impact of both a strategic dossier and a legislative proposal within one impact assessment is confusing and ineffective for the purpose of assessing the detailed implications of the proposed Directive.

In relation to Part II of the report, i.e. the integration of the Hazardous Waste Directive with the Waste Framework Directive to form the new Directive on Waste, there is no reason why this would per se lead to a weakening of environmental standards in hazardous waste management. As a consequence the Commission's approach, i.e. producing one horizontal Waste Directive, which features a separate chapter on hazardous waste, is an approach with which the authors in principle agree.

In relation to the detailed points on which the analysis focused, the conclusions are:

- **Repeal of Annexes I and II:** The main purpose of Annexes I and II of the HWD were to assist with the development of the European Waste Catalogue (EWC). Now that the EWC is in place, Annexes I and II of the HWD no longer have any practical or legal role. Also under the HWD, the decisive criterion for waste to be/become hazardous has always been whether the waste stream has one of the Annex III properties. This opinion has also been supported by the European Court of Justice's jurisprudence. Annex III of the HWD has been replicated in the proposed Directive on Waste, so, in the repeal of Annexes I and II, the proposed Directive does not induce any changes.
- **Listing and De-listing:** As with the repeal of the Annexes, the proposed Directive would not induce any change to the legal status quo with respect to listing and de-listing. De-listing was already possible as a result of Commission Decision of 3 May 2000 establishing a list of wastes (...), which was subsequently implemented by the Member States into their national laws.
- **Concentration limits:** The proposed Directive on Waste does not include actual concentration limits in its definition of hazardous waste. The EWC includes concentration limits for some of the properties of Annex III, but leaves it up to the Member States to lay down concentration limits for other properties. The proposed Directive does not change anything in this respect, as concentration limits will remain for some properties (as set out in the EWC), while for other properties, it will still be up to Member States to set concentration limits, etc.
- **Changes to the mixing ban:** Potentially negative environmental impacts due to the change to the mixing ban cannot be excluded. Even with the condition that any mixing of HW with other HW/NHW follows the rules of BAT and may not worsen the environmental impact, the enforcement of such a condition might be difficult, which might facilitate waste mixing with the intention to dilute waste and evade the stricter Hazardous Waste regime.

ANNEX 1: SUMMARY OF THE METHODOLOGICAL APPROACH TO THE ASSESSMENT OF THE IA

Initially the research team reviewed the IA itself (as presented in SEC(2005)6181) and associated documents, i.e. the DoW, Thematic Strategy, the EPEC study and letter from Commissioner Dimas. This process was intended to establish a clear understanding of each dossier's content and the relationships between them. The content of the DoW was then systematically assessed against the IA to establish: the level of coverage of the former by the latter; the extent to which impacts have been analysed; and the methodologies used to achieve this. These reviews made use of matrix formats in order to systematise the investigation and ensure that the evaluation was objective – Annex 2 presents an example of such a format.

This in-depth investigation of the assessment was complemented by a formal literature review intended to consider responses to the publication of the impact assessment, the process by which the assessment was developed and the engagement of stakeholders within this. Finally, the information from the literature review was complemented by stakeholder interviews designed to elaborate on points presented in the literature, and ensure that processes and opinions were fully understood. The literature and interviews were designed to cover the breadth of stakeholder opinion including Member States, European institutions, environmental NGOs, industry and independent experts.

Based on the information collated, in accordance with the processes outlined above, the quality and appropriateness of the IA were assessed. This assessment included: an evaluation of the IA against the content of the DoW; consideration of the purpose the impact assessment process more generally, in the context of proposing a Directive; and the key topics addressed in the Commission's 2006 guidelines on impact assessment (set out in Section 2.1). More academic, detailed approaches to the analysis of impact assessments were considered as a basis for this report, e.g. criteria being developed as part of the ongoing EVIA (Evaluating Impact Assessments) study for the Commission. However, given the nature of the impact assessment in question and the needs of the European Parliament these were considered inappropriate.

ANNEX 2: MATRIX OF THE ARTICLES CONTAINED IN THE WASTE PROPOSAL, ANALYSING CONSIDERATION IN THE IMPACT ASSESSMENT

Elements underlined are deemed to have changed in terms of meaning between the WFD and DoW text. This annex is included in order to illustrate the analysis supporting this work and the logical thought processes that underlie this. The comments included are not necessarily conclusions of this report and should not be treated as such. The information from this matrix has been combined with other analysis to provide the conclusions and comments discussed in sections 3 and 4 of this report.

Proposal Provision i.e. what article means and link to TS – change	Assessment Needs and summary of approach IA	Options considered	Impacts considered – coverage of social, economic, environmental	Quantitative Assessment – completed, evidence basis and description	Qualitative Assessment - completed, evidence basis and description	Proportionality of assessment	Comments on quality of assessment	Comments on appropriateness of assessment
<p><u>Article 1</u></p> <p><u>Introduces approach to the Directive, very general moving towards recycling and recovery society. Wording of hierarchy modernised and environment introduced.</u></p> <p><u>Potentially alters the waste hierarchy by flattening the structure.</u></p>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
<p><u>Article 2</u></p> <p>Scope of the Directive – changed to community legislation to improve legal certainty and minimum coverage at the community level. New exclusions on animal by-products, contaminated unexcavated soils, animal and agricultural by-products. Not covered by the TS</p>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Proposal Provision i.e. what article means and link to TS – change	Assessment Needs and summary of approach IA	Options considered	Impacts considered – coverage of social, economic, environmental	Quantitative Assessment – completed, evidence basis and description	Qualitative Assessment - completed, evidence basis and description	Proportionality of assessment	Comments on quality of assessment	Comments on appropriateness of assessment
Article 3 <u>Definitions – recycling added and collection. Definition meaning altered because of some other articles i.e. Article 5 on recovery and article 11 on waste</u>	Not directly considered within the IA, although discussions re 4 option 4 discuss the possibility of amending the waste framework Directive in order to clarify the meaning of disposal and recovery. This in turn impacts upon these definitions.	No clear options presented regarding the addition of definitions	No	No	No	Arguably it is inappropriate not to consider the impacts and options clearly for the addition of such definitions as their construct – especially in the case of recycling – may have potentially substantial impacts upon activity	No assessment	No assessment
• <u>Addition of recycling</u>	Under section 4 worked example 3 does examine clarifying recycling in terms of plastics. This does consider in the case of recycling plastics whether it is best to have a broad or a very specific interpretation of the term. This example does however, not draw any conclusions but presents only negative arguments for each case. No clear consideration of impacts generally	Two general options are put forward in the worked example but these are vague i.e. defined as a narrow scope of definition and a wide scope of definition. These are purely presented however in the context of the example i.e. clarifying the definition of recycling in the case of plastic	These options are not assessed although there is a vague comment regarding the potential environmental implications but this is not systematic	No	No	See above	The options are not clearly defined and impacts not clearly worked through for all three aspects of sustainability. An example is used only for a specific product.	While adding a definition may clarify interpretation of the Directive it is important that the most appropriate wording for that definition is adopted and the implications understood. It is not apparent that these issues have been assessed based on the information presented in the IA
• <u>Addition of collection</u>	There is no consideration of the addition of a definition for collection in the IA. See above	No	No	No	No	See above	No assessment	No assessment

Proposal Provision i.e. what article means and link to TS – change	Assessment Needs and summary of approach IA	Options considered	Impacts considered – coverage of social, economic, environmental	Quantitative Assessment – completed, evidence basis and description	Qualitative Assessment - completed, evidence basis and description	Proportionality of assessment	Comments on quality of assessment	Comments on appropriateness of assessment
<p>Article 4</p> <p><u>List of wastes – provides for the future amendment of list of waste via the comitology procedures set out in Art 36(2). Includes hazardous waste provisions. Maintains legal basis for the waste list</u></p>	<p>Primary change relates to the inclusion of hazardous waste – see analysis of articles 12 to 15</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>	<p>N/A</p>
<p>Article 5 (Chapter 2)</p> <p><u>Recovery- revised definition of this basis is substitution of resource.; Annex II amended r1 relating to use of waste as a fuel to generate energy applies and specification is expanded with the specification that this includes incineration facilities dedicated to the processing of municipal solid waste only where the energy efficiency criteria meet those set.; permits the setting of efficiency criteria for activities in article II via comitology.</u></p>	<p>This is discussed in relations to 4, option 4 which considers the revision of the waste framework Directive. While the impacts of revising the framework Directive are assessed generically, the specific impacts of altering the definition of recovery are not assessed. Detailed options for this change are not considered and the options put forward under 4 are arguably not comparable. When considering the impacts these are not clearly broken down in detail but generic statements i.e. clarifying the regulatory environment would have positive impacts on recycling and recovery – it does not explain the causality in terms of these</p>	<p>No options in terms of definition of recovery considered. The options considered against the amendment of the waste framework Directive are not considered to be sufficient.</p>	<p>While impacts of amending the waste framework Directive are considered these are very generic, there is no explanation of the reasoning that underpins this or the causality i.e. why the impacts result. The scale of the impacts is unclear. There is no specific consideration of the impacts of amending the recovery definition or the broadening of the remit to include energy efficiency criteria. While the worked example is interesting it does not systematically identify different options and impacts. This also only considers the use of</p>	<p>No assessment specific to this factor</p>	<p>No assessment specific to this factor</p>	<p>Considered that the assessments conducted are not adequate to assess the impact of what are potentially substantial changes to the Directive’s approach</p>	<p>The is a lack of assessment making it difficult to assess quality of consideration s</p>	<p>Assessment to generic to allow conclusions regarding these specific amendments. Should be noted that the IA was supplemented by additional information from the Commission to the European Parliament upon the implications of the amendment to recovery in relation to energy efficiency standards for incinerators. This assessment, however, focuses on the number and geographical coverage of installations affected and not in terms of systematically assessing the implications of this amendment</p>

Proposal Provision i.e. what article means and link to TS – change	Assessment Needs and summary of approach IA	Options considered	Impacts considered – coverage of social, economic, environmental	Quantitative Assessment – completed, evidence basis and description	Qualitative Assessment - completed, evidence basis and description	Proportionality of assessment	Comments on quality of assessment	Comments on appropriateness of assessment
	<p>impacts nor does it give a clear idea of the impacts of any one change to the Directive. Following a substitution approach and allowing incineration at certain energy efficiencies to be considered recovery are potentially substantial policy changes and are not considered. It should be noted that a worked example on an energy efficiency threshold to define energy recovery at incinerators is set out. The example does not clearly consider the options for a threshold and the impact of this. It focuses on presenting an explanation as to why such a measure might be included.</p>		<p>efficiency standards for a specific example and there is no elaboration in terms of the impact of efficiency standards more broadly upon recovery operations</p>					
<p>Article 6 <i>Disposal –changes intended to clarify difference between disposal and recovery. Annex unamended but arguably wording on disposal strengthened i.e. that all waste undergoes disposal operations where recovery is not possible compared and requirement that Member States</i></p>	<p>As for recovery clarifying the meaning of disposal is an element considered under analysis 4, option 4. However, the same lack of clarity applies as in the case of recovery. There is, however, now worked example relating explicitly to the amendment of this definition. Changes to the definition of</p>	See above	See above	See above	See above	<p>Limited changes in terms of strengthening, detailed analysis perhaps not necessary but it should be clear the reasons for the changes and some consideration of potential impacts should be put forward. Changing the definition of recovery will ultimately impact upon this as well i.e. changing the scope of disposal as</p>	See above	<p>Although the implications of these specific changes may be limited the complete lack of consideration and explanation is inappropriate</p>

Proposal Provision i.e. what article means and link to TS – change	Assessment Needs and summary of approach IA	Options considered	Impacts considered – coverage of social, economic, environmental	Quantitative Assessment – completed, evidence basis and description	Qualitative Assessment - completed, evidence basis and description	Proportionality of assessment	Comments on quality of assessment	Comments on appropriateness of assessment
<i>prohibit the abandonment, dumping or uncontrolled disposal of waste rather than take all necessary measures to prohibit.. Additionally there now is the possibility expressly that the comitology committee can add operations to the list expressed in Annex 1</i>	disposal are more limited than those to recovery focus on emphasis and the strengthening of provisions rather than representing a change in terms of policy direction					this based upon the definition of recovery		
Article 7 Conditions i.e. MS should ensure recovery and disposal are carried out inline with guiding principles - Wording unchanged from 91/156 although structure altered. Comparable to article 4 of Directive 2006/12	IA not necessary given no change of provisions	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Article 8 Responsibly for handling waste – No material change from wording in 2006/12 although it is clarified that provisions apply to both recovery and disposal	IA not necessary given no change of provisions	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Article 9 <i>Costs of treatment – extended to recovery operations as well of disposal operations. Costs of waste should be born by holders or producer. In</i>	No consideration of this extension in the IA, not included in descriptions of amendments to the waste framework Directive but arguably this may have	No	No	No	No	It is considered in appropriate not to consider the impacts of this change	No assessment	No assessment

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<u>line with polluter pays intended to ensure that all those responsible for waste are liable for the full cost of this activity i.e. internalizing externalities</u>	environmental, social and economic impacts the extent of which will depend upon Member State approach to implementation.							
Article 10 – Network of disposal installations <i>Substantially unchanged from text in Directive 2006/12, Article 5. Links in relation to BAT under the IPPC Directive are clarified</i>	No substantial change made	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Article 11 (Chapter III, end of waste) <u>Redefines when waste ceases to be waste i.e. process for assessing this via comitology. Reclassifying based on environmental impacts and secondary market. Environmental and quality criteria.</u>	This represents a substantial new addition to the Directive and is fundamental to the redefinition of recovery and disposal as well. Arguably the analysis in the IA under assessment 4 focuses on this amendment.	The options considered as alternatives to amending the waste framework Directive to take into consideration when waste ceased to be waste include: 1 - Member States developing national standards; 2- the development of common EU treatment standards; 3 - adoption of guidelines	The analysis included in table 4 presents the environmental, economic and social impacts of the changes. The impacts are considered quite generically and it is unclear on what basis conclusions are drawn. There is no explanation in terms of causality and the underlying processes are work. It is unclear how the impacts put forward are comparable i.e. whether options result is small are a large impact. Health impacts appear to be considered twice. The IA ultimately	In the analysis in table 1 no sources of information or quantitative assessments are provided. However, a worked example (no 2 within this section) does consider the impact of clarifying when waste ceases to be waste in terms of construction and demolition waste. This presents figures regarding the cost of landfilling. It also considers the administrative burden posed for companies in terms of dealing with waste legislation for recycled aggregates. It concludes that defining waste criteria for recycle aggregates	The assessments in table 4 are qualitative in nature, however information sources are not cited – except in the case of worked example no 2. Additionally the qualitative impacts are not clearly defined but very generic.	The level of detail of this assessment does not provide enough detail regarding the impact of amending the waste framework Directive. It is unclear exactly what change would be made to the Directive from the IA, therefore, the baseline for assessment is unclear. Arguably more detailed analysis of the different options for dealing with this important change should be put forward – as would be the case in an IA for a new measure. Worked example 2 is an interesting input to the assessment, however it is unclear how this analysis helps to	The options assessed are unclear in places, hence the baseline is confusing. Options are not necessarily comparable. Assessment of impacts is limited, generic and there is no assessment of different approaches for Directive	Arguably the approach taken is in appropriate when trying to assess such an important amendment. A more detailed IA on the options for inclusion in the waste framework Directive would be appropriate following on from the assessment made here – which is perhaps acceptable for vague strategic document such as the Thematic Strategy but inappropriate for assessing the impacts of adding detailed requirements to a Directive. A more detailed assessment would also arguably make better use of the

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		<p>interpreting waste and recovery. While option 2 is presented in detail, there is little detail provided in terms of what exactly the amendment to the waste framework Directive might entail. This option is poorly defined therefore it is difficult to understand the basis upon which the assessment is being made. Additionally, arguably options 2 and 3 could be adopted as amendments to the waste framework Directive therefore are alternatives to one another but not the Directive amendment option.</p>	<p>concludes that amending the waste framework Directive is the most desirable option. There is, however, not further discussion concerning what approach such an amendment should take.</p> <p>Table 4 also contains a specific section presenting the economic, environmental and social impacts of clarifying when waste ceases to be waste. However, the impacts are not systematically assessed in relation to this. It is unclear what impacts will be excepting statements that they will be positive and distinctions between the impact of the different options are not clearly made</p>	<p>would have positive impacts. The analysis is based upon input by the FIR. Only economic impacts are quantified.</p>		<p>distinguish between the options presented. It is also unclear as to how such an example might translate to other areas of policy. The unclear baseline for the waste framework Directive limits the usefulness of this example i.e. it is unclear if the solutions put forward would be part of an amendment to the Directive.</p>		<p>useful information in worked example 2, which is currently isolated and links to the assessment are unclear.</p>

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<p>Article 12 - 15 (Chapter IV – hazardous waste)</p> <p><u>Definition of hazardous waste revised to clarify the exclusion from the definition domestic/households waste</u></p> <p>Article 1 of the hazardous waste directive has exempted domestic waste. This Article states that it becomes hazardous waste upon collection</p>	Refers only to the integration of the Hazardous Waste Directive and the WFD and the consultation that has taken place	No	No	No	No	No	No	No
<p>Article 16</p> <p><u>Separation – requirements in relation to mixing altered to consider conformity with BAT, ref to safety removed because not compatible with the focus on environmental impacts and not used in other waste measures</u></p>	Only mentioned that BAT is extended to cover certain waste management operations but is not referring to the mixing of waste	No	No	No	No	No	No	No
<p>Article 17</p> <p><u>Labelling – from Hazardous waste Directive</u></p>	Refers only to the integration of the Hazardous Waste Directive and the WFD and the consultation that has taken place	No	No	No	No	No	No	No

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<p>Article 18</p> <p><u>Mineral waste oils – continues separate collection and that should be handled in accordance with conditions set out in Article 7</u></p> <p><u>Removes the requirement to prioritise the regeneration of waste oils</u></p>	<p>Covered By Annex I. The IA reviews a number of LCA studies comparing oil regeneration with oil recovery.</p>	<p>The options covered for regeneration and oil recovery are “maximum regeneration” compared to “maximum incineration”. The assessment also looks at the environmental impact based on three different waste oils. Table 5.5 summarises the findings from Annex I comparing the options “no policy change” and “focus on collection”.</p>	<p>Environmental, social and economic impacts covered. Greatest focus on environmental impacts with social impacts being least covered</p>	<p>The environmental impacts for regeneration and incineration are compared and quantified. The economic impact of regeneration and collection is quantified. The social impacts of regeneration are quantified. The figures used are based on previous research.</p> <p>According to the Danish report the high priority given to global warming, leads to the overall environmental result being neutral i.e. regeneration is no more environmentally beneficial than energy recovery. The IA economic assessment’s main conclusion is that regeneration cannot compete with incineration in the market place without state subsidy.</p>	<p>Only the social impacts of collection are qualitative. All the other impacts are quantified.</p>	<p>Appropriate level of detail</p>		
<p>Article 19 (Chapter V - Permits</p> <p><u>Issuing – combines previous articles but</u></p>	<p>Mention that guidelines would be adopted to facilitate permit applications. Nothing</p>	<p>No</p>	<p>No</p>	<p>No</p>	<p>No</p>	<p>No</p>	<p>No</p>	<p>No</p>

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<i>wording unchanged</i>	else.							
<p>Article 20</p> <p><u>Permits under IPPC Directive - states that IPPC permit is sufficient don't need WFD and IPPC</u></p>	<p>Refers to the EPEC report “Support in the drafting of an ExIA on the Thematic Strategy on the prevention and recycling of waste”. States that the report contains specific and targeted information and data of relevance to the Impact Assessment, such as a qualitative assessment of the impact of extending the IPPC Directive to additional waste management activities. The IA includes four scenarios where IPPC is extended to waste management operations. However, these do onto include the permitting aspect</p>	No	No	No	No	No	No	No
<p>Article 21</p> <p><u>Implementing measures – minimum permit standards via comitology. Only allows setting</u></p>	Not mentioned	No	No	No	No	No	No	No

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<p>Article 22 to 24</p> <p><i>Permit exemptions – sets out conditions for permit exemptions for waste and hazardous Eligibility, general rules and hazardous waste</i></p>	Not mentioned	No	No	No	No	No	No	No
<p>Article 25</p> <p><i>Registration – reinforces requirements – check for changes</i></p> <p><i>Article 12 of the of 2006/12: "Establishments or undertakings which collect or transport waste on a professional basis or which arrange for the disposal or recovery of waste on behalf of others (dealers or brokers) shall, where they are not subject to authorisation, be registered with the competent authorities".</i></p>	Not mentioned	No	No	No	No	No	No	No

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<p>Article 26 (Article VI)</p> <p><i>Waste management plans – clarifies what should be contained in WMP and life cycle approach to elaboration.</i></p> <p><u>Compared to the original WFD significant changes are made to waste management plans</u></p>	Not mentioned	No	No	No	No	No	No	No
<p>Article 27</p> <p><i>Cooperation between Member States – no change</i></p>	N/A							
<p>Article 28</p> <p><i>Implementing measures – no change</i></p>	N/A							

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Article 29 - 31 <i>Establishment waste prevention programme – draw up programmes and conditions for the development of these programmes</i>	Covers the issue of Waste Prevention Programmes as part of an option in harnessing the potential of waste prevention to contribute to reducing the environmental impact of waste generation.	The Impact Assessment of Waste Prevention Programmes is assessed against the impacts of the alternative option of “indicative prevention targets”.	Environmental, social and economic impacts considered	A quantitative worked example on food waste impact (however, this seems unconnected to the what is assessed)	Impacts assessed as positive, negative or neutral.			It is unclear from the impact assessment to what degree, if any, it refers to the waste prevention programmes of the Proposal revising the waste framework Directive and the possible integration to waste management plans. Even so, the assessment is so general that it is not proportionate to the requirements set out in the Proposal.
Article 32 <i>Inspections – reinforced to cover the origin and destination of waste collected and transported.</i>	Not mentioned	No	No	No	No	-	-	-
Article 33 <i>Record keeping – no comment</i>								

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Article 34 (chapter VIII) <i>Reporting and reviewing – includes a review clause additional to existing provisions. Commission should review and assess if amendment needed</i>	Not mentioned	No	No	No	No	-	-	-
Article 36 – wording the same but committee has far greater responsibility for defining fundamental issues re waste – Look at if there is discussion on impact of expanding this committee’s role	Not mentioned	No	No	No	No	-	-	-

ANNEX 3: SUMMARY OF THE EPEC SUPPORTING STUDY

The aim of the EPEC study was to support and assist the European Commission in its task to develop the Impact Assessment (IA) for the Thematic Strategy for prevention and recycling of waste by preparing specific and targeted information and data of relevance to the IA. The purpose of the report was to assist the Commission in:

- Understanding the economic, environmental and social impacts of the considered policy options; and
- Putting together the necessary information for this understanding.

Note that the aim of the study was not to provide the IA. However, the IA report itself states that it is built on this review. The actual IA refers in more detail to the EPEC report under the “Analysis of the impact of the options” section. It states “that EPEC report contains specific and targeted information and data of relevance to the IA”. The IA further states that the report (the EPEC report) includes:

- A series of tables summing up the information found in 167 reference documents and in stakeholder contributions on the impact of waste generation and management and identification of the data/information gaps and an assessment of the potential and the work to be done to fill the gaps;
- A comparative assessment of material-based and product-based recycling policies for paper (qualitative assessment) and for plastics (quantitative assessment);
- A qualitative assessment of the impact of extending the IPPC Directive to additional waste management activities.

None of this information is that relevant to the issues as perceived as the most relevant in the proposal DoW. The EPEC report compares the environmental impacts between incineration, landfill and other recycling and recovery options as well as the economic, social and environmental impacts between “Incineration with Energy Recovery” and “Material recycling”. This information is summarised in the IA. The IA of recovery/regeneration is based on a separate assessment and does not refer to information from the EPEC report.

The other issue that might have been of relevance to the proposed DoW is the “general assessment of extending the IPPC Directive to existing waste treatment processes”. This could have been relevant to Article 16 (Separation – mixing ban maintained but subject to conformity with BAT, ref. to safety removed because not compatible with the focus on environmental impacts and not used in waste) and Article 20 (a WFD permit not required if in possession of an IPPC permit) of the proposed DoW. In the end these issues are not touched upon. However, the section “Use of the Waste Framework Directive to Lower Administrative Costs” suggests that the Regulation of processes with low environmental impact within the WFD may be an option, rather than applying BAT through IPPC, i.e. in effect the reverse of Article 20.

The report also includes an Annex with comments by stakeholders for all the consultation questions divided into environmental, social and economic impacts. The questions relevant for the proposed DoW are 10c: “introducing in the Waste Framework Directive a provision allowing the exclusion from the definition of waste of materials complying with technical criteria – these could include aggregates and bio-diesel amongst others”.

In general the assessment has a strong focus on the consultation questions on the Thematic Strategy and not many of these are relevant to the issues perceived as important for the IA of the proposed DoW.
