

State of the *acquis communautaire* in environmental matters in Ukraine: waste management

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1 Introduction

EU waste legislation is an important part of the *acquis communautaire* in the environmental sector with which Ukraine must comply when joining the European Union.¹ Waste management is also one of the environmental sub-chapters within the Association Agreement² (AA) between Ukraine and the European Union. Prior to the Russian military aggression, Ukraine was facing a major waste problem.³ This problem will become compounded by the war and the masses of waste generated by the immense destruction caused by military attacks to buildings and infrastructure. According to preliminary estimates, at least 15.2 million tons of debris was generated as a result of the destruction of residential buildings, and at least two thousand civilian vehicles were burned. These figures only refer to the de-occupied territories as of July 1, 2022.⁴

The following analysis takes a closer look at the legislative efforts that have been taken to adapt waste legislation in Ukraine to European requirements since the AA was fully entered into force. Our analysis is based on the Waste Management Law, which has recently been adopted in second reading by Ukrainian Parliament on June 20, 2022.⁵

We analyse first the new Waste Management Law with respect to the requirements set out in the Association Agreement (AA), as the Agreement already covers major parts of the Waste Framework Directive (WFD)⁶ and some parts of the Landfill

Directive⁷. In Chapter 3, we will evaluate how far the law complies with the AA and the WFD.

2 The obligations concerning waste policy under the Association Agreement

The requirements concerning waste legislation are defined in Art. 361 of the Association Agreement and more specifically in Annex XXX to Chapter 6 'Environment', sub-chapter 'Waste and Resource Management'.

In the waste sector, the AA addresses three pieces of legislation. The obligations deriving from the Agreement concern the WFD, the Landfill Directive, and certain basic concepts of the Mining Directive⁸. However, the AA does not require full compliance with these directives but rather with particular main elements. We will analyse these obligations step by step. The obligations concerning the Mining Directive were not included in the Waste Management Law but are to be transposed by further specific legislation. Therefore, the following considerations concentrate on the WFD and the Landfill Directive.

Given that the legal framework on waste comprises a number of further important waste stream directives, it is clear that the *acquis communautaire* in this sector is much broader than what has been addressed in the AA. EU waste law covers an important number of further legislative acts on waste streams (such as WEEE, batteries, waste oil, etc.) and treatment activities (such as incineration, which is included today in the Industrial Emissions Directive). We will point out where the draft partially incorporates elements of these legal acts. However, there already exists in Ukraine some draft laws that partially cover these waste streams, such as waste from electrical and electronic equipment,⁹ and on batteries and accumulators.¹⁰ A draft on packaging and packaging waste has not yet been published.

Given the importance of the Waste Framework Directive as a fundamental basis of waste legislation in the EU, the analysis of the compliance with the WFD may provide an important indication of the state of Ukraine's approach to the EU environmental *acquis*

¹ In 2018, the authors had been involved in the elaboration of the Draft Law on waste in the framework of the project 'Support to Ukraine in approximation of the EU environmental *acquis*' (APENA) under the programme 'EuropeAid'. The Ministry of Ecology and Natural Resources (MENR) had requested from APENA support in the drafting of a new Waste Framework Law for Ukraine.

² Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJEU L 161, 3 of 29.5.2014. The agreement entered fully into force on September 1, 2017, but was applied provisionally on November 1, 2014, http://europa.eu/rapid/press-release_IP-17-3045_en.htm.

³ See the information of Environment People Law (EPL), 2018, based on data from the Ukraine government: In Ukraine in 2017, approximately 10 million tons of household waste was created. In 2017, the total number of landfills was 5,434. Among them, 5.7% were overloaded and 25% did not meet environmental safety standards. Moreover, about 30,000 unauthorized landfills are found annually in Ukraine, see <http://epl.org.ua/en/eco-analytics/9282/>.

⁴ Official data are not yet available.

⁵ See <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1378837> (in Ukrainian language). An analysis of a previous draft in English can be also found at the NGO Environment People Law, 2018.

⁶ Directive 2008/98/EC on waste, OJ L 312/3 of 22/11/2008.

⁷ Directive 1999/31/EC on landfill, OJ L 182/1 of 16/07/1999.

⁸ Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, OJ L 102, 15 of 11/4/2006.

⁹ See <https://itd.rada.gov.ua/billInfo/Bills/Card/622> (in Ukrainian language).

¹⁰ See <https://itd.rada.gov.ua/billInfo/Bills/Card/545> (in Ukrainian language).

and of the quality of the draft legislation. The following analysis is arranged according to the structure given by the AA (and not according to the structure of the Waste Management Law).

2.1 *The obligations concerning Directive 2008/98/EC on waste (Waste Framework Directive)*

2.1.1 *Adoption of national legislation and designation of competent authority(ies)*

With the adoption and entry into force of the new law, a major requirement of the AA is fulfilled. The competent authorities that are to implement the law are defined in Chapter III of the Law. This comprehensive chapter defines the competences of the central executive authorities and of local authorities. Art. 18 defines competences of a central authority, which implements the state policy in waste management. The provision remains open regarding the question of on what institutional form this central authority will be established. Based on Article 18, either an independent specific waste management agency or a general environmental protection agency, where waste management is one of several tasks, could be established. It may even be decided that the Ministry of Environment directly carries out policy-making and implementation functions.

In general, one might question if the centralised approach of the draft should not be replaced by a more decentralised approach, in particular as far as competences for permitting are concerned. On the other hand, the centralised approach is justified in solving the problem of 6,000 landfills and dumpsites that currently operate without permits in Ukraine. These sites should either be closed or undergo a permitting procedure.

2.1.2 *Preparation of waste management plans in line with the five-step waste hierarchy and of waste prevention programmes (Chapter V of Directive 2008/98/EC)*

These requirements are covered by a chapter on waste management planning that goes far beyond the AA and even to some extent beyond what is required by the Waste Framework Directive.

(i) *Waste hierarchy*

The five step waste hierarchy is laid down in Art. 4 of the Law and complies with the respective Art. 4 in the WFD.

(ii) *Waste management plans*

Chapter VIII deals with waste planning and waste prevention programmes.

The chapter on waste management planning is rather detailed. In some respects, it even goes beyond the requirements of the WFD. Art. 50 para. 1 requires

plans on the local level, as well as for enterprises, organizations, and institutions. The Directive only requires that the plans shall, alone or in combination, cover the entire geographical territory of the State.

Whereas the previous draft of the law did not yet define the minimum content and the structure of the plans, Art. 50 of the adopted law was amended by exhaustive details concerning the content of the national plan and the main sections with which the plan should deal.¹¹ The plans are subject to a strategic environmental assessment (Art. 49 para. 3). Public participation in the elaboration phase of the plans is also required, according to the existing laws (Art. 50 para. 7, 51, para. 8).

(iii) *Prevention and prevention programmes*

It must be noted that the Law already implements the amendment in Art. 9 of the WFD by Directive (EU) 2018/851¹², strengthening waste prevention policy by determining appropriate prevention measures. The Draft Law transposes this in Art. 5.

Art. 55 provides for a national waste generation prevention programme. With respect to the evaluation of the programme, the Law is stricter than the Directive and provides for an evaluation by the central executive authority every two years (Art. 55 par. 3). The Directive sets a minimum standard of every six years (Art. 30 par. 1). The reason for this short delay is to stimulate the implementation of the plans, as in practice there are many cases where programme documents and plans are adopted but not implemented.

2.1.3 *Establishment of full cost recovery mechanism in accordance with the Polluter Pays Principle and the Extended Producer Responsibility Principle (Art. 14)*

(i) *Full cost recovery*

The principle of cost recovery is enshrined in several provisions of the Draft Law.

Art. 56 para. 1 aims at implementing economic instruments “to ensure full reimbursement and to ensure financing of waste management activities”. Art. 34 of the Law provides for the payment system of household waste management and assures cost-recovery. Art. 34 para. 2 explicitly provides that

¹¹ This includes inter alia: a) the main waste generators; b) the main indicators of waste management (volumes of education, waste collection, transportation, and treatment); c) characteristics of waste collection systems, including separate collection, the state of coverage of the country's territory by waste collection systems; d) a brief description of waste treatment facilities, in particular those carrying out treatment of hazardous waste.

¹² Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste, OJEU L 150, 109 of 14/6/2018.

“tariff setting below the economically justified level is not allowed”.

(ii) *Polluter Pays Principle*

Cost recovery is also linked to the Polluter Pays Principle. This principle is enshrined in Art. 3 par. 2 (2) of the Law. According to this provision, the producer or holder of waste shall cover the costs of waste management measures. Accordingly, Art. 55 of the law stipulates that the financing of waste management activities is carried out at the expenses of the waste generator and the owner¹³.

(iii) *Extended producer responsibility*

Art. 10 of the Draft Law establishes an extended producer responsibility system for certain waste streams. The Law implements the option, provided by Art. 14 par. 2 of the WFD, that the producer of the product can also be held responsible for waste management costs. The draft offers the option to the producer to join either a collective or individual system of producer responsibility. The provisions on extended producer responsibility already take into account the amended version of the directive of 2018 (Art. 8 and 8a WFD).

2.1.4 *Establishment of a permitting system for establishments/undertakings carrying out disposal or recovery operations, with specific obligations for the management of hazardous wastes (Chapter IV of Directive 2008/98/EC)*

(i) *Permitting system*

The establishment of a permitting system is the core of any waste legislation. Section VII of the Law provides for a permit and licencing system. As a general rule, Art. 41 para. 2 of the Law stipulates that any business entity carrying out treatment operations are required to obtain a permit prior to the start of their activities. Moreover, the information that has to be delivered in order to obtain a permit is precisely differentiated for each activity, according to Art. 42 of the Law.

In contrast to a previous version, the adopted Law neither subjects collection and transport to permitting requirements nor does it introduce registration obligations for these types of activities. The reason being, waste policy in Ukraine will first focus on the existing landfills and in the following steps registration will be implemented for collection and transportation of waste. This approach is understandable, although it is not yet in compliance

with Art. 23 of the WFD that provides for registration for collection and transport activities.

(ii) *Licence for hazardous waste*

Art. 44 of the Law provides, in addition to the permit, for a licence for waste management activities dealing with hazardous waste. From a systematic point of view, there are two different procedures. The licence requires a verification of the availability of the material and the technical base. Further compliance with the licence requirements during the operation of the installation has to be shown. The licencing procedure currently exists and was maintained by the lawmaker in order to strengthen the state control over the operation of hazardous waste facilities. At the same time, the additional authorisation procedure runs the risk of making the application of the law more bureaucratic.¹⁴

We note that Ukraine is also obliged to approximate the IPPC Directive, which will ensure the introduction of an integrated permit into Ukrainian legislation. This permit covers almost all waste treatment operations. Therefore, we suggest revising the procedures for permits and licences for waste treatment as Ukraine approaches the next stage of aligning its legislation with EU requirements.

(iii) *Further specific obligations for the management of hazardous wastes*

The ‘National List of Waste’ (Art. 7) that will be approved by the Cabinet of Ministers of Ukraine will define the type of waste that is considered hazardous.

Section IV of the Law provides more details for the management of hazardous waste. In particular, the relevant provisions of the WFD dealing with labelling and transporting, as well as banning the mixing of hazardous waste are transposed in Art. 27-29 of the Law. It must be mentioned, however, that the derogation of the mixing ban in Art. 18 al. 2 of the WFD is only permitted for an establishment that has a specific licence for the *treatment* of waste, according to Art. 23 of the WFD. Business entities, which generate, collect, or transport waste should not be entitled to make use of this derogation. The competent authorities should consider this point when applying Art. 29 para. 3 of the Law.

(iv) *Management of household waste – targets for reuse and recycling*

Section V of the Waste Management Law is dedicated to household waste, although the AA does not oblige Ukraine to set up rules for household waste. This section was integrated according to a recommendation of the working group. Originally, a separate Draft Law on household waste had been elaborated on in the Ministry. As two different laws would incur the risk of

¹³ It must be noted that in its English translation the Law is using the word ‘owner’ instead of ‘holder’. According to the definition of ‘owner of waste’ in Art. 1 No. 12 of the Draft Law it seems that this also covers the ‘possession’ (in factual, not legal terms) of the waste, according to the definition of the WFD.

¹⁴ See also the critical comment of EPL, 2018, recommendation 1 and 3.

overlapping and friction, it is a preferred solution to integrate this chapter into the Waste Management Law.

The amendment of the WFD in 2018¹⁵ reinforced the objective to move from waste management to a circular economy by inserting targets for *household waste*. Art. 11 al. 2 (c) –(e) of the WFD provide that the preparing for reuse and the recycling of municipal waste shall be increased to a minimum of 55 % by weight by 2025, to 60 % by 2030, and to 65 % by 2035. Art. 38 of the Waste Management Law sets targets for the preparation of reuse and recycling of household waste. Although these targets are clearly beneath those given by the WFD (from 10 % in 2025 to 35% in 2040), it is a first step in moving towards a circular economy in this field.

2.1.5 Establishment of a register of waste collection and transport establishments and undertakings (Chapter IV of Directive 2008/98/EC)

Art. 45 provides for a declaration of waste. Waste holders generating hazardous waste are obliged to submit an annual declaration to the central executive body, which implements the state policy on waste management. As there are no further criteria, even very small amounts of hazardous waste must be transmitted. The Law establishes only a limit of 50 tons per year for non-hazardous waste. The objective of these provisions is primarily data collection. For municipal waste holders, the declaration will be done by business entities that collect municipal waste.

The Association Agreement requires the establishment of a register of waste collection and transport establishments and undertakings. The legislator decided, however, to postpone the transposition of this requirement at a later stage of the implementation procedure.¹⁶

As far as waste accounting is concerned, Art. 47 goes beyond the obligations of the WFD as it provides that all producers, holders, and waste management operators are obliged to keep accounting books for waste. This would include, for example, without minimal criteria, both the producer and holder of non-hazardous waste carrying out collection and sorting activities of non-hazardous waste. The WFD requires only an accounting system for hazardous waste, and for any establishment or undertakings that carry out waste treatment (treatment being recovery and disposal operations). Moreover, the WFD leaves it to the Member States to also set up an accounting system for producers of non-hazardous waste. In order to avoid administrative burdens for small producers (in particular small producers of non-hazardous waste), the practical requirements when applying these

provisions should be limited to a simple accounting procedure of the amount of waste treated.

2.2 Directive 1999/31/EC on the landfill of waste

According to the AA, the following provisions should be implemented into Ukrainian legislation:

- Adoption of national legislation and designation of competent authority(ies)
- Classification of landfill sites (art. 4)
- Preparation of a national strategy reducing the amount of biodegradable municipal waste going to landfill (art. 5)
- Establishment of an application and permit system and of waste acceptance procedures (art. 5-7, 11, 12 and 14)
- Establishment of control and monitoring procedures in the operation phase of landfills and of closure and after-care procedures for landfills to be disaffected (art. 12 and 13)
- Establishment of conditioning plans for existing landfill sites (art. 14)
- Establishment of a costing mechanism (art. 10)
- Ensuring the relevant waste is subject to treatment before landfilling (art. 6)

There is an important Article on landfill in section VI of the Law. Art. 40 para. 1 defines the general requirements for waste disposal at landfills. Waste disposal shall be carried out only at landfills that meet certain requirements, such as systems for protection of groundwater, extraction and disposal of biogas and filtrate, control systems for air emissions, and pollution of soil and groundwater. Technical requirements shall be determined by the Cabinet of Ministers.

As provided by Art. 4 of Directive 1999/31/EC, the landfill sites are classified according to Art. 40 al. 2 of the Law in classes for hazardous, non-hazardous, and inert waste.

The Law also provides for the obligation of preparing a strategy to reduce biodegradable waste that has to be developed by the central executive body that implements the state policy in the field of waste management, according to Art. 40 para. 7.

As required by the AA, the permit/licencing system also applies to landfills. Art. 42 para 2. (2) defines the information that has to be provided for the permit.

Control and monitoring procedures in the operation phase and closure and after-care procedures are covered in general, as explained above, by para. 1 of Art. 40. According to para. 3, the waste management entity (the operator) shall ensure the control and monitoring according to an approved programme by the central executive body of environmental protection.

¹⁵ *Supra* note 12.

¹⁶ See above section 2.1.4.1.

Technical details for closure and maintenance after closure shall be determined by the Environmental Ministry of Ukraine (Art. 40 para. 6). The waste management entity has to ensure maintenance of the landfill after its closure for 30 years (Art. 40 para. 4).

Finally, Art. 40 para. 6 transposes Art. 10 of the landfill Directive concerning the costs of the landfill.

The Law also covers existing landfills. In section XI dealing with transitional measures, procedures are established if the regional waste management plan provides termination or extension of existing landfills that do not meet the requirements of the Law. Thus, Art. 14 of the Landfill Directive on conditioning plans for existing landfills is also implemented.

We may conclude that the Law meets the obligations deriving from the AA concerning the Landfill Directive.

2.3 Timeframe

The AA also provides for a time frame in which the obligations should be transposed. The obligations concerning the WFD must be implemented within three years (for the national legislation and the plans) or five years (for all other obligations) from when the Agreement entered into force.

All provisions mentioned in the AA deriving from the Landfill Directive for existing installations have to be implemented within six years from when the Agreement entered into force. For any installations put into operation after the signature of the Agreement, the provisions of the Landfill Directive shall be implemented as of the date the Agreement entered into force.

The Association Agreement between the European Union and Ukraine regarding political provisions (Preamble, Article 1, Titles I, II, VII) was signed in Brussels on March 21, 2014, and on June 27, 2014, regarding trade and economic and sectoral provisions (Titles III, IV, V, VI). The Association Agreement was ratified by the Law of Ukraine on September 16, 2014. No. 1678-VII. Article 363 of the Association Agreement provides for “*gradual approximation of Ukrainian legislation to EU law and policy on environment*”, which “*shall proceed in accordance with Annex XXX to this Agreement*”.

Article 2 of the Law of Ukraine on Ratification of the Association Agreement between on one side the European Union and European Atomic Energy Community and their Member States, and on the other side Ukraine, stipulates that “[b]efore the Agreement enters into force, it shall be applied pursuant to the procedure provided for by Article 486 of the Agreement”. In accordance with the provisions of Article 486 of the Agreement and the Note Verbale of the General Secretariat of the Council of the European Union SGS14/12029 of September 30, 2014, the provisions of Article 363 and Annex XXX

to the Agreement shall be applied on a provisional basis between Ukraine and the EU from November 1, 2014. According to Art. 486 para. 5 of the AA, any reference in the Agreement “*to the date of entry into force of this Agreement*” shall be understood to “*the date from which this Agreement is provisionally applied*”. Therefore, the implementation deadlines given in the Annex concerning waste legislation began on November 1, 2014.

These deadlines were not respected, and were perhaps too optimistic, given the internal and external political conditions in which Ukraine has struggled over the last years. The current process of Accession that started this year may have an accelerating effect on further ongoing legislative procedures.

3 Evaluation

The Waste Management Law, as it has been adopted in second reading by Parliament has significantly improved compared to previous draft versions. It covers all relevant requirements set up by the Association Agreement, as far as the Waste Framework Directive and the Landfill Directive are concerned.

The Association Agreement does not, however, oblige Ukraine to comply with all aspects of the Waste Framework Directive. This would be the case, of course, if Ukraine were to become a Member of the Union. In any event, it is useful to look at the provisions in the draft that go beyond the AA and that are already in compliance with the Directive.

The draft provides for a definition of by-products and of the end of waste status (Art. 8 and 9). In the discussion during the elaboration of the text, some doubts had been expressed if this definition would not be premature for the situation in Ukraine. On the other hand, the differentiation between ‘waste’ and ‘by-products’ has always been an important legal discussion between authorities and companies (with important effects in practice) as the number of decisions of the European Court of Justice in this field show.¹⁷ It is therefore judicious that the Law has incorporated both definitions.

Regarding the provisions on extended producer responsibility, they are already taking into account the obligations deriving from the amended version of the WFD of 2018 (Art. 8 and 8a WFD).

Certain provisions of the Waste Management Law go beyond what is required by the WFD. The Law provides for strict liability for the owner of the land on which abandoned waste has been identified (Art. 12 al. 1). The objective of this concept is to avoid waste not being able to be attributed to a person (‘ownerless

¹⁷ ECJ, C-418/97, 15 June 2000, ARCO Chemie, ECLI:EU:C:2000:318; ECJ, C-9/00, 18 April 2002, Palin Granit Oy, ECLI:EU:C:2002:232; ECJ C-114/01, 11 September 2003, AvestaPolarit, ECLI:EU:C:2003:448.

waste’) and therefore liability remains unclear. This provision could eventually play a role in cleaning up unauthorised dumpsites.

Section VI deals with incineration, co-incineration, and waste disposal. As for incineration, there are technical requirements defined in Art. 39, such as the combustion temperature of 850 degrees for incineration plants and 1,100 degrees for installations burning hazardous waste. In this respect, the draft already complies with the provisions of the Industrial Emissions Directive. The Cabinet of Ministers of Ukraine can further define technical requirements.

The problem of transboundary movement of waste is also addressed by the Law, although transboundary movement of hazardous waste is not a part of the AA or the WFD. It is regulated by either the EU Waste Shipment Regulation (as far as shipment to EU countries is concerned) or the Basel Convention. Art. 43 of the Law provides for a notification procedure in accordance with the Basel Convention. The import of waste for disposal is prohibited (Art. 13 para.5).¹⁸

Art. 58 provides for compensation of damage resulting from a violation of legislation on waste management. The Law refers to the calculation of the damage to existing Ukrainian legislation that regulates the procedure and methods for calculating those damages (“*in the manner and amount established by the legislation of Ukraine*”). An example of such a regulation is the approval of the methodology for determining the amount of damage caused by pollution and littering of land resources due to violations of environmental legislation, issued by the Ministry of Environment on October 27, 1997.¹⁹ The implementation of this article also depends on further regulation specifying details of the procedure for calculating the damage.

Art. 57 of the law transposes the obligation deriving from Art. 36 of the Waste Framework Directive that Member States shall lay down provisions on the penalties applicable to infringements of the Directive. Art. 57 contains a list of violations of the law that are subject to disciplinary, criminal, and administrative liability. However, the procedure for prosecution and the amount of fines are regulated in Ukraine by other legislation. Therefore, for the qualitative implementation of this article, relevant articles in such legislation are required.

Administrative and criminal liability in Ukraine is regulated by separate codes: the Criminal Code of Ukraine and the Code of Administrative Offenses. A bill on amendments of these codes is currently being developed for submission to Parliament. The adoption of these drafts will be an important step in order to

implement the control over compliance with the law. However, there remains a problem with respect to the principle of legal certainty that is an important principle in criminal law, in particular. The violations are described in Art. 57 without references to the Articles of the Law that shall entail sanctions.²⁰ There should be consideration in amending this on the occasion the above-mentioned drafts are adopted.

4 Conclusion

The evaluation of the Waste Management Law shows that Ukraine is on a good path to fulfil EU requirements in waste law. The Law complies with both the Association Agreement and the Waste Framework Directive (despite the section on sanctions). Certain points go beyond what is required by the WFD. Certainly, the *acquis communautaire* in the waste sector covers more directives that were not subject to this analysis. Moreover, the success in practice will depend on the implementation and enforcement of the law, once it has been adopted. But this will be an ongoing process, even after Membership may be accorded in the future.

Bibliography

Environment People Law, Lviv. 2018. On the draft law “On Waste Management”, November 19, 2018. Accessible [here](#).

¹⁸ This provision is to be found in the Article on general requirements for waste management. Systematically it would have been better integrated in Art. 43.

¹⁹ See <https://zakon.rada.gov.ua/laws/show/z0285-98#Text>.

²⁰ For instance, there is only mentioned “*violation of the rules of accounting for waste generation and waste management operations*” without specifying precisely which rule is meant (the citation of the concrete article is missing).