The new Hungarian waste legislation and its likely traps

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Two weeks ago, following many internal discussions and much less open discussions and even less care for the general opinion of the waste management industry, without public debate, the Parliament adopted the new waste management act, implementing – with a nearly two years delay – the Directive 2008/98/EC on waste. This is still not the end of the story, as together with some remarks, related to the authorization procedure, the President sent back the draft to the Parliament for minor reconsideration. Anyhow, the remarks did not relate to the substance of the whole.

Here I do not want to present the whole act (or bill, at least at the moment), but only those examples, which may easily lead to some confusion and may likely lead to infringement procedure or at least serious legal problems.

One of my concerns is the unlimited use of different definitions, which may easily confuse proper understanding. The EU directive is also rich in this respect, using 20 (!) definitions, while the Hungarian bill contains 50 (!) altogether. One may say that it is necessary, but still there are elements, which could end up in legal disputes. My favorite is the 'pre-treatment', as this may be used to refer to a separate waste treatment operation. According to Art. 3.14 of the Directive, ""treatment" means recovery or disposal operations, including preparation prior to recovery or disposal;". Thus pre-treatment is part of either recovery or disposal operations, it is not a stand-alone issue. According to Art. 2(1), point 7 of the bill, pre-treatment is taken as an individual operation, preceding the disposal or recovery, the list of which is covered either in the annex of disposal operations or in the annex of recovery operations.

I already had a case as a lawyer – mentioned also in Madrid in connection with direct effect – where the court underlined, that the EU Regulation related to the transboundary movement of wastes knows only movement intended for recovery or for disposal - and there is nothing in between. The Hungarian authorities in the given case introduced a third destiny for waste movement – waste intended for pre-treatment. This proved to be against the direct effect and of the logic of the Regulation. This anachronism is still in use, this time not in connection with transboundary movements – where the direct effect of the wording of the regulation does not allow domestic interpretation of a third type – but in domestic use. But this is just an example of the use of exaggerated list of definitions.

There are three issues, which I really want to raise here: first, the nationalization of municipal waste management, second, the regulated fee of MSW services and third, the introduction of landfill tax.

1. <u>Nationalization of MSW services</u>

According to the new law, those persons who are subject to the compulsory municipal waste collection system – from the group of businesses only those companies may use different system, who produce waste which shall be taken as municipal waste or more

precisely: ‘household-like’ waste (so non-hazardous and non-inert) (Art. 2 (1) 21: household waste; Art. 2 (1) 22: household-like waste), but also has a separate collection system for this municipal-like waste fraction. Thus, small companies, small firms are most likely to remain in the general system of compulsory services. The starting point is, that according to the definition, municipal waste consists of waste produced by households and waste which have similar characteristics, but produced outside households (actually, nearly everything may go there from offices to shopping malls, or to production waste). If this remains a mixed waste only, the MSW service is a must, while if there is a separate collection scheme waste producers may have their own authorized services or may use other services than the compulsory municipal one. This has also been the system up till now, thus there is no real change in this respect.

And here comes the real shift from 2013 onwards – with some transition period till the middle or exceptionally till the end of 2013 -, namely only those waste management companies may stay in the compulsory MSW business, within which the decisive majority is in the hands of either the state or the local governments. Interestingly enough, according to the law, decisive majority may be either direct or indirect – without further explanations. Why it is a major shift? Because around half of the companies undertaking MSW services do not meet this standard, also most of the available treatment operations – landfills, recovery operations, etc. – are in the hands of private businesses.

One should not forget, that there are available and ongoing contracts for MSW services, usually signed for a 10 years term, also there are valid waste management permits, etc. How to overcome this situation? There are handy answers in the law:

- the valid contracts shall not be valid after the end of 2013, they have to be revised and may live also in the future if all the other conditions are met (Art. 90 (5) - (9)) ;
- the local governments has to revise the contracts, have to use a new procurement system along the lines of the new conditions, listed here (Art. 90 (5) - (9));
- the obligatory MSW services require a newly introduced public services permission, above the already existing permits, as only those companies are allowed to run such services who have this new permit and only those may have the permit who are in a situation where the decisive majority is of the state or of the local governments (Art. 81 (1) and Art. 90 (4));
- only those companies may run these MSW public services who are accepted and qualified by the National Waste Management Agency (OHÜ) (Art. 90 (4);
- these new MSW public service companies may use private sub-contractors also (Art. 41 (3));
- the whole system is a must in the field of waste collection and not in the field of waste treatment (e.g. Art. 42 (2));
- the MSW public services operator may not undertake any other waste management services than public services (Art. 42 (5)).

What is the underlying idea? The official statements claim that only centrally controlled and more or less non-profit organizations may run these operations for the sake of

people. Also the separate collection system is going to be introduced from 2014 and this may better be set up with these types of operations and by pro-profit ones.

Here it is worth to look at the Judgment of the Court C 209/98 (of 23 May 2000. - - Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune. - Reference for a preliminary ruling: Østre Landsret - Denmark.) One of the major questions here is the establishment of monopolistic situations within the city. Here I would only remind everybody that the judgment did not necessarily find major and general problems with such a situtation, but with some reservations:
„83 The answer to the second part of the first question must therefore be that Article 90 of the Treaty, read in conjunction with Article 86 of the Treaty, does not preclude the establishment of a local system, such as the system in issue in the main proceedings, under which, in order to resolve an environmental problem resulting from the absence of processing capacity for non-hazardous building waste destined for recovery, a limited number of specially selected undertakings may process such waste produced in the area concerned, thus making it possible to ensure a sufficiently large flow of such waste to those undertakings, which precludes other undertakings from processing that waste, even though they are qualified to do so."

2. Regulated fee for MSW public services

The first step has already been taken last December, when the Government decided not to allow the raise of MSW public service prices, but only with a small percent. Also the fees of these services may not be raised with more then 4,2 % for 2013 (Art. 91 (2)), which is below the inflation rate.

The next step is to centralize the fees. In 2013 the MSW public service fees are not going to be specified in a contract by the local government, but by the order of the minister responsible for the environmental issues, based on the proposal of the National Energy Office (Art. 47 (4)). It is not clear today, whether it means a national, regional or local fee, but it is most likely – based upon the political statements – that the belief is that the fee could be universal, not taking into consideration the underlying circumstances.

3. Landfill tax

Art. 68 is the main provision off landfill tax, as prescribed in details in Annex 5. Landfill tax is in use for decades in most of the EU Member States (see the recent report of ETC/SPC: Working paper 1/2012, Overview of the use of landfill taxes in Europe, http://scp.eionet.europa.eu/publications/WP2012_1/wp/WP2012_1). It has always been introduced on a step-by-step approach, usually many years have passed before the present quantity is reached, also with a relative diversity related to the waste types. The idea behind is to divert waste from landfills towards recovery operations, thus also the available recovery options shall be taken into consideration when the exact details are provided for.

Consequently, the idea is absolutely supportable, while the means and methods shall be carefully balanced. The law introduces a landfill taw from January 1, 2013, beginning usually with 3000 HUF (10 euros) per tons and reaching 12000 HUF (40 euros) by 2016, which most probably lead to a serious raise of the waste management fees,

without the available recovery system. Actually there is no diversification along the lines of waste types, as there is only one type of waste, in connection with which there is a difference – half of the fee shall be paid in case of residues form waste recovery operations. There are no other ways of diversification.