

W-t-E under the "Taxonomy Regulation": a legal analysis

Executive Summary

Context

Energy recovery from waste, i.e. the incineration of waste for energy recovery ("waste to energy", WtE), plays an important role in waste management, and in the Circular Economy, the European Union. The position of WtE in the context of the provisions of the Taxonomy Regulation is not clear, i.e. it is not apparent whether waste incineration for energy recovery can be considered a sustainable economic activity or not. **FEAD**, the European Federation of Waste Management and Environmental Services, commissioned a legal analysis and interpretation of the Taxonomy Regulation with regard to the **question of whether waste incineration for energy recovery (WtE) - as opposed to waste incineration for disposal - can be considered an environmentally sustainable economic activity under the Taxonomy Regulation** or not. Such a clarification would be essential to the EU legislator for further Taxonomy work. The **outcome** of the legal analysis clearly shows that **WtE can be regarded as an environmentally sustainable economic activity under the Taxonomy Regulation**.

Background

On July 12, 2020 the Regulation 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (hereinafter: **Taxonomy Regulation**) entered into force, amending Regulation (EU) 2019/2088. The **aim of the Regulation** is to **bring Environmental, Social and Governance (ESG) considerations at the heart of the financial system** in order to support the transformation of the EU economy into a greener and more resilient circular system. In order to provide economic operators and investors with **clarity** in their investment decisions as to which activities are considered sustainable, the Regulation sets out **uniform criteria for determining whether an economic activity is environmentally sustainable**, cf. Article 1 (1) Taxonomy Regulation.

It also establishes a procedure whereby a **multi-stakeholder platform** will create a **uniform EU classification system, the Taxonomy**, based on a set of technical assessment criteria to determine in detail which economic activities (and, consequently, investments in such activity) are considered sustainable.

According to Article 3 Taxonomy Regulation, an economic activity is considered environmentally sustainable if it:

- (a) makes a **substantial contribution** to one or more of the **environmental objectives** set out in Article 9 in accordance with Articles 10 to 16;

- (b) does **not significantly harm** any of the environmental objectives set out in Article 9 in accordance with Article 17;
- (c) is carried out in compliance with the **minimum safeguards** laid down in Article 18; and
- (d) complies with **technical screening criteria** that have been established by the Commission in accordance with Articles 10 (3), 11 (3), 12 (2), 13 (2), 14 (2) and 15 (2).

Legal Analysis

One of the environmental objectives under the Taxonomy Regulation is the **transition to a circular economy**, laid down in Article 9 d. In addition, while Article 17 provides a negative definition of what is to be regarded as a harm to the circular economy, Article 13 issues a positive definition of what shall be considered as a substantial contribution to the environmental objective of the transition to a circular economy. In particular, according to Article 13 (1) j), these include when the economic activity *'minimises the incineration of waste and avoids the disposal of waste, including landfilling, in accordance with the principles of the waste hierarchy'*. According to Article 17 (1) (d), a significant harm of the environmental objective of the circular economy - including waste prevention and recycling - occurs inter alia if the activity in question *'leads to a significant increase in the generation, incineration or disposal of waste, with the exception of the incineration of non-recyclable hazardous waste'*.

The plain language of Articles 13 (1) j) and 17 (1) (d) seems to create the false assumption that waste incineration *in general* is in contradiction to the circular economy. However, the Taxonomy Regulation provides neither a definition of "waste incineration" nor a clarification on the term and what it covers in the regulation: all forms of waste incineration or only specific types? This lack of definition requires to draw from the rest of the EU legislation and practice, and in particular from the Waste Framework Directive, under which a **distinction is made between the incineration of waste for the purpose of disposal** - cf. Article 3 No. 19 WFD in conjunction with Annex I, D 10 'Incineration on land' and D 11 'Incineration at sea' - **and incineration for energy recovery** - cf. Article 3 No. 15 WFD in conjunction with Annex II, R1 'Use principally as a fuel or other means to generate energy'. This is also reflected in the **waste hierarchy** according to Article 4 WFD, insofar as incineration of waste for energy recovery is a recovery measure at the 4th level of the hierarchy, whereas incineration for disposal is a disposal measure at the 5th level of the hierarchy.

The Commission has also noted that the incineration of waste encompasses *'very different waste treatment operations, ranging from 'disposal' and 'recovery' to 'recycling'*.¹ According to its analysis, waste incineration for energy recovery is considered higher in the waste hierarchy than waste incineration, which can only be regarded as disposal due to the absence of sufficient energy efficiency of the incineration plant.

However, depending on the particular purpose of waste incineration, the impact on the circular economy varies, thus the sustainability of the activity needs to be assessed differently.

The legal analysis deployed all the methods applied in principle in interpreting provisions of Union law, and which are also familiar from the national legal systems, i.e. **grammatical** (i.e. interpretation according to the wording), **historical** (i.e. interpretation based on the will of the

¹ European Commission, Communication 'the role of waste-to-energy in the Circular Economy' (COM(2017) 34 final) of 26.01.2017, p. 4.

legislator), **systematic** (i.e. interpretation according to the embedding of the individual law provision in the overall context), and **teleological interpretation** (i.e. interpretation according to the meaning and purpose of the law provision), and took into account the overall **European waste law and political framework**.

Outcomes

1) Grammatical Interpretation: The grammatical interpretation does not provide any clarity, since the wording supports both the assumption that waste incineration is generally considered to be in contradiction with the circular economy and thus not sustainable, and the assumption that a distinction must be made between waste incineration for disposal and waste incineration for energy recovery and that the latter cannot per se be considered as being in contradiction to the circular economy and thus being not sustainable.

2) Historical Interpretation: A similarly unsatisfactory result is achieved by the historical interpretation, as it cannot be established with sufficient legal certainty that the legislators intend to differentiate between different forms of waste incineration and that the incineration for energy recovery can possibly be regarded as sustainable.

3) Systematic Interpretation: The systematic interpretation of the regulations on waste incineration proved to be much more useful. Here, the content of the law is derived from the relationship of the specific provision to other provisions of the same law and to other relevant laws. Thus, the provisions of Articles 13 (1) j) and 17 (1) d) ii) on waste incineration must be seen both in the **overall context of the Taxonomy Regulation and in relation to the other provisions of the Regulation, as well as in the overall context of EU waste legislation, and in particular in relation to the WFD and the waste hierarchy**.

The systematic interpretation of the provisions on waste incineration in the (overall) context of the Taxonomy Regulation shows that the incineration of waste for energy recovery (according to the R1-criterion of Annex II WFD) actually **contributes to achieving the environmental objective of ‘transition to a circular economy’** pursuant to Article 9 d), as it **preserves natural resources, of ‘climate protection’** under Article 9 a) and **‘prevention and reduction of pollution’** under Article 9 e), **by reducing CO2 emissions** in relation to fossil fuel based production of electricity and/or heat/steam, and **by removing the pollutants contained in waste** from the material cycle and **reducing the emission of heavy metals**, compared to conventional production of electricity and/or heat/steam.

In particular, the waste hierarchy under the WFD indicates that waste incineration is to be considered in a differentiated manner and that waste incineration for energy recovery can certainly be considered sustainable. **The waste hierarchy is the ‘cornerstone of European waste policies and legislation’ and the leading principle of waste and recycling management.** Insofar as waste incineration is in line with the waste hierarchy, it serves the circular economy and is not contrary to the other environmental objectives of the Taxonomy Regulation, since a measure that complies with the hierarchy is the best environmental option. Waste incineration can be classified at different levels of the waste hierarchy (recycling - recovery - disposal). In addition, the WFD and the waste hierarchy require that the treatment option for waste is chosen which best serves the protection of the environment and human health and that furthermore the choice of the treatment option is also subject to technical feasibility and economic reasonableness, so that deviations from the hierarchy are possible and may be necessary.

Therefore, it cannot be stated in a general and universally valid manner that waste incineration and especially waste incineration for energy recovery is not in line with the circular economy. In addition, Member States have a wide discretion in determining the most appropriate treatment option for waste. This discretion would be undermined by the general classification of waste incineration (for energy recovery) as not being in line with the circular economy and thus not being sustainable.

Moreover, when assessing waste incineration under the Taxonomy Regulation, the **principle of self-sufficiency** in waste disposal under Article 16 WFD must also be taken into account. It would be contrary to the legal obligation of the Member States to create and maintain sufficient capacity for the treatment of their waste for disposal and mixed municipal waste if the incineration (for recovery) of (municipal) waste under the Taxonomy Regulation were to be generally regarded as contrary to the circular economy and therefore as unsustainable.

Thus, the systematic interpretation of the Taxonomy Regulation leads to the conclusion that Articles 13 and 17 must be interpreted in respect of the principle of self-sufficiency under Article 16 WFD in such a way that waste incineration must be viewed in a differentiated manner, and that waste incineration for energy recovery can be in line with the circular economy, while also fulfilling other environmental objectives of the Taxonomy Regulation.

4) Teleological Interpretation: The teleological interpretation is closely related to the systematic interpretation and also leads to the conclusion that waste incineration for energy recovery can be considered as sustainable pursuant to Article 3. After interpreting the provisions of the Taxonomy Regulation on waste incineration, it must be concluded that [A] **waste incineration must be viewed in a differentiated manner**, that [B] **a distinction must be made between incineration for disposal and incineration for energy recovery** and that [C] **incineration for energy recovery, if it complies with the requirements of the waste hierarchy, does not in fact contradict with the environmental objectives of the Taxonomy Regulation and in particular with the circular economy.**

Conclusion

The interpretation of the Taxonomy Regulation leads to the conclusion that waste incineration for energy recovery (WtE) can be regarded as an environmentally sustainable economic activity pursuant to Article 3.

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