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THE INTERPRETATION OF THE DEFINITION OF MUNICIPAL WASTE USED IN THE LANDFILL ALLOWANCE TRADING SCHEME (LATS) IN ENGLAND

I am pleased that the Government has accepted there is a real difficulty with the legislative basis of the Landfill Allowance Trading Scheme (LATS) and has launched the above consultation to ensure there is nothing of this nature to undermine the scheme in the future.

Q.1 Do you agree that the interpretation of the definition of municipal waste used in LATS should be clarified?

A.1 Yes. The Authority believes there is a fundamental discrepancy between the definition Parliament provided in the Waste & Emissions Trading Act 2003 and the definition that the Government is using for LATS purposes. It cannot be true in all cases that “waste from households and other waste that, because of its nature or composition, is similar to waste from households” (WET Act) is the same as “all waste ... in the possession of or under the control of a waste disposal or collection authority” (consultation paper, para. 3.15). Because of the exceptionally wide variety in the types of materials and substances in waste from households, it does not appear possible to say that no “similar” wastes will arise from other sources (mainly commercial) that mostly do not enter the municipal waste stream; and conversely that local authorities do not manage wastes that are not “similar” to waste from households such as gully wastes, fly-tipped wastes and abandoned vehicles.

Q.2 Do you agree that the Government's preferred option, to amend the definition of municipal waste in the WET Act, is the most appropriate option?

A.2 Before addressing the Government's options, it is essential to note that in the Authority's view, the most important factor is certainty and confidence in the means by which the Government proposes to fulfill its obligations under the Landfill Directive (that the Government agreed to through the European Council of Ministers). In this regard, the Authority notes that LATS is now widely accepted and, whilst trades are thus far very small, the Government's intentions are understood and built into local authority plans and strategies. A practical solution is therefore needed if several years of policy, planning and implementation are not to be undone, but it will be for Parliament and the Government to demonstrate that whatever changes they make, there is no further or residual inconsistency between statute on the one hand and regulations or guidance on the other with the Landfill Directive that might have the effect of perpetuating the uncertainty that currently exists.

Option A – Do Nothing

For the reasons set out above, the Authority believes there is a discrepancy between current legislation and Government guidance, so the option of doing nothing would appear to lead only to further confusion and legal challenges, particularly if the Government seeks to enforce fines on any waste disposal authority(ies) under LATS.

Option B – Amend Government Guidance

This is clearly one way by which the Government can reconcile the current inconsistency and thereby create the necessary certainty for the fulfilment of its obligations under the Landfill Directive. It may however transpire that the WET Act definition of municipal waste is so broad that it is not possible to limit the WET Act's application to municipal wastes, so the scheme would have to fundamentally change. This would risk creating the widespread uncertainty and lack of confidence that the Government is so keen to avoid in order to ensure that, notwithstanding very long lead times for waste facilities, the country fulfils its Landfill Directive obligations. If the Government is nevertheless satisfied that it can revise its guidance to be consistent with the WET Act definition without substantial amendment to LATS, this is the most certain way to remove the current inconsistency.

Option C – Amend the WET Act Definition of Municipal Waste

Notwithstanding the concluding merit of Option B above, the third option of amending the definition of municipal waste in the WET Act appears to the Authority to be the only possible way to remove the current inconsistency and consequent uncertainty at the same time as maintaining the substantial momentum already gained, and thereby providing a practicable solution, provided the Government can satisfy itself that the fundamental questions below can be overcome.

The first issue is that the Government must be absolutely certain that by proceeding in this way, it is not just moving the same discrepancy from where it currently lies (between Parliament and the Government) to a new level (between the European Union and our national legislation). The Authority believes this can only be achieved by written confirmation from the European Union, in a form of similar legal standing to the Landfill Directive, that Parliament may properly define “municipal waste” in this way (i.e. waste under the control of waste collection and disposal authorities) and fulfil its obligations under this Directive. Given that the EU approved the UK baseline for the Directive on the basis of statistics of wastes under the control of local authorities, this seems logically possible.

The second issue will be the precise nature of waste under the control of local authorities, and how the different historic reporting approaches and the multitudinous structures of local authority services will be captured by a new WET Act definition and revised guidance or new regulations.

The principal matters to be grappled with will be the wastes generated by local authority services and activities that are not themselves to do with waste services, as these are most unlikely to be in the current baseline data; and future structures of local authority services that will inevitably be aimed at minimising risk of LATS fines in ways that are financially most efficient for local authorities and continue to deliver good, value-for-money services to local residents. This will require further consultation.

The Authority concludes that both Options B and C are available to the Government, but that it will be a matter for the Government ultimately to satisfy itself as to which Option will best remove the current inconsistency and provide a secure legislative and regulatory foundation for the achievement of its obligations under the Landfill Directive. Whilst the Authority believes that the Government has correctly identified the only practical way forwards (in expressing its preference for Option C), the Authority nevertheless suggests most strongly that the Government secures the above confirmation from the European Union, and consults further on the detail of how it intends to change the WET Act so that it can create the certainty and security that is essential for the multi-£billion contracts that this Authority and others will be entering into in order to play our part in reducing the amount of biodegradable waste that goes to landfill where it would generate methane and contribute to climate change.

If you wish any clarification of the above, please feel free to contact me.

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