

Case No: 73643  
Document No: 1050404  
Decision No: 029/19/COL



EFTA SURVEILLANCE  
AUTHORITY

## **REASONED OPINION**

**delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Liechtenstein's breach of Directive 2008/98/EC of the European Parliament and of the Council of 18 November 2008 on waste and repealing certain Directives**

## 1 Introduction

By letter dated 30 July 2013 (Document No 679278), the EFTA Surveillance Authority (“the Authority”) informed the Liechtenstein Government that it had opened an own initiative case regarding the implementation of Directive 2008/98/EC *on waste and repealing certain Directives*<sup>1</sup> (“the Waste Framework Directive”). In its letter, the Authority asked the Liechtenstein Government to provide information on a number of issues related to the Waste Framework Directive. The requested information was provided by the Liechtenstein Government on 30 September 2013 (Document No 685087). In that letter, the Liechtenstein Government (i) provided explanations on the applicability of Swiss law; (ii) clarified some definitions, the list of hazardous waste, the body responsible for the control and ban of the mixing of hazardous waste, the process for the labelling of hazardous waste, for registration of establishments and undertakings and for the notification of the waste management plan and waste prevention programme to the Authority; (iii) indicated how inspections and record keeping were to take place; and (iv) informed the Authority about upcoming legislative changes to address the Authority’s concerns on definitions and the waste hierarchy.

As the reply gave rise to other questions, the Authority requested by letter of 11 December 2013 (Document No 692034) additional information on the application of Swiss law, the definitions, the registration of establishments and undertakings, and record keeping. The Authority also drew the attention of the Liechtenstein Government to the deadline for the submission of the waste prevention programme (12 December 2013). The Liechtenstein Government submitted its reply by letter dated 19 February 2014 (Document No 699972). The Liechtenstein Government listed the waste-related Swiss provisions that can be directly enforced in Liechtenstein by Swiss authorities, further clarified some definitions and the record keeping regime, explained how establishments and undertakings active in the waste sector are registered and informed the Authority about the planned timing for the submission of the waste prevention programme (end of 2014).

By letter dated 23 April 2014, (Document No 704600) following the package meeting in Liechtenstein on 2 – 3 April 2014, the Authority invited the Liechtenstein Government to submit a list of establishments and undertakings established in Switzerland that operate on the Liechtenstein waste market, to identify which of the Swiss provisions listed in the Liechtenstein Government’s letter of 19 February 2014 are relevant to the Waste Framework Directive, to detail the role of the Federal Office for the Environment (Bundesamt für Umwelt “BAFU”) and to explain how several waste-related regulations on end-of-waste status are coordinated with the Swiss legislation as well as the applicable rules for importation, exportation and transit between Liechtenstein and Switzerland.

By letter of 23 September 2014 (Document No 723109), the Liechtenstein Government replied to the Authority’s letter and submitted the requested information. It provided a list of registered establishments and undertakings that transport waste on a professional basis and announced that the legislation will be amended to establish the legal basis to keep registers. It listed the Swiss provisions directly related to the Waste Framework Directive and clarified the role of the BAFU. It also explained the links between EU regulations on end-of-waste status and Swiss legislation. Finally, it described the application of Swiss

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<sup>1</sup> Directive 2008/98/EC *on waste and repealing certain Directives*, OJ L 312, 22.11.2008, p. 3. Act referred to at point 32ff of Annex XX to the EEA Agreement. As incorporated into the EEA Agreement by Joint Committee Decision No 85/2011, which entered into force on 1 November 2012.

custom legislation to Liechtenstein, and the consequent rules for importation, exportation and transit.

By letter of 3 December 2014 (Document No 727130), the Authority informed the Liechtenstein Government of the current status of the case. It welcomed the clarifications made by the Liechtenstein Government in its letter of 23 September 2014, and the upcoming modifications of the legislation with regard to the registry. It invited the Liechtenstein Government to keep the Authority informed about these modifications. In that letter, the Authority also invited the Liechtenstein Government to report on the progress of the waste management plan and the waste prevention programme by 1 June 2015.

By letter of 1 April 2015 (Document No 753108), the Liechtenstein Government informed the Authority of the modifications of Liechtenstein legislation with regard to the registry.<sup>2</sup>

At the package meeting of 23 April 2015, the Liechtenstein Government indicated that the finalisation of the waste management plan and the waste prevention programme was envisaged for the end of 2015.

On 13 May 2015, the Authority sent a follow-up letter to the Liechtenstein Government summarising the developments of the case (Document No 755552).

By letter of 29 May 2015, the Liechtenstein Government replied to the Authority's follow-up letter (Document No 758827). In that letter, the Liechtenstein Government informed the Authority that it planned to have the waste management plan and waste prevention programme approved by the Government in spring 2016. It also shared with the Authority its interim reports established in the process of preparing the waste management plan and the waste prevention programme.

On 17 December 2015, the Authority issued a pre-Article 31 letter (Document No 785183). In this letter, the Authority stated that it was of the preliminary view that Liechtenstein had failed to fulfil its obligations under Articles 28 and 29 of the Waste Framework Directive. Moreover, the Authority informed the Liechtenstein Government that it did not find the submitted interim reports to be in accordance with the requirements of Articles 28 and 29 of the Waste Framework Directive. The Authority therefore offered guidance to the Liechtenstein Government on how to progress with the waste management plan and waste prevention programme in order for Liechtenstein to comply with the Waste Framework Directive.

The Liechtenstein Government submitted its reply on 1 March 2016 (Document No 795763). In this letter, the Liechtenstein Government estimates that the waste management plan and the waste prevention programme could be finalised in autumn 2016, and adopted by the Government shortly after.

In an email of 14 November 2016 (Document No 829795), the Authority invited the Liechtenstein Government to explain why there had not been any submission of the waste management plan and waste prevention programme. In an email received 1 December 2016 (Document No 829799), the Liechtenstein Government informed the Authority that

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<sup>2</sup> Introduction of a new Article 50a to the Act on the Protection of the Environment (*Umweltschutzgesetz (USG) vom 29. Mai 2008*), LR 814.01, and adoption of the executing Ordinance based on Article 50a of the USG together with the Swiss Technical Ordinance on Waste (*Technische Verordnung über Abfälle vom 10. Dezember 1990 (TVA)*), SR 814.600.

the process had once again been delayed. The Authority was informed by the Liechtenstein Government that the waste management plan and the waste prevention programme would not be finalised before September 2017.

On 20 December 2016, the Authority issued a letter of formal notice (Document No 829744). The Authority concluded in this letter that Liechtenstein had failed to fulfil its obligations according to Articles 28 and 29 of the Waste Framework Directive, by failing to establish in due time pursuant to these articles, respectively, a waste management plan and a waste prevention programme.

The Liechtenstein Government responded by letter dated 20 February 2017 (Document 842841). It indicated that the process for the adoption of the waste management plan and the waste prevention programme was still pending. It anticipated their adoption in September 2017.

At the package meeting of 11 – 12 May 2017, the Liechtenstein Government anticipated that the waste management plan and the waste prevention programme would be adopted at the end of 2017, as stated in the follow-up letter from the package meeting (Document No 856558).

In an email of 24 November 2017, the Authority asked the Liechtenstein Government for information on the status of adoption of the waste management plan and waste prevention programme (Document No 884180). In an email of 11 December 2017, the Liechtenstein Government informed the Authority that the process had been delayed and that the adoption of the waste management plan and waste prevention programme was expected for the first quarter of 2018 (Document No 887690).

At the package meeting of 17 – 18 April 2018, the Liechtenstein Government indicated that the most likely date for the adoption of the waste management plan and the waste prevention programme was at the end of 2018, as stated in the follow-up letter from the package meeting (Document No 910790).

In an email of 21 November 2018 (Document No 1039506), the Authority asked the Liechtenstein Government for updates on the adoption status of the waste management plan and waste prevention programme. By email dated 11 December 2018 (Document No 1043102), the Liechtenstein Government informed the Authority of a delay in the process. It clarified, in a phone conversation with the Authority, that the waste management plan and waste prevention programme could, in a best case scenario, be adopted at the end of February 2019. The Liechtenstein Government committed in this phone conversation to provide to the Authority in early January 2019 further information on the best case scenario, the next steps and timing, as well as detail on the alternatives if the best case scenario could not be completed. By email of 16 January 2019 (Document No 1047250), the Liechtenstein Government indicated that the information would be sent to the Authority as soon as possible.

At the package meeting of 26 - 27 March 2019, the Liechtenstein Government announced that the adoption of the waste prevention programme had to be postponed to identify a new landfill. It anticipated that the programme could be adopted within one, to one year and a half. For the waste management plan, the Liechtenstein Government anticipated that it could be possibly adopted in June 2019. The Liechtenstein Government and the Authority agreed to keep an open dialogue in this process, with the Liechtenstein

Government informing the Authority of the timeline and regularly reporting on the progress.

Based on the information and documents provided by the Liechtenstein Government, the Authority is of the view that Liechtenstein has failed to fulfil its obligations, according to Articles 28 and 29 of the Waste Framework Directive. Firstly, Liechtenstein has failed to establish a waste management plan before the general period for compliance for the Waste Framework Directive, i.e. 1 November 2012. Secondly, Liechtenstein has failed to establish a waste prevention programme before the period for compliance specified in Article 29 of the Waste Framework Directive, i.e. 12 December 2013. This assessment does not appear to be contested by the Liechtenstein Government.

## 2 Relevant national law

### 2.1 National law implementing Article 28 of the Waste Framework Directive

According to the information submitted by the Liechtenstein Government,<sup>3</sup> Article 28 of the Waste Framework Directive is implemented in Article 39 of the Act on the Protection of the Environment of 29 May 2008 (*Umweltschutzgesetz vom 29. Mai 2008*) (“the Environment Act”), which provides that the Government shall establish a waste plan (*Abfallplanung*) in collaboration with the municipalities.<sup>4</sup> In addition, Articles 37, 38, 40 and 49(3) of the Environment Act implement Article 28 of the Waste Framework Directive.

Article 28 of the Waste Framework Directive is also implemented in Articles 16, 17 and 18 of Swiss Technical Regulation on Waste of 10 December 1990 (*Technische Verordnung über Abfälle vom 10. Dezember 1990*) (“the Waste Regulation”),<sup>5</sup> which contain provisions on the content of a waste plan (*Abfallplanung*).

The information submitted also indicated that Article 28 of the Waste Framework Directive is implemented in Article 4(1)(a) of the Act on strategic environmental assessments of 15 March 2007 (*Gesetz über die Strategische Umweltprüfung vom 15. März 2007*) (“the SEA Act”).

### 2.2 National law implementing Article 29 of the Waste Framework Directive

According to the information submitted by the Liechtenstein Government, Article 29 of the Waste Framework Directive is implemented in Articles 5, 37, 39, 64, 78, 80 and 81 of the Environmental Act, as well as Article 16(2)(1) of the Waste Regulation and Article 4(1)(a) of the SEA Act.

## 3 Relevant EEA law

Article 28 of the Waste Framework Directive reads as follows:

*“Waste management plans*

<sup>3</sup> See Form 1 submitted by the Liechtenstein Government (Document No 651362) and the Table of Correspondence prepared by the Liechtenstein Government (Document No 771023).

<sup>4</sup> In German: “*Abfallplanung. Die Regierung erstellt in Zusammenarbeit mit den Gemeinden eine Abfallplanung. Sie ermitteln insbesondere den Bedarf an Entsorgungsanlagen und legen deren Standorte fest. Die Planung ist periodisch den Verhältnissen und dem Stand der Technik anzupassen.*”

<sup>5</sup> The Waste Regulation is a Swiss Regulation applicable in Liechtenstein according to the current Notice of 21 April 2015 on Swiss legislation applicable in Liechtenstein on the basis of the 1923 Treaty between Liechtenstein and Switzerland (*Kundmachung vom 21. April 2015 der aufgrund des Zollvertrages im Fürstentum Liechtenstein anwendbaren schweizerischen Rechtsvorschriften (Anlagen I und II)*).

1. Member States shall ensure that their competent authorities establish, in accordance with Articles 1, 4, 13 and 16, one or more waste management plans.

Those plans shall, alone or in combination, cover the entire geographical territory of the Member State concerned.

2. The waste management plans shall set out an analysis of the current waste management situation in the geographical entity concerned, as well as the measures to be taken to improve environmentally sound preparing for re-use, recycling, recovery and disposal of waste and an evaluation of how the plan will support the implementation of the objectives and provisions of this Directive.

3. The waste management plans shall contain, as appropriate and taking into account the geographical level and coverage of the planning area, at least the following:

(a) the type, quantity and source of waste generated within the territory, the waste likely to be shipped from or to the national territory, and an evaluation of the development of waste streams in the future;

(b) existing waste collection schemes and major disposal and recovery installations, including any special arrangements for waste oils, hazardous waste or waste streams addressed by specific Community legislation;

(c) an assessment of the need for new collection schemes, the closure of existing waste installations, additional waste installation infrastructure in accordance with Article 16, and, if necessary, the investments related thereto;

(d) sufficient information on the location criteria for site identification and on the capacity of future disposal or major recovery installations, if necessary;

(e) general waste management policies, including planned waste management technologies and methods, or policies for waste posing specific management problems.

4. The waste management plan may contain, taking into account the geographical level and coverage of the planning area, the following:

(a) organisational aspects related to waste management including a description of the allocation of responsibilities between public and private actors carrying out the waste management;

(b) an evaluation of the usefulness and suitability of the use of economic and other instruments in tackling various waste problems, taking into account the need to maintain the smooth functioning of the internal market;

(c) the use of awareness campaigns and information provision directed at the general public or at a specific set of consumers;

(d) historical contaminated waste disposal sites and measures for their rehabilitation.

5. Waste management plans shall conform to the waste planning requirements laid down in Article 14 of Directive 94/62/EC and the strategy for the implementation of the reduction of biodegradable waste going to landfills, referred to in Article 5 of Directive 1999/31/EC.”



Article 29 of the Waste Framework Directive reads as follows:

*“Waste prevention programmes*

*1. Member States shall establish, in accordance with Articles 1 and 4, waste prevention programmes not later than 12 December 2013.*

*Such programmes shall be integrated either into the waste management plans provided for in Article 28 or into other environmental policy programmes, as appropriate, or shall function as separate programmes. If any such programme is integrated into the waste management plan or into other programmes, the waste prevention measures shall be clearly identified.*

*2. The programmes provided for in paragraph 1 shall set out the waste prevention objectives. Member States shall describe the existing prevention measures and evaluate the usefulness of the examples of measures indicated in Annex IV or other appropriate measures.*

*The aim of such objectives and measures shall be to break the link between economic growth and the environmental impacts associated with the generation of waste.*

*3. Member States shall determine appropriate specific qualitative or quantitative benchmarks for waste prevention measures adopted in order to monitor and assess the progress of the measures and may determine specific qualitative or quantitative targets and indicators, other than those referred to in paragraph 4, for the same purpose.*

*4. Indicators for waste prevention measures may be adopted in accordance with the regulatory procedure referred to in Article 39(3).*

*5. The Commission shall create a system for sharing information on best practice regarding waste prevention and shall develop guidelines in order to assist the Member States in the preparation of the Programmes.”*

Article 30 of the Waste Framework Directive provides that EEA States are to ensure that the waste management plans and waste prevention programmes are evaluated at least every sixth year and revised as appropriate and where relevant in accordance with Articles 9 and 11 of the Waste Framework Directive.

Article 31 of the Waste Framework Directive requires that EEA States ensure that relevant stakeholders and authorities and the general public have the opportunity to participate in the elaboration of the waste management plans and waste prevention programmes, and have access to them once elaborated, in accordance with Directive 2003/35/EC<sup>6</sup> or, if relevant, Directive 2001/42/EC.<sup>7</sup> Furthermore, in accordance with Article 31 of the Waste Framework Directive, the EEA States are to place the plans and programmes on a publicly available website.

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<sup>6</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 *providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC*. OJ L 156, 25.06.2003, p. 17, referred to at point 1k of Annex XX to the EEA Agreement.

<sup>7</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 *on the assessment of the effects of certain plans and programmes on the environment*. OJ L 197, 21.07.2001, p. 30, referred to at point 1g of Annex XX to the EEA Agreement.

Article 33 of the Waste Framework Directive obliges EEA States to inform the Authority of the waste management plans and waste prevention programmes once adopted and of any substantial revisions to the plans and the programmes.

The Commission has also issued Guidance Documents for both waste management plans (“the EU Guidance note”)<sup>8</sup> and waste prevention programmes.<sup>9</sup>

## 4 The Authority’s Assessment

### 4.1 Failure to establish a waste management plan before the expiry of the period for compliance set out in the Waste Framework Directive

According to Article 28 of the Waste Framework Directive, EEA States are to ensure that their competent authorities establish waste management plans. There is no separate deadline in Article 28 of the Waste Framework Directive and thus the general deadline for the implementation of the Waste Framework Directive applies. This deadline was 1 November 2012, which is the date on which Joint Committee Decision No 85/2011 entered into force.

In the two older Directives on waste, i.e. Directive 75/442/EEC<sup>10</sup> and Directive 2006/12/EC<sup>11</sup>, it was stated that waste management plans should be drawn up “*as soon as possible*.” The Court of Justice of the European Union (“CJEU”) interpreted the words “*as soon as possible*” as meaning that it established a different period for compliance than the transposition deadline stipulated in both of the above-mentioned Directives.<sup>12</sup>

The words “*as soon as possible*” were not replicated in Article 28 of the Waste Framework Directive during the legislative process. The Authority therefore considers that the period for compliance with Article 28 of the Waste Framework Directive is the same as for all other provisions of the directive (i.e. 1 November 2012 in the EEA EFTA States) other than those which set out a separate deadline for compliance (as is the case for Article 29 of the directive).

The Authority notes that the Liechtenstein Government’s correspondence since the Authority’s initial letter in 2011 indicates that it accepts that Liechtenstein does not have a

<sup>8</sup> See *Preparing a Waste Management Plan. A methodological guidance note*. European Commission, 2012. (“the EU Guidance Note”) See link:

[http://ec.europa.eu/environment/waste/plans/pdf/2012\\_guidance\\_note.pdf](http://ec.europa.eu/environment/waste/plans/pdf/2012_guidance_note.pdf)

<sup>9</sup> See *Preparing a Waste Prevention Programme. Guidance document*. European Commission, 2012 (available under:

<http://ec.europa.eu/environment/waste/prevention/pdf/Waste%20prevention%20guidelines.pdf>)

<sup>10</sup> Council Directive 75/442/EEC of 15 July 1975 *on waste*. OJ L194, 25.07.1975, p. 39.

<sup>11</sup> Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 *on waste*. OJ L 114, 27.04.2006, p. 9.

<sup>12</sup> See, to that effect, Case C-292/99 *Commission v French Republic*, EU:C:2002:276, at paragraph 41: “*In this connection, it should be observed that the inclusion of the words ‘as soon as possible’ in Article 7(1) is an indication that the period laid down in the first subparagraph of Article 2(1) of Directive 91/156 for the transposition of that directive does not relate to the obligation to draw up waste management plans. If that were the case, the words would be meaningless. It thus follows that the words ‘as soon as possible’ are to be interpreted as stipulating, in principle, a reasonable period for compliance by the competent authorities of each Member State with that particular obligation, that period being unconnected with the period laid down for transposition of the directive.*” (emphasis in bold added by the Authority). This reasoning was also confirmed by the CJEU in Joined Cases C-53/02 and C-217/02 *Tillieut and Other*, EU:C:2004:205, at paragraph 37.



waste management plan that meets the requirements of Article 28 of the Waste Framework Directive.

As Liechtenstein Government has not established a waste management plan before the expiry of the period for compliance set out in the Waste Framework Directive (1 November 2012) the Authority takes the view that Liechtenstein has failed to fulfil its obligations under Article 28 of that directive.

#### **4.2 Failure to establish a waste prevention programme before the period for compliance**

Article 29(1) of the Waste Framework Directive stipulates specifically that the EEA States must establish a waste prevention programme before the expiry of the period for compliance set out in that article, which is 12 December 2013.

In the Liechtenstein Government's letter of 29 May 2015 (Document No 758827), it is stated that the waste management plan for Liechtenstein would include an integrated waste prevention programme.

However, the Authority notes that the Liechtenstein Government's correspondence since the Authority's initial letter in 2011 indicates that it likewise accepts that Liechtenstein does not have a waste prevention programme that meets the requirements of Article 29 of the Waste Framework Directive.

As Liechtenstein has not established a waste prevention programme before the expiry of the period for compliance set out in the Waste Framework Directive, the Authority is of the view that Liechtenstein has failed to fulfil its obligations arising from Article 29 of that directive.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Liechtenstein the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by failing to establish a waste management plan before the general period for compliance for the Waste Framework Directive, 1 November 2012, and for failing to establish a waste prevention programme before the period for compliance specified in Article 29 of the Waste Framework Directive, 12 December 2013, Liechtenstein has failed to fulfil its obligations according to Articles 28 and 29 of the Waste Framework Directive

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Liechtenstein to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels, 10 April 2019

For the EFTA Surveillance Authority

Bente Angell-Hansen  
President

Frank J. Büchel  
College Member

Högni Kristjánsson  
Responsible College Member

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*This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.*