



POSITION PAPER

New waste battery legal framework in the EU: choice between "Directive or Regulation" for the Environmental regulation of applicable principles on the put on market of all types of batteries and the outcome of waste batteries

1. Introduction

--A **directive** is an act that sets a goal for all Member states to achieve, such as was the case with DIRECTIVE 2006/60/EC. The individual states were charged with the responsibility to create their own laws to meet the goals specified in that directive for creating a EPR system throughout the EU.

--A **regulation** is a binding legislative act that requires all Member states to follow. It must be followed in its entirety throughout the EU.

Therefore, simply put, a directive provides a framework for individual Member states to create their own national laws, while a regulation is a law that will apply in all EU countries.

Since the 1990s, Directive 91/157/EEG of 1991 and Directive 2006/66/EC (including and enforced by the decisions of the sixth EAP (Environmental Action Plan combined with the Directive on waste electrical and electronic equipment (WEEE)) have regulated all types of batteries that are placed on the European Union (EU) market. This legislation, which aims to ensure that batteries are safe and perform as intended by the manufacturer, could eventually currently being replaced by one single new EU (waste) Battery Regulation. The principle of extended producer responsibility (**EPR**) through directives has becoming more widespread in the EU and in the Member states to achieve the objectives of environmental policy and to strive for a circular economy. This policy approach gives producers a significant responsibility – financial and/or physical – not only for the requirements to collect and recycle end-of-life products, but also for prevention, communication, sensibilisation,...

2. A legal overview of EU principles and evolution introducing environmental law in the Member states confirms the instrument of 'directives'

EU environmental law and policy has thus evolved over the years from a scattered and uncoordinated group of measures incidental to the overriding objectives of market integration to a sophisticated and detailed system of environmental regulation and multilevel governance.

Environmental protection now represents an important area of EU action both internally and on the international level. Yet a number of important challenges remain to be addressed if the EU is to play a meaningful role in the protection of the environment and to affirm itself as a leader in global environmental governance processes. (the recent initiatives of "Green deal" and "Circular Economy Plan")

3. The 'Directive' as basic legal instrument in Environmental matters

The basic elements and principles of the 'Directive' have a history of more than forty years, long preceding its introduction. **The principle of subsidiarity plays an important role in the environmental field**, where the competence for policy and legislation is shared between the EU and the Member states. This means that the Member states have primary responsibility for the protection of the environment, and the EU may act "*only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States*" but can "*be better achieved at Union level*" (article 5 TFEU). Article 191(3) TFEU clarifies that the pursuit of the twin EU objectives of environmental protection and European integration must take into account the diversity of environmental, social and economic conditions of the various European "regions".

4. EUCOBAT vision

Within this 'Directive' framework, **differentiation and flexibility** gradually became main features of EU environmental governance also in the domain of waste, end-of-Life strategy of products and extended producer responsibility (EPR) (see **WEEE-directive, ELV-directive, waste directive and the Battery directive**). This were principal triggers for the increased recourse to more flexible methods and a greater decentralisation in environmental regulation.

The argument that reinforces the suitability (and almost the need) to regulate this matter through a Directive is that in the "**Framework Directive**" on waste (2008/98 / EC) after the modifications through Directive 2018/851 / EU, it has already been established a very complete general legal regime applicable to all waste (among other matters, for example, under the extended responsibility of the producer) with a specific provision in art. 2.4 that "**Specific or complementary specific provisions to those of this Directive, intended to regulate the management of certain categories of waste, may be established through specific directives**".

In other words, it is the Waste Framework Directive itself that expressly and clearly establishes that in the event that it is necessary to adopt measures to regulate certain categories of waste, it will be done through "Specific Directives", which excludes the use of the Regulation for this purpose. In other words, it would be a real contradiction if the general rules on waste were set in a Directive and then specific rules on a specific waste were set in a Regulation.

Specific rules for the collection, treatment, recycling and disposal of waste batteries and accumulators these are best translated in a new revised directive of the actual directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators.

The primary objective of this Directive is to minimise the negative impact of batteries and accumulators and waste batteries and accumulators on the environment, thus contributing to the protection, preservation and improvement of the quality of the environment.

But in order to do so it must be possible to follow the law (producer, distribution network-*take back obligation*-, consumer, compliance scheme, local (waste) authorities, recycling companies). Detailed secondary legislation, containing important implementation details, are prepared and published by the European Commission over a number of years. This secondary legislation addresses precisely how key provisions (ex. collection rate of waste batteries, ...) of the actual Directive is working.

It had become clear the past years that an effective integration process in the expanding European Union **should also take into account the different backgrounds (culture) and commitments of the various Member states.**

A "one-size-fits-all" solution is not possible.

Not all Member States are on the same level with regard to general consumer awareness towards waste, environmental awareness and attitude towards selective collection of specific waste streams.

On the other hand, the influence of the sustainable development discourse and the environmental integration approach demanded more inclusiveness, dynamism and flexibility.(example the demographical and geographical characteristics: the population density, the surface, the urbanization degree have a large impact on the required collection network)

Directive: maintain of Good Practices of the Battery Directive

There are justifications for using a **directive rather than a regulation**: (i) it complies with the EU's desire for "subsidiarity"; (ii) it acknowledges that different Member States have different legal systems, legal traditions and legal processes; and (iii) each Member state has leeway to choose its own statutory (proper culture)...

In accordance to **the battery directive** we refer to items like:

- minimum budget and content of marketing/prevention actions to the users of batteries,
- evaluation of principles like PoM-Put on market of batteries (financial and reporting aspects in accordance with local authorities)

- minimum collection networks and the active participation of specific stakeholders like local schools, small retail (the density of the collection network cannot be the same in each member State (a dense collection network is required to ensure effective collection)
- the local communication channels for the (visible) environmental fee,
- control and objectives on the local recycling and re-use activities,
- professional requirements for interaction compliance schemes with local authorities, .. etc
- enforcement of the EPR rules and obligations

In this context and for these items, **subsidiarity becomes relevant** not only “vertically” in the definition of the appropriate level of intervention, but also “horizontally” in determining the scope of EU intervention and encouraging the participation of an increasing number of actors and stakeholders in the Battery Directive. EUCOBAT esteems that the minimum requirements for an optimal collection of waste batteries (take-back-obligation) cannot be determined in a general way for all countries, as substantial differences influence significantly the collection rate and the required density of collection points.

We refer also to the “*new approach*” to environmental governance adopted by the Commission several years ago and translated in practice to a marked “proceduralisation” of the relevant environmental obligations and a greater use of framework directives and horizontal measures. (**See also the consecutive EAP’s (Environmental Action Plans of the Commission)**)

New enforcement measures could also help to create level playing field for all the producers who put batteries on the markets in the EU in the new legal framework and preferable through the instrument of a Directive.

In this context we refer to the 2001 White Paper on environmental liability and the final text of the ELD (**Directive** 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the **prevention and remedying** of environmental damage (ELD) which signalled a radical shift from a private law-civil liability approach to **a public law-administrative approach** for the prevention (through preventive and response action measures) and remediation of environmental damage.

A progressive set of remedial measures and complementary remediation, and an administrative scheme of enforcement to respect the REP can only be accomplished under the new model of a Directive, Member states are required to appoint national or regional authorities with the exclusive competence to order the liable operator to take the appropriate preventive or remedial measures in the context of the take back obligations of batteries of all types.

5. About Eucobat

Eucobat aisbl is the European association of national collection schemes for batteries. They assure that all waste batteries are collected and recycled in an ecological sound way, and contribute this way to a better environment.

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