Neutral Citation Number: [2013] EWHC 425 (Admin)

Case No: CO/6117/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES

Cardiff Civil Justice Centre,
2 Park Street, Cardiff CF10 1ET

Date: 06/03/13

Before:

MR JUSTICE HICKINBOTTOM

- -

Between:

THE QUEEN on the application of

(1) UK RECYCLATE LIMITED
(2) SMURFIT KAPPA UK
(3) PALM RECYCLING LIMITED
(4) D S SMITH PAPER LIMITED
(5) NOVELIS UK LIMITED
(6) PLASTICS SORTING LIMITED
(7) ARDAGH GLASS LIMITED — **Claimants**

- and -

(1) THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) THE WELSH MINISTERS

Defendants

- and -

(1) LOCAL GOVERNMENT ASSOCIATION
(2) WELSH LOCAL GOVERNMENT ASSOCIATION
(3) ENVIRONMENTAL SERVICES ASSOCIATION
(4) WELSH ENVIRONMENTAL SERVICES ASSOCIATION — **Interested Parties**

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Timothy Straker QC and Garrett Byrne (instructed by **Anthony Collins Solicitors LLP**) for the **Claimants**
Clive Lewis QC and Justine Thornton (instructed by **the Treasury Solicitor**) for the **First Defendant**
Clive Lewis QC and Justine Thornton (instructed by **the Director of Legal Services, Welsh Government**) for the **Second Defendant**
Karen Steyn (instructed by **Wragge & Co LLP**) for the **First Interested Party**
The **Second Interested Party** was not represented and did not appear
David Hart QC (instructed by **Bird & Bird LLP**) for the **Third and Fourth Interested Parties**

Hearing dates: 25-26 February 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE HICKINBOTTOM

Mr Justice Hickinbottom:

Introduction

1. The rate at which refuse is produced, and its potential for harm to human health and the environment, has been a major concern of government at local, national and European level for some years. This claim focuses on one small corner of that large tapestry, namely whether the transposing domestic regulations properly implement the relevant provisions of European Directive 2008/98/EC ("the Waste Framework Directive") insofar as it requires the separate collection of certain types of waste, namely paper, metal, plastic and glass. The Claimants say that they do not. The Defendants and Interested Parties disagree. Each party contends that the interpretation of the provisions for which it contends is clear, beyond reasonable argument. However, insofar as it is not so clearly in their favour, the Claimants apply for a reference to the Court of Justice of the European Union, for a definitive ruling.

The Parties

2. The Claimants are all commercially involved in the recycling of waste into new products. The First Claimant is a brokerage, supplying material from domestic sources to industrial reprocessors. The Second Claimant is a corrugated paper mill operator and packaging manufacturer, with a recycling division. The Third Claimant collects waste paper and onward supplies a mill which produces paper for newspapers. The Fourth Claimant is a waste management and paper recycling company. The Fifth Claimant recycles cans as part of an aluminium manufacturing process. The Sixth Claimant operates a plastics reprocessing plant (although it discontinued its claim prior to trial). The Seventh Claimant produces glass packaging for the food and drink industry. They are all members of the Campaign for Real Recycling, and their commercial interest in this claim is underpinned by a strong belief in the environmental benefits of recycling.

3. The First Interested Party is an unincorporated association of local authorities in England and Wales. The Second Interested Party is also an unincorporated association of local authorities, but restricted to the Welsh Unitary Authorities; and, although not represented in these proceedings, it is itself a member of the First Interested Party, which is represented. Most of these local authorities are responsible for the collection and/or disposal of waste in their respective areas.

4. The Third Interested Party is a trade association, whose members collect about 50% of relevant waste in England and Wales. The Fourth Interested Party assumes the same role in Wales, all of its members also being members of the Third Interested Party.

5. The First Defendant (the Secretary of State) is, in relation to England, responsible for the environment. The Second Defendants (the Welsh Ministers) are, in Wales, responsible for the prevention, reduction and management of waste which is a devolved function. The Defendants together were responsible for the introduction of the relevant domestic regulations, which apply equally to England and Wales.

The Background to the Waste Framework Directive

6. The making of European environmental law is governed by Articles 191-193 of the Treaty on the Functioning of the European Union. Article 191 provides:

> "1. Union policy on the environment shall contribute to pursuit of the following objectives:
>
> - Preserving, protecting and improving the quality of the environment,
> - Protecting human health,
> - Prudent and rational utilisation of resources,
> - Promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
>
> 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventative action should be taken, that environmental damage should be rectified at source and that the polluter should pay…".

7. The Waste Framework Directive is made pursuant to Article 192(1), which provides that the European Parliament and Council shall decide on action to be taken by the Union in order to achieve the objectives referred to in Article 191.

8. The Directive was built on the foundations of Decision No 1600/2002/EC of the European Parliament and Council, which laid down the Sixth Community Environment Action Programme. Article 8(1) set out objectives for meeting the high level aims of the Decision described in Article 2, those objectives including a significant reduction in waste going to disposal, encouragement of re-use, and otherwise giving preference to recovery and especially recycling. Article 8(2) set out "priority actions" for meeting those objectives, including the development of a thematic strategy on waste recycling which was itself to include "measures aimed at ensuring source separation, the collection and recycling of priority waste streams".

9. The Waste Framework Directive takes up that strategic theme. As one would expect of a directive, it sets out high level principles, aims and objectives, the primary objective being to protect the environment and human health. So, it states that:

> "The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment…." (Recital (6)).

10. Confirming the priorities set out in Decision No 1600/2002/EC, Recitals (28) and (29) of the Directive state:

> "28. This Directive should help move the EU closer to a 'recycling society', seeking to avoid waste generation and to

> use waste as a resource. In particular, the Sixth Community Environment Action Programme calls for measures aimed at ensuring the source separation, collection and recycling of priority waste streams. In line with that objective and as a means to facilitating or improving its recovery potential, waste should be separately collected if technically, environmentally and economically practicable, before undergoing recovery operations that deliver the best overall environmental outcome…".
>
> 29. Member States should support the use of recyclates…".

The Waste Framework Directive

11. The relevant part of the Waste Framework Directive is structured thus.

12. Article 2 altogether excludes various categories of waste from the scope of the Directive (e.g. radioactive waste, decommissioned explosives and waste covered by other Community legislation).

13. Article 3(1) and (11) define "collection" as "the gathering of waste, including the preliminary sorting and preliminary storage of waste for the purposes of transport to a waste treatment facility"; and "separate collection" as "collection where a waste stream is kept separately by type and nature so as to facilitate a specific treatment".

14. Article 3(15) gives a wide definition to "recovery": "any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy". By Article 3(17), "recycling" is defined as a subset of "recovery": "any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes…", expressly excluding energy recovery.

15. Article 4(1) sets out an order of priority for waste prevention and management that "shall apply" in relevant legislation and policy, namely:

> "(a) prevention;
>
> (b) preparing for re-use;
>
> (c) recycling;
>
> (d) other recovery, e.g. energy recovery; and
>
> (e) disposal";

i.e. a waste hierarchy of (i) prevention, (ii) recovery and (iii) disposal, and, within "recovery", a hierarchy of (i) re-use, (ii) recycling and (iii) energy or other recovery. Recital (6) indicates that, "Waste policy should… aim at reducing the use of resources, and favour the practical application of the waste hierarchy". In that connection, Article 4(2) provides that this hierarchy is subject to the overarching aim of achieving "the best overall environmental outcome":

> "… Member States shall take measures to encourage the options that deliver the best overall environmental outcome. This may require specific waste streams departing from the hierarchy where this is justified by life-cycle thinking on the overall impacts of generation and management of waste."

16. Chapter II sets out "General requirements" for various aspects of waste prevention and management. Articles 10 and 11 deal with "Recovery" and "Re-use and recycling". By definition, "recycling" is a subset of "recovery" (see paragraph 14 above); but in any event, before it can be "re-used" and/or "recycled", material must first be "recovered". Waste that is ultimately recycled is therefore subject to the obligations in both Article 10 and Article 11; but, if and insofar as there is any conflict, the provisions of Article 11 (being *lex specialis*) would prevail.

17. Articles 10 and 11(1), which are the focus of this claim, read as follows:

> "Article 10
>
> Recovery
>
> 1. Member States shall take the necessary measures to ensure that waste undergoes recovery operations, in accordance with Articles 4 and 13.
>
> 2. Where necessary to comply with paragraph 1 and to facilitate or improve recovery, waste shall be collected separately if technically, environmentally and economically practicable and shall not be mixed with other waste or other material with different properties.
>
> Article 11
>
> Re-use and recycling
>
> 1. Member States shall take measures, as appropriate, to promote the re-use of products and preparing for re-use activities, notably by encouraging the establishment and support of re-use and repair networks, the use of economic instruments, procurement criteria, quantitative objectives and other measures.
>
> Member States shall take measures to promote high quality recycling and, to this end, shall set up collections of waste where technically, environmentally and economically practicable and appropriate to meet the necessary quality standards for the relevant recycling sectors.
>
> Subject to Article 10(2), by 2015 separate collection shall be set up for at least the following: paper, metal, plastic and glass."

I shall refer to the paragraphs that comprise Article 11(1) as "the first paragraph", "the second paragraph" and "the third paragraph" respectively.

18. In this claim, the phrase "technically, environmentally and economically practicable", which appears in recital (28) and Articles 10 and 11, features large. In common parlance, "practicable" means more than merely "convenient", "useful" or even "practical"; but rather "feasible" or "capable of being done". On the basis of this usage, the phrase used (and particularly, perhaps, "environmentally practicable") might appear to be linguistically awkward. However, although no direct help is available in the Directive itself – the phrase is not, for example, defined in the definitions provisions of Article 3 – assistance is at hand in the form of guidance issued by the European Commission's Director-General of the Environment Directorate-General, "Guidance on the Interpretation of Key Provisions of Directive 2008/98/EC on Waste", issued on 12 June 2012 ("the Commission Guidance"). This Directorate-General was of course responsible within the Commission for the Waste Framework Directive. Although not legally binding, domestic courts are not only allowed but required to take such guidance into account in deciding the meaning of a directive (R (Morge) v Hampshire County Council [2011] UKSC 2 at [14]).

19. Paragraph 4.4 of the Commission Guidance states:

> "The combination of terms 'technically, environmentally and economically practicable' describes the preconditions for Member States being, to varying extents, obliged to set up separate collection under Articles 10 and 11…. The wording has been introduced into the [Waste Framework Directive] without any preceding examples in EU waste management legislation.
>
> 'Technically practicable' means that the separate collection may be implemented through a system which has been technically developed and proven to function in practice. 'Environmentally practicable' should be understood such that the added value of ecological benefits justify possible negative environmental effects of the separate collection (e.g. additional emissions from transport). 'Economically practicable' refers to a separate collection which does not cause excessive costs in comparison with the treatment of a non-separated waste stream, considering the added value of recovery and recycling and the principle of proportionality."

This guidance suggests that the phrase "technically, environmentally and economically practicable" is used in the Directive as a term of art, importing the principle of proportionality and demanding a sophisticated context-driven exercise of judgment, balancing (amongst other things) the positive and negative environmental and economic effects of separate collection. This term is here clearly used as a term of art; and no party suggested that I should depart from this guidance in respect of it.

20. Three other obligations on Member States, imposed by the Directive, are worthy of mention, at this stage:

i) Article 11(2) requires Member States to take measures designed to achieve particular targets, e.g. by 2020, preparing for re-use and recycling a minimum of 50% by weight of paper, metal, plastic and glass from households.

ii) In line with the primary objective, Article 13 requires Member States to take necessary measures to ensure that waste management is carried out without endangering human health and without harming the environment. This to an extent chimes with Article 4(2), which makes the waste hierarchy subservient to "the best overall environmental outcome" (see paragraph 15 above).

iii) Article 28 requires Member States to ensure that their competent authorities establish a waste management plan or plans, analysing the current waste management and setting out:

> "… 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."

Domestic Transposition

21. European directives are not directly applicable: Article 228 of the Treaty on the Functioning of the European Union provides that directives are binding on Member States "as to the results to be achieved", but the methods to be adopted in order to achieve those results are left to each Member State to decide. Article 40(1) of the Waste Framework Directive requires Member States to bring into force "the laws, regulations and administrative provisions necessary to comply with [the Directive]…" by 12 December 2010; and Article 36(2) requires Member States to provide for effective, proportionate and dissuasive penalties for infringements of the directive, and to take all measures necessary to ensure they are effective.

22. The United Kingdom through the First Defendant (in respect of England) and the Second Defendants (in respect of Wales) sought to transpose its obligations under the Waste Framework Directive by making the Waste (England and Wales) Regulations 2011 (SI 2011 No 988) ("the 2011 Regulations"), which for the most part came into effect on 29 March 2011.

23. Part 5 deals with "Duties in relation to waste management and improved use of waste as a resource".

24. Generally, Regulation 12 requires any waste producer or waste collector to apply the waste hierarchy in Article 4(1) of the Directive, except, reflecting Article 4(2) and the overarching aim of the Directive, departure is allowed "to achieve the best overall environmental outcome" taking account of (amongst other things) technical feasibility, economic viability and the overall environmental, human health, economic and social impacts.

25. There are several provisions relating to the separate collection of waste.

26. Pursuant to Article 28 of the Directive (see paragraph 20(iii) above), Regulation 7 requires the Secretary of State in respect of England and the Welsh Ministers in respect of Wales to ensure that there are plans in place, containing policies in relation to waste management. Reflecting the second paragraph of Article 11(1) of the Directive, Regulation 8(2)(b) requires those plans to include matters set out in Part 2 of Schedule 1, which themselves include (at paragraph 8):

> "Measures to promote high quality recycling including the setting up of separate collections of waste where technically, environmentally and economically practicable and appropriate to meet the necessary quality standards for the relevant recycling sectors."

27. Regulation 13, under the cross-heading "Duties in relation to collection of waste" provided:

> "(1) An establishment or undertaking which collects waste paper, metal, plastic or glass must, from 1st January 2015, take all such measures to ensure separate collection of that waste as are available to the establishment or undertaking in that capacity and are –
>
> (a) technically, environmentally and economically practicable; and
>
> (b) appropriate to meet the necessary quality standards for the relevant recycling sectors.
>
> (2) For the avoidance of doubt, co-mingled collection (being the collection together with each other but separately from other waste of waste streams intended for recycling with a view to subsequent separation by type and nature) is a form of separate collection.
>
> (3) Every waste collection authority must, when making arrangements for the collection of waste paper, metal, plastic and glass, ensure that those arrangements are by way of separate collection."

28. These proceedings, as originally formulated, claimed that that provision failed properly to transpose the obligations imposed by Article 11(1), in particular contending that "co-mingling" and "separation" were mutually exclusive concepts and Regulation 13(2) erred by defining one in terms of the other. On 16 August 2011, His Honour Judge Jarman QC sitting as a judge of this court gave permission to proceed on that claim.

29. However, the proceedings were then stayed while the Secretary of State and Welsh Ministers reconsidered Regulation 13. On 17 June 2012, the Waste (England and Wales) (Amendment) Regulations 2012 (SI 2012 No 1889) ("the 2012 Regulations")) were made. By Regulation 2, Regulation 13 of the 2011 Regulations was replaced with:

> "(1) This regulation applies from 1st January 2015.
>
> (2) Subject to paragraph (4), an establishment or undertaking which collects waste paper, metal, plastic or glass must do so by way of separate collection.
>
> (3) Subject to paragraph (4), every waste collection authority must, when making arrangements for the collection of waste paper, metal, plastic or glass, ensure that those arrangements are by way of separate collection.
>
> (4) The duties in this regulation apply where separate collection –
>
> > (a) is necessary to ensure that waste undergoes recovery operations in accordance with Articles 4 and 13 of the Waste Framework Directive and to facilitate or improve recovery; and
> >
> > (b) is technically, environmentally and economically practicable."

30. However, the Claimants consider that that amendment too fails properly to transpose the Waste Framework Directive. It is that challenge they now pursue.

31. Part 10 of the 2011 Regulations deals with enforcement. The assigned enforcement authority is the Environment Agency (Regulation 37). Enforcement is by way of compliance notice (Regulation 38), stop notice (Regulation 39) or restoration notice (Regulation 40), any of which may be the subject of appeal to the First-tier Tribunal (Regulation 41). Otherwise, a person who fails to comply with a notice is guilty of a criminal offence (Regulation 42).

The Main Issue: The Parties' Submissions

32. Any consideration of whether domestic regulations have properly transposed a directive, must begin with the obligations required to be transposed – particularly where, as here, there is dispute as to what those obligations might be.

33. The relevant obligation appears in the third paragraph of Article 11(1), namely that "by 2015 separate collection shall be set up for at least the following: paper, metal, plastic and glass". It is common ground, now, that "separate collection" here requires each of the four named types of waste to be separately collected. That obligation is limited by only one restriction, namely it is "Subject to Article 10(2)…". This case turns on what is imported by that phrase. In fact, the area of controversy is yet more focused, because, as I understand it, all parties agree that "Subject to Article 10(2)" means "Subject to the limitations on separate collection set out in Article 10(2)". The issue is therefore focused on what those limitations comprise.

34. Mr Lewis QC for the Defendants (supported by Mr Hart QC and Miss Steyn for the Interested Parties) submitted that Article 10(2) only requires separate collection of waste "Where necessary to comply with paragraph 1 and to facilitate or improve

recovery…", and "… if technically, environmentally and economically practicable…". "Paragraph 1" is of course a reference to Article 10(1), which requires Member States to take necessary measures to ensure that waste undergoes recovery operations, in accordance with Article 4 (i.e. that waste management is carried out in accordance with the waste hierarchy provisions) and Article 13 (i.e. waste management is carried out without endangering human health or harming the environment). Mr Lewis submitted that "where" imports the conditional – it means "if" – and, like the practicability limitation which follows, the clause sets out limitations on the requirement to collect separately, based upon necessity. Separate collection is therefore only required if such collection (i) is necessary to ensure waste undergoes recovery operations in accordance with the waste hierarchy and the requirements not to cause harm, and to facilitate or improve such operations; ("the necessity requirement"), and (ii) is technically, environmentally and economically practicable ("the practicability requirement"). Those limitations on the obligation separately to collect the four waste streams are replicated in Regulation 13(4) of the amended 2011 Regulations. Consequently, submitted Mr Lewis, the Regulations properly transpose the obligation imposed by the third paragraph of Article 11(1).

35. Mr Straker QC for the Claimants submitted that the reference to Article 10(2) does not import any necessity requirement, the only limitation imported being the practicability requirement.

36. His point of departure from Mr Lewis's analysis comes in respect of the meaning of the opening phrase of Article 10(2), "Where necessary to comply with paragraph 1 and to facilitate or improve recovery…". He submitted that those words perform two separate functions, neither of which limits the scope of the requirement to collect separately in the way suggested by Mr Lewis, or indeed at all. First, the words "Where necessary to comply with paragraph 1…" are clarificatory: Article 2 excludes certain types of waste (see paragraph 12 above), and this is merely a reminder that the requirements in respect of waste recovery are restricted to waste covered by the Directive. It were as though the phrase read: "Where [it is] necessary to comply with paragraph 1…". Second, "… to facilitate or improve recovery…" is not governed by the earlier words, "Where necessary…", at all. "… [T]o facilitate or improve recovery…" is purposive: it expresses the purpose behind the requirement to collect separately. It were as though the phrase read: "… and [in order to] facilitate or improve recovery…". Therefore, the only limitation on the requirement for separate collection of waste under Article 10(2) is the practicability limitation; and the following, entirely distinct requirement not to mix separately collected waste with other waste or other material with different properties.

37. On that interpretation, as the third paragraph of Article 11(2) only imports the same restrictions on the collection obligation as does Article 10(2), the requirement for the separate collection of paper, metal, plastic or glass from 2015 is consequently only subject to this exception: it is not required if, and only if, such collection is not technically, environmentally and economically practicable. By importing a further restriction on the obligation based on necessity in Regulation 13(4)(a), the amended 2011 Regulations fail properly to transpose the relevant obligation. Mr Straker conceded that, if the necessity requirement were included in the Directive as contended for by Mr Lewis, that requirement was transposed into that regulation. The central issue in this claim therefore turns solely on the interpretation of the Directive.

The Directive's Requirements in respect of Technical, Environmental and Economic Practicability

38. The main issue in this claim is therefore narrow: it concerns the proper interpretation of Article 11(1) of the Waste Framework Directive, and notably whether "Subject to Article 10(2)…" imports the necessity requirement as well as the practicability requirement. However, before I turn to that, it would be helpful first to clear the decks in respect of another issue relating to the requirements of the Directive raised on behalf of the Claimants.

39. It is common ground that the Directive only requires collection of waste separately, under the obligations in both Article 10(2) and the third paragraph of Article 11(1), where such collection is "technically, environmentally and economically practicable". There is no doubt that that limitation has been appropriately transposed by Regulation 13(4)(a) of the amended 2011 Regulations, which uses that precise phrase: but there was some debate before me as to what that obligation required the state to do. Whilst most of the discussion before me was focused on the main construction issue, the submissions by Mr Straker on this issue comprised an important pillar of the Claimants' case.

40. Mr Straker made two broad submissions, one legal and the other essentially factual.

41. First, as a matter of law, he submitted that the Waste Framework Directive requires the issue of whether separate collection was or was not technically, environmentally and economically practicable to be determined by a top-down decision by the United Kingdom Government. It was his initial submission that the Directive required a one-off decision, applicable across the whole of the United Kingdom (which linked into his second, factual submission that, on the evidence, that decision could only properly be that separate collection is practicable in that sense throughout the United Kingdom – and, certainly, throughout England and Wales, with which this claim is concerned – in all circumstances of collection, with which I deal below: see paragraphs 46 and following). During the course of the hearing, and particularly during his reply, he accepted, at least as an alternative submission, that the United Kingdom Government could consider and determine practicability in this sense by reference to specific areas, such as Wales or areas covered by particular local authorities. He even, at one point, appeared to concede that it would be open to the United Kingdom Government to leave the issue of practicability in Wales to the Welsh Ministers. However, he firmly and consistently submitted that, as a matter of law, the United Kingdom Government could not leave the decision as to whether separate collection is technically, environmentally and economically practicable to be determined by a local authority on the basis of particular collection circumstances; or by an agency such as the Environment Agency which the scheme of the 2011 Regulations makes responsible for enforcement through criminal proceedings following an assessment of such practicability by that agency.

42. I find this submission, in all of its alternative forms, uncompelling. Although obligations imposed by European Union treaties, regulations or directives are imposed upon Member States (to whom such provisions are directed), as a matter of general European Union law, it is well-settled that, in respect of European acts that are not directly applicable and consequently require transposing into domestic law, provided that the Community obligation in question is correctly and fully implemented, a

Member State has a broad discretion as to the choice of form and methods of transposition. The form may, for example, include:

i) a general measure setting out principles or legal context (R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform [2009] 3 CMLR 4 at paragraphs 41-3);

ii) measures adopted by regional or local authorities, reflecting European Union recognition of multi-level, devolved governance (Hansa Fleisch Ernst Mundt GmbH v Landrat des Kreises Schleswig-Flensburg [1992] ECR I-5567 at paragraph 23; and R (Horvath) v Secretary of State for Environment, Food and Rural Affairs [2009] ECR I-6355 at paragraphs 49-50); and

iii) a system whereby the directive obligation is enforced by criminal sanctions, policed by a body assigned that task by the Member State (see R (Morge) v Hampshire County Council [2011] UKSC 2 at [29]).

43. There is nothing in the Waste Framework Directive to suggest that it seeks to restrict the form and methods of transposition. To the contrary, in the usual way, it requires Member States to "take measures" (or, sometimes, "necessary measures" or "appropriate" measures) towards various aims and objectives, without qualification; and Article 40 requires a Member State to "bring into force the laws, regulations and administrative provisions necessary to comply with the Directive", again without restriction.

44. It was and is open to the United Kingdom to fulfil its obligations under the Directive by the system created by the 2011 Regulations, which allows a local authority to determine within its area whether separate collection is technically, environmentally and economically practicable; enforced by the Environment Agency, through compliance, stop and restoration notices, and ultimately by way of criminal proceedings (see paragraph 31 above). Given the need to consider the particular circumstances of collection, it is perfectly understandable that the primary decision-making function has been given to local authorities, which are uniquely placed to take into account local circumstances.

45. Nor does the Waste Framework Directive, as a matter of law, require a particular authority to make a decision with regard to practicability for the entire area it covers, or for any particular area. Whether separate collection is technically, environmentally and economically practicable depends upon a balancing exercise, that is both sophisticated and context-specific (see paragraph 19 above). The relevant factors will be different (and, certainly, will attract different weight) in a city centre from a sparsely populated countryside, and may well be different within the same city centre or within the same particular sparsely populated area. One can imagine idiosyncratic collection circumstances (perhaps remote households) where the exercise of assessing the practicability of separate collection will require an especially specific, if not unique, consideration of the relevant factors. As the Commission Guidance in respect of the Waste Framework Directive (referred to in paragraph 18 above) stresses (Notice, page 3):

> "In practical implementation and enforcement, specific circumstances and the context of the waste management situation, as well as the requirements of the legislation, will always need to be taken into account."

Indeed, as a matter of law, as I have indicated, the test for technical, environmental and economical practicability not only permits but demands consideration of the particular collection circumstances.

46. That brings me to Mr Straker's second submission, essentially factual but closely linked to his first, legal submission. Although he stressed he did not ask me to make any factual finding in relation to this, Mr Straker contended that the evidence before me showed that separate collection of the four streams of waste was technically, environmentally and economically practicable in respect of every waste producer, in all possible circumstances of collection throughout England and Wales. Therefore, whether the decision was required to be taken at United Kingdom Government level or at some other level, the Claimants assert that, whatever the circumstances, the decision-maker would inevitably be driven to conclude on the evidence that separate collection is practicable in the relevant sense in respect of all collections.

47. I appreciate that the Claimants have a strong belief in the benefits of recycling, and the advantages of separate collection of waste to that end. However, on any view, this is an extremely bold contention. I am not called upon to make any factual finding in respect of it – nor do I formally do so – but it would be remiss of me if I were not to mark that, in my view, the evidence before me simply does not bear out that assertion. Of course, all parties acknowledge that, in many circumstances, separate collection of waste is both practicable and appropriate. The Directive clearly encourages it, and the evidence is that, for some authorities, separate collection has proved practicable and both environmentally and economically efficient. On the basis of figures for 2010-11, 38% of local authorities in England and Wales even then separately collected all four waste streams in their area, and the proportion may possibly be even higher now. However, there is no evidence to support the very different proposition that it is technically, environmentally and economically practicable to collect separately the four types of waste in all collection circumstances throughout the United Kingdom, or at least throughout England and Wales.

48. Mr Straker relied upon reports from the Waste and Resources Action Programme ("WRAP"), a non-profit-making organisation funded by the Department for the Environment, Food and Rural Affairs: for example, in the Executive Summary of its June 2008 Report, "Kerbside Recycling: Indicative Costs and Performance", it is said that kerbside sort schemes show lower costs than single steam co-mingled schemes, and also offer the best prospect for achieving good quality materials by way of recycling. However, it is clear from a fair reading of that report as a whole, that the authors consider that the practicability and appropriateness of separate collection is dependent upon the collection circumstances. It says, for example, under the cross-heading "Flexible" (at paragraph 2.1.4):

> "A good scheme needs to demonstrate flexibility in a number of different areas:

> ▪ Flexible to meet local circumstances – No two areas within a local authority are the same due to varying socio-demographics leading to varying waste generation and composition, and to housing type and space available for storing recyclables containers. Therefore local authorities should recognise genuine differences in household circumstances and not force 'one size fits all' solutions. It may be necessary to vary systems to accommodate different local circumstances…"

49. He also relied upon a November 2011 Research Paper prepared by Dr Jane Beasley of Beasley Associates, "Overview of Household Waste Dry Recycling Collection Methods in the EU", to support the proposition that separate collection of dry recyclable material was both common in Europe, and (as I understood his submission) technically, environmentally and economically practicable at least throughout the United Kingdom. However, whilst that report, commissioned by the Claimants, sets out brief descriptions of the performance of dry waste collection methods in Member States, it does not support at all the proposition that separate collection is practicable throughout the United Kingdom. Indeed, it suggests that many Member States were, in November 2011, very far from utilising a system that generally involves the separate collection of the relevant waste streams or even actively engaged in the task of progressing to such a system by 2015. For example, Hungary and Romania appear to have had no separate collection kerbside, although in Hungary there was some facility to deposit paper waste and in Romania there was some system for refillable packaging. The report does no more than suggest that Member States delivering the highest level of compliance with the goal of delivering a recycling society generally have extensive source separation systems in place. But that is not compelling evidence that the only means of achieving such a society is by way of separate collection of waste in the case of all collection circumstances, let alone that such collection is practicable in all those circumstances. For the claim with which I have to deal, this report is, at best, of peripheral relevance.

50. Mr Straker relied upon witness statements which extolled the virtues of recycling and separate collection, and the advantages of such collection for those who, like the Claimants, process specific types of waste into recycled material and products. I need not refer in detail to that evidence. I do not seek to disparage the views held by these witnesses, strong and sincere, as to the advantages of separate collection: I accept that separate collection has a number of distinct advantages over co-mingled collection of waste. But those advantages are not determinative of the question as to whether separate collection is technically, environmentally and economically practicable: they are just one factor (albeit, perhaps, often an important factor) in the balancing exercise that that practicability test requires. In evidence, I also have witness statements from those engaged in local government, to the effect that separate collection is practicable in the Shire District Councils in Somerset (Clare Whelan Statement, 27 October 2011, paragraph 28(g)(i)), but not practicable (or not yet practicable) in Denbighshire County Council (Stephen Parker Statements, 27 October 2011 and 15 November 2012, the detail of which emphasises the complexity of the balancing exercise which engages local authorities) or in Blackburn with Darwen Borough Council (Clare Whelan Statement, 27 October 2011, paragraph 28(h)(i)). The views of these witnesses are no less strong and sincere, and they are backed by detailed analysis.

Whilst making no factual finding as to England and Wales as a whole, or any part of it including any particular local authority area, from the evidence it is quite clear that technical, environment and economic practicability in the sense used in the Directive and hence Regulations requires a sophisticated and complex context-specific balancing exercise that, depending on particular circumstances, is capable of resulting in different conclusions. As Miss Steyn submitted, the evidence simply does not support the Claimants' proposition that there is a single technically, environmentally and economically practicable waste collection method which is most effective in every set of collection circumstances throughout every area of England and Wales.

51. Therefore, in conclusion on these issues, the Directive, clearly and unarguably, leaves the decision as to practicability to the national authorities of each Member State: and the United Kingdom has left such decisions to local authorities, to be policed by the Environment Agency. They were, again clearly and unarguably, entitled to take that course. On the evidence before me, I am entirely unconvinced that separate collection of the four streams of waste is practicable in the Directive sense in all circumstances of collection throughout England and Wales. In any particular circumstances, whether separate collection is technically, environmentally and economically practicable is a matter for a context-specific decision by the relevant local authority and by the enforcement agency.

The Main Issue: Discussion

52. I now return to the main issue: the proper construction of the third paragraph of Article 11(1) as regards the circumstances in which the obligation to collect paper, metal, plastic and glass separately applies.

53. Whilst of course this issue of construction of a European measure requires a purposive approach, the starting point is the wording used in the third paragraph of Article 11(1) of the Directive. It is common ground that "Subject to Article 10(2)…" at the outset of that paragraph imports the same limitations on the requirement to collect separately that are found in Article 10(2). The issue is whether, as Mr Straker submitted, those limitations are limited to the practicability requirement; or whether, as Mr Lewis submitted, by virtue of the opening words of Article 10(2) ("Where necessary to comply with paragraph 1 and to facilitate or improve recovery…"), they also include the necessity requirement.

54. I accept that the drafting of Article 10(2) is not paradigm. I also accept that no interpretation of the opening words of the article fits as nicely as it might with the other provisions in which it lies. However, the construction promoted by Mr Straker does far more damage to the actual wording used than that suggested by Mr Lewis. Indeed, on the basis of simply an exegetical exercise on the wording of Articles 10 and 11, I do not consider that the words can properly bear the interpretation pressed by Mr Straker.

55. I have arrived at that conclusion for the following reasons.

    i) Mr Straker suggests that, in the opening of Article 10(2), "Where …" is used as part of a clarificatory clause, meaning: "Where, because the waste is covered by this Directive, it is necessary to comply with the requirement to take necessary measures to ensure waste undergoes recovery operation…".

However, (a) the scope of the Directive in respect of the waste covered is dealt with in Article 2, and Mr Straker was unable to say why it might have been considered necessary to repeat that limitation at all, or why it might have been considered necessary to have repeated that limitation in Article 10(2) in respect of recovery operations but not elsewhere; and (b) Mr Straker did not refer me to any other instance in the Directive of "where" being used in this way. In fact, "where" is used elsewhere in the relevant articles as Mr Lewis submits it is used here – to import a limitation on an obligation. The second paragraph of Article 11(1) provides:

> "Member States shall take measures to promote high quality recycling and, to this end, shall set up collections of waste *where* technically, environmentally and economically practicable and appropriate to meet the necessary quality standards for the relevant recycling sectors" (emphasis added).

As a matter of construction, it is overwhelmingly more likely that "Where…" in the opening of Article 10(2) has the same function: it is equivalent to "if".

ii) I also accept Mr Lewis's submission that "Where necessary…" governs both "to comply with paragraph 1" and "to facilitate or improve recovery". There is no comma after the first part of the phrase, as there might (and should) be if we were moving from a clarification (or limitation) clause, to a purposive clause: but, in any event, where the draftsman wished to indicate a purposive clause elsewhere, he does not appear to have been reticent to include the words "in order to". Examples abound, but one can be found in the opening words of Article 11(2). Furthermore, whilst I do not consider that support for this interpretation is needed from any other language versions, it seems to me that the French version of the opening to Article 10(2) is, as Mr Hart submitted, in fact supportive:

> "Lorsque cela est nécessaire *pour* le respect du paragraphe 1 et *pour* faciliter ou améliorer la valorisation…" (emphasis added).

iii) I concede that importing those various limitations on the obligation separately to collect paper, metal, plastic and glass in the third paragraph of Article 11(1) could have been done more elegantly than by way of reference back to the limitations on separate collection in Article 10(2) – although, given that recycling (covered by Article 11) is a subset of recovery (Article 10), there is some rationale for incorporating requirements from the latter into the former – but, if the only limitation on the obligation was (as Mr Straker submits) technical, environmental and economic practicability, the draftsman could have been expected simply to have used that phrase, as he has done in the second paragraph of Article 11(1). To import that limitation alone by reference back to Article 10(2) would be a particularly clumsy, if not obtuse, device. I do not regard the importation from Article 10(2) of the separate obligation not to re-mix to be of any moment – it is not a limitation on separate collection, but rather a restriction on re-mixing waste once separately collected (a somewhat different thing). Although this does not assist any party's

contentions in this claim, it is noted that the restriction on re-mixing is not imported or set out in respect of the obligation to collect separately in the second paragraph of Article 11(1).

iv) I can deal briefly with one further submission made by Mr Straker. He submitted that, if, before an obligation to collect the four waste streams separately arises, such collection must be necessary to ensure the waste hierarchy is respected (Article 4) and that human health and the environment is not harmed (Article 13) and to facilitate and improve recovery, then separate collection is unlikely to be required much, if at all, in practice: for example, there would be few occasions where it is required to avoid harm to human health. That, he submitted, could not have been the intention of the Directive. However, that mischaracterises Mr Lewis's submission, which was that, before the obligation to collect separately under Article 11(1) arises, such collection must be necessary to ensure that waste undergoes recovery operations and (disjunctive here) to facilitate or improve such operations, any operations undergone being required to be performed in accordance with the waste hierarchy provisions and Article 13. That interpretation does not mean that separate collection is not required merely because it can be shown that it is not necessary for the protection of human health.

56. Consequently, I accept Mr Lewis's simple, but compelling, submission on the meaning of the words used. The opening words of Article 10(2) mean what they say: waste shall be collected separately, where such collection is necessary to comply with Article 10(1) (i.e. to ensure that the waste undergoes recovery operations, and to facilitate or improve recovery). The recovery operations that are to be ensured must, as the provision says, be performed in accordance with Articles 4 and 13. They require the correct priority be given to recovery, subject to Directive's overarching aim of delivering "the best environmental outcome". Therefore, on the words used in the Directive itself, the clear meaning appears to be that, in addition to the practicability requirement, before an obligation to collect the four streams of waste separately arises, the necessity requirement also has to be met.

57. How does that interpretation stand up when measured against the purposes and objectives of the Directive? Given that that is the clear and unambiguous meaning of the words used, it is in my view unsurprising that that interpretation is in line with the principles, aims and objectives of the Directive – and is, certainly, far more consistent with them than is the construction put forward on behalf of the Claimants.

58. In addition to the wording used in Articles 10 and 11, Mr Straker relied upon the following.

i) He submitted that it was open to the European Parliament and Council to determine that separate collection was necessary in furtherance of the Directive's aims, subject only to the practicability requirement. He submitted that it was unsurprising that they had made that determination: on the evidence, it was clear that it was necessary in all circumstances of collection throughout the Union.

ii) He relied upon Paragraph 4.4 of the Commission Guidance (quoted at paragraph 19 above), in which it states:

> "The combination of terms 'technically, environmentally and economically practicable' describes the preconditions for Member States being, to varying extents, obliged to set up separate collection under Articles 10 and 11…".

He submitted that that suggested that these were the only preconditions for the obligations under Article 10 and 11 to collect waste separately. In support of that proposition, he also relied upon Paragraph 4.3.3 of the Guidance, which states:

> "… [The third paragraph of Article 11(1)] contains a reference to Article 10(2)…, and by this to the condition that the separate collection of these waste streams is "technically, environmentally and economically practicable…. The viability of separate collection of the dry fractions from household waste has been demonstrated by longstanding practice and experience in many Member States. Therefore, separate collection of these waste streams should in principle also be introduced in the remaining Member States, provided the above mentioned preconditions are met."

iii) Even without the necessity requirement, Mr Straker submitted that "necessity" still played a part in the restriction of the obligation to collect separately; because that obligation was limited by the practicability requirement, and one factor within that balancing exercise was the extent to which separate collection was necessary for the achievement of the aims and objectives of the Directive, which include the need for waste recovery and recycling in line with the waste hierarchy.

iv) The second paragraph of Article 11(1) imposes a general obligation to collect waste separately. The third paragraph imposes a specific obligation to collect paper, metal, plastic and glass separately. Both obligations are restricted by the practicability requirement. The general obligation is otherwise only restricted by the requirement that the obligation is only imposed where (here, clearly meaning "if") "appropriate to meet the necessary quality standards for the relevant recycling sectors". There was some debate before me as to what is meant by "necessary quality standards", and whether those standards are the same as, or different from, the standards implicit in the phrase "high quality recycling" used earlier in the paragraph. That is a debate with which I am not concerned: it does not directly impact upon the issues I have to decide. However, Mr Straker submitted that it would be curious, and inherently unlikely, that the limitations on the specific obligation were greater than those on the general obligation, as (he said) would be the case of Mr Lewis's construction.

59. I will deal with each of those submissions in due course. In some, there is a degree of force. However, they are swept away by factors in favour of the construction proposed by Mr Lewis. Five matters are worthy of particular note.

60. First, the primary objective of the Waste Framework Directive is not the separate collection of waste: it is the protection of the environment and human health (see Recital (49)). Separate collection is, at most, a means to better recovery – which is itself a means to the achievement of that primary objective. Insofar as prioritising recycling over disposal and some other forms of recovery is an objective of the Directive, it is of course subsidiary and subservient to the higher objective of "the best environmental outcome" (Article 4(2): see paragraph 15 above). By Article 5(3) of the Treaty on European Union, which sets out the principle of subsidiarity:

> "… [T]he Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

Article 5(4) sets out the principle of proportionality, thus:

> "… [T]he content and form of Union actions shall not exceed what is necessary to achieve the objectives of the Treaties."

The European Court has consistently held that that principle "requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question" (R v Ministry of Agriculture, Fisheries and Food ex parte National Farmers Union [1998] 2 CMLR 1125 at paragraph 96). Those principles are expressly recognised in Recital (49) of the Waste Framework Directive, which confirms the primary objective of the Directive, and expressly states that the Directive does not go beyond what is necessary in order to achieve that objective. In the light of those principles, and their express recognition in the Directive, it would be very strange indeed if the European Parliament and Council had determined in November 2008 that it was necessary for the four relevant streams of waste to be separately collected throughout the Union.

61. Nor, second, do I consider that the fact that the practicability requirement to an extent imports proportionality is an answer to the point. Where, in particular circumstances, separate collection does not lead to a better environmental and human health outcome, it is not necessary for the objective of the Directive. There is of course overlap between the necessity and practicability requirements – both of which involve exercises in judgment on the basis of factors, some of which are common – but that does not mean that the practicability test fully encompasses necessity. Insofar as it did, that would not of course assist the Claimants' ultimate cause. However, they are analytically distinct – as paragraph 4.3.4 of the Commission's Guidance (with which I deal below: see paragraph 63 below) makes clear.

62. Third, it would be contrary to principle, and fundamentally incongruous, if the Directive were to require separate collection of each of the four waste streams, if such collection were not necessary to achieve the higher objectives of the Directive, such as the protection of the environment and human health. It might be less startling, if, as Mr Straker contended, the evidence was such that it was clear that separate collection is necessary to achieve that objective in every circumstance of collection in the Union. But, as with the contention that I could safely assume that separate

collection would satisfy the practicability requirement in all circumstances of collection in England and Wales, the evidence before me does not in my view begin to justify the assertion that such collection is in all circumstances necessary for the achievement of the Directive's objectives or any of them. Far from it. There is a recognition from the highest level of European act to the evidence of particular circumstances before me that the appropriateness of separate collection will be context-dependent, i.e. dependent upon the circumstances of the specific collection. For example:

i) Article 191 of the Treaty on the Functioning of the European Union recognises that high level of protection of the environment and human health must "[take] into account the diversity of situations in the various regions of the Union" (Article 191(2), quoted in paragraph 6 above).

ii) The Waste Framework Directive itself acknowledges, specifically in relation to targets for re-use and recycling, that:

> "Member States maintain different approaches to the collection of household wastes and wastes of a similar nature and composition. It is therefore appropriate that such targets take account of the different collection systems in different Member States " (Recital (41).

iii) Article 4(2) of the Directive allows Member States to depart from the waste hierarchy if justified by "life-cycle thinking" in the context of "the best overall environmental outcome". Article 13 provides that national authorities shall take necessary measures to ensure that waste management is carried out without endangering human health or the environment: but even Article 13 is not unconditional. It allows national authorities to permit disposal or recovery operations even when they consider they will harm human health or the environment, provided there is sufficient reason to do so (Ardley Against Incineration v Secretary of State for Communities and Local Government [2011] EWHC 2230 (Admin). Thus, Article 10(1), which refers to Article 4 and 13, inherently grants national authorities a wide discretion as to the measures taken to ensure that waste undergoes recovery operations in accordance with the specified requirements of those two articles.

iv) The Commission envisages circumstances in which co-mingling will be appropriate in terms of the Directive (see paragraph 63 below).

v) There is evidence from local councils as to the need for separate collection, and where, at least arguably, recovery by way of separate collection would be detrimental to the overall environmental outcome, because of the higher carbon emissions in such collection system and/or the amount of aggregate recyclables collected may in fact be considerably higher if streams are co-mingled, to the extent that any potentially recyclable waste that has to be disposed of because of (e.g.) contamination is far outweighed by the saving in waste disposal overall. This evidence goes to both practicability and necessity.

vi) But there is also evidence from the Claimants themselves. In the response of the Fourth Defendant (D S Smith Paper Limited) to the consultation on

amending Regulation 13 of the 2011 Regulations, they said that their preference would be for the co-mingled collection of plastic bottles and cans (potentially to be extended to all domestic plastics and cans), because plastic bottles and cans can be effectively and economically sorted. In their response, the Fifth Defendant (Novelis UK Limited), stressed that they were "not opposed to co-mingling per se"; and their concern was over the usability of secondary resources. It appears to be common ground that, whilst glass is a well-recognised potential contaminant, metal and plastic can be separated at a stage later than kerb-side without any significant contamination or other relevant disadvantage. If the Claimants' construction of the Directive were true, however, subject only to the practicability requirement, it would require the separate collection of such steams of waste even if such collection were unnecessary for the achievement of any Directive objective.

63. Fourth, Mr Straker relied upon an extract from paragraph 4.4 of the Commission's Guidance. However, that extract cannot be taken out of context: the Guidance has to be read as a whole. Paragraph 4.3.4 makes clear beyond doubt that the Commission considers that "Subject to Article 10(2)…" means subject to both necessity and practicability requirements. Paragraph 4.3.4 states, under the cross-heading "Possibility of Co-Mingling":

> "The [Waste Framework Directive] does not include an express statement covering the co-mingled collection of different recyclable waste streams (as one co-mingled steam).
>
> As a starting point, it should be borne in mind that in accordance with [the third paragraph of] Article 11(1)…, and subject to the conditions set out in this provision, there is an obligation to have in place by 2015 separate collection of paper, metal, plastic and glass. Separate collection is defined as waste-stream-specific separate collection….
>
> On the other hand, setting up a separate collection is also subject to the principle of proportionality (*subject to Article 10(2) [of the Directive]: necessity and technical, environmental and economic practicability*). Considering the aim of separate collection is high-quality recycling, the introduction of a separate collection system is not necessary if the aim of high-quality recycling can be achieved just as well with a form of co-mingled collection.
>
> So, co-mingled collection of more than one single waste streams may be accepted as meeting the requirement for separate collection, but the benchmark of 'high-quality recycling' of separately collected single waste streams has to be examined; if subsequent separation can achieve high-quality recycling similar to that achieved with separate collection, then co-mingling would be in line with Article 11 [of the Directive] and the principles of waste hierarchy. Practically, this usually excludes co-mingled collection of bio-waste and other 'wet' waste fractions with dry fractions such as e.g. paper. On the

> other hand, subject to available separation technology, the co-mingled collection of certain dry recyclables (e.g. metal and plastic) should be possible, if these materials are being separated to high quality standards in a subsequent treatment process." (emphasis added).

64. While this paragraph also refers to the limitation in the second paragraph of Article 11(1) that the general requirement to set up separate collections of waste to promote high quality recycling is limited to circumstances in which such collection is "appropriate to meet the necessary quality standards for relevant recycling sectors", it makes clear – and clear beyond doubt – that the Commission considers that the obligation to collect the four streams of waste separately only arises when the necessity and practicability requirements in Article 10(2) are met; and that reference to "conditions" for the obligation to apply, is a reference to both the necessity and practicability requirements (cf Mr Straker's submission to the contrary, paragraph 58(ii) above). Mr Straker accepted during the course of debate that this is what the Commission Guidance said and meant; but, he submitted, it was simply wrong, because co-mingling of the four streams of waste had no part to play in waste collection outside the practicability requirement. The Director-General had, he said, fundamentally misunderstood the limitations on the obligation imposed upon Member States by the third paragraph of Article 11(3); and, of course, the Guidance is not legally binding. In my view, as the Director-General was responsible within the Commission for the Directive, that would be error would be concerning enough: but, if Mr Straker's interpretation of the provisions is right, it is in fact far worse than a simple, if fundamental, misunderstanding of legislation the Director-General himself promoted. It appears clear from the Guidance that it was the intention of the Director-General (and hence the Commission) that the obligation should be restricted by both the necessity and the practicability requirements; and, if Mr Straker's construction were true, then the wording used in the Directive singularly failed to effect that intention. For the reasons I have already given, I consider that the wording used *did* effect that intention. But, in any event, the Commission's Guidance is very strong support for Mr Lewis's interpretation of the relevant provisions; and, even given the limits on such Guidance, it comes as some considerable comfort that the construction of the Directive I favour appears to implement (rather than defeat) the intention of the Commission who commissioned it.

65. Fifth, I do not consider that the relationship between the general requirement to set up separate collections of waste in the second paragraph of Article 11(1), and the specific requirement in the third paragraph, is anything more than peripheral to the issues in this claim, which turns on the scope of the limitation by reference to Article 10(2). However, the obvious difference between the provisions is that, unlike the general obligation in the second paragraph, which is already in force, the specific obligation in the third paragraph is subject to a time limit for compliance: "… by 2015…". As I have indicated, the general obligation in the second paragraph is reflected in Regulation 8(2)(b) of, and Paragraph 8 of Part 2 of Schedule 1 to, the 2011 Regulations (see paragraph 26 above).

The Main Issue: Conclusion

66. For all of those reasons, with respect to the arguments of Mr Straker to the contrary, I find that the interpretation of the third paragraph of Article 11(1) of the Waste

Framework Directive is unambiguously clear: the obligation to set up separate collection of paper, metal, plastic and glass from 2015 is restricted by both the practicability and necessity requirements that also restrict the obligation in Article 10(2) to collect separately for the purposes of recovery. That is also generally concordant with the objectives and aims of the Directive, and general European law principles.

67. Mr Straker properly conceded that, if the necessity requirement was incorporated in to the third paragraph of Article 11(1), then that requirement was properly transposed by Regulation 13(4)(a).

68. Therefore, I conclude that, so far as the Article 11(1) obligation is concerned, that has been properly transposed into domestic law by the amended Regulation 13 of the 2011 Regulations.

The Failure Properly to Consult

69. At the hearing before me, Mr Straker said that the Claimants did not pursue their alternative claim based on a failure properly to consult. I need not say anything further about it, save to say that the course taken by the Claimants in relation to that alternative claim appears to me to be appropriate, and indeed wise.

The Application to Refer Issues to the Court of Justice of the European Union

70. The Claimants contend that, if I am not minded to find in their favour on the point of interpretation, then I should refer appropriate questions as to the proper interpretation of Article 10 and 11 of the Waste Framework Directive to the Court of Justice of the European Union, under Article 267 of the Treaty on the Functioning of the European Union and CPR Rule 68.2(1). That is the subject of a specific application.

71. It will be clear from the above that I do not consider that any reference is necessary or appropriate. In my judgment, the interpretation of those Articles 10 and 11 is clear; and clear to the extent that the Claimants' argument for a different interpretation could not be accepted on any conventional basis of reasoning.

72. I therefore refuse that application

Conclusion

73. For the reasons I have given, I dismiss this claim.