

EU waste shipment legislation: one year on



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IN AUGUST 2006 A SHIPMENT OF TOXIC WASTE FROM a Panamanian flagged ship, the Probo Koala, was unloaded in Abidjan in the Ivory Coast. The Probo Koala was chartered by Trafigura Ltd, a subsidiary of the Dutch trading company Trafigura Beheer BV. After the waste was discharged, people living in the vicinity of the discharge sites began to suffer from a range of illnesses. Reports vary on the number of casualties but at least ten people have died and many thousands have needed treatment. In November 2006 a class action was filed at the High Court in London over the alleged dumping of toxic waste from the Probo Koala. The applicants alleged that the waste was hazardous, making the shipment illegal. Trafigura denies this allegation, claiming that the waste was standard waste from onboard ship operations. The company is further alleged to have shipped the untreated chemical waste to the Ivory Coast despite knowing that there were no facilities to treat the waste at its destination. Again, Trafigura denies the allegation, maintaining that it had entrusted the waste to an Ivorian disposal company. The trial is due to take place in 2009.

It is high-profile events such as the Trafigura case that have led to pressure to revise the system regulating the transfrontier shipment of waste. The Trafigura case has highlighted the problems in the previous regime, demonstrated how complex it was and the weaknesses in the enforcement measures in EU member states.

One year after the entry into force of the new European Community (EC) regulation – Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste (the 2006 Regulation), which came into force on 12 July 2007) – this article looks at its impact and examines its objectives and measures. The regime and its so-called simplification actually results in an increase in reporting and notification requirements, which have the potential to catch out a number of companies involved in the shipment transaction (including producers, dealers and operators of waste facilities). Breaches are criminal offences and care needs to be taken.

BACKGROUND

Every year about two billion tonnes of waste are produced in the EU member states and this figure is rising. The quantities of hazardous waste in the EU also continue to increase year on year. It is estimated that at present over 40 million tonnes of hazardous waste is generated in the EU per year. While most of this is treated firstly within member states, significant quantities are being exported to non-member states.

In 1984 the EC introduced a Directive (84/631/EEC) that aimed to harmonise for the first time the control procedures for the shipment of hazardous waste within the Community. The Directive was triggered by a series of cases where toxic waste from Europe was exported and dumped in developing countries.

International shipments and movements of hazardous waste and other waste are governed by a framework established under the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal. This international convention obliges parties to minimise the generation of such waste and ensure its environmentally sound management. A further amendment to the Basel Convention in 1995 prohibited the transboundary movement of hazardous waste to states that are not members of the Organisation for Economic Co-operation and Development (OECD), the EC and Liechtenstein. The EC incorporated the principles of the international conventions of the 1990s into Community law.

Since the 1990s various amendments and changes have resulted in the need for revised EC legislation on shipments of waste. The 2006 Regulation was introduced in July 2007. While dealing with amendments to the international conventions the EC sought in the 2006 Regulation to reinforce, simplify and specify the procedures for controlling waste shipments.

THE NEW 2007 RULES

The new rules introduced by the 2006 Regulation have applied in the UK (under the Transfrontier Shipment of Waste Regulations 2007), as in all EU member states, since 12 July 2007. Both imports and exports of waste to and from the UK are subject to a range of different regulatory controls. If the proper procedures are not followed, there is a risk of prosecution.

Scope

The 2006 Regulation applies to shipments of waste that come into and out of the EU. Various categories of waste are covered (defined in broad terms by Directive 2006/12/EC). However, this regime does not apply to certain situations, such as the shipment of radioactive waste and the import of waste into the EU due to emergency situations.

Identifying procedures and requirements

It is important to be aware of the two waste shipment control procedures that apply:

- The procedure for prior written notification and consent. This applies to all shipments of waste intended for disposal as well as hazardous and

semi-hazardous waste for recovery (known as notification controls);

- The simplified procedure in which shipments are accompanied by certain information. This applies to non-hazardous waste intended for recovery (known as green list controls).

Anyone involved in the shipment (import or export) of waste needs to have the following three variables in their mind:

- the type of waste involved;
- the type of operation, whether it is for disposal or for recovery; and
- the parties involved.

WASTES FOR EXPORT

Type of waste being exported

It is very important to correctly classify the waste. Incorrect classification could lead to the inappropriate control procedures being followed and consequently to an illegal shipment that will lead to sanctions.

The 2006 Regulation distinguishes between three different categories of waste (corresponding to Annexes III, IV and V):

- Annex III specifies the types of non-hazardous waste (including, for example, wastes containing metals, such as electronic scrap). In this case, green list controls apply, which means that waste needs to be accompanied by a specific form (as set out in Annex VII), to be signed by the party that ships the waste and the party that receives it. In addition, a contract must be drawn up to reflect the transaction.
- Annex IV describes the different hazardous waste types (and some non-hazardous wastes that are subject to stricter control) that are subject to notification controls (including, for example, wastes such as hydraulic fluids and brake fluids). These controls are more rigorous. Notification and movement documents are required, a contract must be drawn up between the notifier and the consignee and a financial guarantee or equivalent insurance must be set up.
- Annex V lists hazardous wastes that cannot, as a general rule, be exported (including, for example, waste asbestos), although there are exceptions.

Type of operation – recovery or disposal

This assessment needs to be made at the first possible occasion. Waste for disposal includes

operations such as deposits on land (ie landfill) and incineration. Waste for recovery includes most recycling operations. Here the control to be applied depends on the type of waste being exported and the 'status' of the country where the recovery takes place.

Parties involved in the export of waste

- *Exports for disposal.* The general rule is that exports for disposal are only allowed to European Free Trade Association (EFTA) countries that are also party to the Basel Convention. This rule therefore applies to all four EFTA countries: Iceland, Liechtenstein, Norway and Switzerland. Even when an export is authorised outside the EFTA countries, they are always subject to notification controls.
- *Exports for recovery.* In these circumstances, the situation varies. If recovery takes place in other EU member states it is generally allowed and will be subject to either notification or green list controls depending on the type of waste and the particular EU country where the recovery is to take place.

If recovery takes place in OECD countries outside the EU, it is generally allowed and will be subject to either notification or green list controls depending on the type of waste being exported.

For recovery in a non-OECD country outside the EU, the rules prohibit exporting almost all types of hazardous waste to these countries. Where export is not prohibited, the controls depend upon the type of waste being moved and which particular non-OECD country the waste is being moved to for recovery. The EU has dealt with this issue by producing a new Regulation (No 1418/2007) which sets out the control procedures applicable according to each country. This has itself been amended by a further EC Regulation (No 740/2008) adopted on 29 July 2008.

So, in summary it is prohibited to export:

- wastes for disposal in general outside EFTA countries. Exports authorised outside EFTA are always subject to notification controls;
- hazardous waste (both for disposal and recovery) to economically developing countries (ie countries that are outside the OECD);
- some types of non-hazardous waste to certain non-OECD countries outside the EU.

WASTES BEING IMPORTED

Type of waste to be imported

As with wastes for export, it is important to correctly classify the waste, otherwise there is a risk that the inappropriate control procedures could be followed leading to an illegal shipment, in turn leading to sanctions. As with exports, the first reference point should be the three Annexes to the 2006 Regulation.

Recovery or disposal operations

As with wastes for export, it is important to assess at the first opportunity whether the waste is subject to a recovery or disposal operation because the procedural requirements will vary.

Parties involved in the import of waste

Import of waste for disposal is generally prohibited. The only exceptions are when a country is a party to the Basel Convention or where there are bilateral agreements in place between the parties. Even when import is allowed, the notification controls apply.

The import of waste for recovery is generally allowed and will be subject to either notification or green list controls depending on the type of waste being imported:

- Notification controls apply for wastes listed in Annex IV to the 2006 Regulation.
- Green list controls normally apply for wastes listed in Annex III.

So in summary:

- Imports for disposal are, apart from some very restricted exceptions, prohibited.
- Imports of hazardous waste for recovery from any country are potentially permitted under notification controls.
- Imports of some types of non-hazardous waste for recovery are allowed.
- Where exceptional circumstances apply, the import of any type of waste to be disposed of may be permitted.

- Some imports of certain types of non-hazardous waste to be recovered are subject to green list controls, such as imports of clean waste paper for recycling.

GENERAL OBLIGATIONS

Any party involved in the shipment process must ensure that they take all steps necessary to ensure that waste is moved, recovered or disposed of in an environmentally sound manner. It is also important for all parties involved in the shipment process to complete and keep all relevant documentation, which varies with the procedure. All documents relating to a notified shipment must be kept for three years by all parties, as authorities can ask for copies of documents or information on the shipment. In addition, any waste importer and exporter must:

- be absolutely clear in which category their waste fits;
- know where the waste is going and to which facility;
- be sure that the party responsible at the destination facility has the capacity to deal with the waste in an environmentally sound manner.

Obligations are also imposed on the operator of a waste facility, who is required to:

- comply with the conditions imposed by the competent authority;
- be the holder, if in the UK, of a relevant permit or exemption;
- retain the movement document that accompanies the waste; and
- confirm when the waste has been received.

THE CONSEQUENCES OF FAILING TO COMPLY

Breaches of the requirements set out in the 2006 Regulation can be costly for the parties involved. If a shipment cannot be completed because it is illegal, it must be returned to the notifier, who will be responsible for the costs of storage or take-back of the waste, including transport, recovery or disposal.

Member states are also entitled to take enforcement action against those who are suspected of being involved in the illegal shipment of waste.

Member states can establish procedures to include inspections and spot checks at any stage during the shipment. Checks on shipments must include the inspection of documents, confirmation of

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identity and, when appropriate, a physical inspection of the waste.

In the UK, there are a number of offences set out including offences in relation to the obstruction of those in authority seeking to enforce the rules, those falsely obtaining consent to a shipment or approval of a financial guarantee or equivalent insurance. A person guilty of an offence under these regulations is liable:

- on summary conviction, to a fine not exceeding the statutory maximum, or imprisonment not exceeding three months, or both;
- on conviction on indictment, to a fine, or imprisonment for a term not exceeding two years, or both.

CONCLUSION

In theory, the 2006 Regulation provides a clearer, simpler legal framework, although as we have demonstrated, there is a significant increase in reporting and notification requirements. It is

important to be aware of all the obligations in terms of reporting and keeping documents. The new Regulation also extends responsibility to different parties for the first time.

The UK Environment Agency has stated that the main focus on enforcement will be to target the export of waste that is masquerading as 'green list waste' or as 'non-waste' and the export of waste to countries that have not agreed to accept it. Any waste importer and exporter must be absolutely clear in which category their waste fits and must know where the waste is going, to which waste facility, and whether the facility responsible can deal with the waste in an environmentally sound manner. Likewise all relevant documentation must be completed and kept. The knock-on effect of cases such as *Trafigura* on all exporters and importers, no matter what size, has been dramatic.

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