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Contributions to the further development of the EC Waste Shipment Regulation

Final report

German Environment Agency

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Contributions to the further development of the EC Waste Shipment Regulation

Final report

by

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Abstract: Contributions to the further development of the EC Waste Shipment Regulation

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste (Waste Shipment Regulation – WSR) transposes the requirements of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal as well as OECD Decision C (2001) 107 into Union law. Following international law, the WSR prohibits certain transboundary shipments of waste and provides a procedural framework with two applicable types of procedures, which are to be used depending on the waste concerned, the planned method of waste management and the states involved.

By 31 December 2020, the European Commission shall carry out a review of the WSR and, if appropriate, submit a legislative proposal. In this context, the Commission will also assess inspection plans and their effectiveness in combating illegal shipments. Against this background, the aim of the present project was to summarise and evaluate the implementation of the WSR in Germany with a focus on

1. identifying existing obstacles to an improved combat against illegal shipments and developing corresponding proposals;

2. making suggestions for more efficient enforcement;

3. outlining starting points for strengthening circular economy.

In this report, inspection plans adopted by the German federal states (Bundesländer) in accordance with Article 50(2a) of the WSR are assessed. Furthermore, relevant topics relating to the application of the WSR are analysed and suggestions for measures are developed.

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List of abbreviations

AbfVerbrG	Abfallverbringungsgesetz [German Waste Shipment Act]
BAG	Bundesamt für Güterverkehr [German Federal Office for Goods Transport]
BB	Brandenburg
BC	Basel Convention
BDE	Bundesverband der Deutschen Entsorgungswirtschaft [Federal Association of the German Waste Management Industry]
BGBl.	Bundesgesetzblatt [German Federal Law Gazette]
BImSchG	Bundes-Immissionsschutzgesetz [German Federal Immission Protection Act]
bvse	Bundesverband Sekundärrohstoffe und Entsorgung [German Federal Association for Secondary Raw Materials and Waste Management]
BW	Baden-Württemberg
BY	Bavaria
CFC	Chlorofluorocarbon
COM	(European) Commission
eANV	Elektronisches Abfallnachweisverfahren [electronic waste records procedure]
EC	European Community

ECJ	Court of Justice of the European Union
EEC	European Economic Community
EU	European Union
HE	Hesse
HH	Hamburg
IED	Industrial Emissions Directive
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
KrWG	Kreislaufwirtschaftsgesetz [German Circular Economy Act]
LAGA	Länderarbeitsgemeinschaft Abfall [Working Group of the German Federal States on Waste]
MV	Mecklenburg-Western Pomerania
NI	Lower Saxony
NW	North Rhine-Westphalia
OECD	Organization for Economic Cooperation and Development
OJ	Official Journal
Para.	Paragraph
Para.	Paragraph
PRTR	Pollutant Release and Transfer Register
RP	Rhineland-Palatinate
SH	Schleswig-Holstein
SL	Saarland
SN	Saxony
TFEU	Treaty on the Functioning of the European Union
TH	Thuringia
UBA	Umweltbundesamt
WEEE	Waste electrical and electronic equipment
WFD	Waste Framework Directive
WSR	Waste Shipment Regulation

List of laws

Abbreviation	Full citation
AbfVerbrG	Abfallverbringungsgesetz [German Waste Shipment Act] of 19 July 2007 (BGBl. I p. 1462), last amended by Article 33 of the Act of 20 November 2019 (BGBl. I p. 1626).
Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 (BGBl. 1994 II p. 2704).
BImSchG	Bundes-Immissionsschutzgesetz [German Federal Immission Protection Act] as published on 17 May 2013 (BGBl. I p. 1274), last amended by Article 1 of the Act of 8 April 2019 (BGBl. I p. 432).
KrWG	Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträglichen Bewirtschaftung von Abfällen [German Act on Circular Economy and Safeguarding the Environmentally Compatible Management of Waste] (Kreislaufwirtschaftsgesetz [German Circular Economy Act]) of 24 February 2012 (BGBl. I p. 212), last amended by Article 2(9) of the Act of 20 July 2017 (BGBl. I p. 2808).
OECD Decision	Council Decision C(2001) 107/FINAL on the Control of Transboundary Movements of Wastes Destined for Recovery Operations.
TFEU	Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union C 115 of 9 May 2008, p. 47, last amended by the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (Official Journal of the European Union L 112/21 of 24 April 2012) with effect from 1 July 2013.
WFD	Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Waste Framework Directive) (OJ L 312 of 22 November 2008, p. 3), last amended by Directive (EU) 2018/851 (OJ L 159, p. 109).
WSR	Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste (WSR) (OJ L 190 of 12 July 2006, p. 1, L 318 of 28 November 2008, p. 15, L 334 of 13 December 2013, p. 46, L 277 of 22 October 2015, p. 61), last amended by Regulation (EU) No 2015/2002 (OJ L 294 of 11 November 2015, p. 1).

Summary

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste (Waste Shipment Regulation − WSR) transposes the requirements of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal as well as OECD Decision C (2001) 107 into Union law.

Following international law, the WSR prohibits certain transboundary shipments of waste and provides a procedural framework with two applicable types of procedures, which are to be used depending on the waste concerned, the planned method of waste management and the states involved.

The application and implementation of the WSR poses specific challenges for economic operators and authorities. The classification of waste in the annexes to the WSR (which is crucial for determining the applicable procedure) is complex. Difficulties, definitional issues and the divergent application of the WSR in practice, as well as the varied interpretation and application of other legislation on waste by authorities in the Member States, are particularly apparent in transboundary scenarios. Relevant topics in this context include the application and implementation of the WSR in relation to illegal shipments, the cooperation between authorities in respect of notification procedures and inspections, and existing barriers to enforcement. Effective enforcement of the WSR requires not only the co-operation of the authorities of the participating states but, in the Federal Republic of Germany specifically, the cooperation of the authorities of different German federal states with each other, as well as with the customs authorities and possibly other supervisory authorities (e.g. German Federal Office for Goods Transport or the police). Since 2017, the German federal states are obliged by Article 50(2a) of the WSR to establish inspection plans with extensive content and documentation requirements. These inspection plans must be reviewed at least every three years and, where appropriate, updated.

The WSR also forms part of the general European and national circular economy framework, which aims to increase the use of waste as a secondary raw material (key words: waste hierarchy, resource policy and “recycling society”).

By 31 December 2020, the European Commission shall carry out a review of the WSR and, if appropriate, submit a legislative proposal. In this context, the Commission will also assess inspection plans and their effectiveness in combating illegal shipments.

1. With that in mind, the aim of this project is to summarise and evaluate the enforcement of the WSR in Germany, which includes:

2. identifying existing barriers which impede a more efficient fight against illegal shipments and submitting appropriate proposals (proposed modifications to the WSR and accompanying or supplementary measures, such as Correspondents’ Guidelines).

3. submitting appropriate proposals for more efficient enforcement (proposed modifications to the WSR and accompanying or supplementary measures, such as Correspondents’ Guidelines),
outlining starting points for strengthening circular economy.

The first step was to analyse the inspection plans of the German federal states. All of the 16 German federal states have adopted inspection plans and published them online. In particular, it was evaluated in what way these plans refer to the individual elements mentioned in Article 50(2a) of the WSR.

In a second step, selected elements of waste shipment were identified through an analysis of technical literature and project reports and in consultation with the Client[1]. These selected elements were subsequently examined in detail. Each individual case was analysed against the backdrop of international law. 17 particularly relevant topics were identified from an extensive collection of topics. An online consultation was carried out with 47 participants. When formulating the questions, it was important for the experts to get an impression of which topics the stakeholders (authorities and associations) consider relevant – including in the context of the upcoming revision of the WSR – and, in particular, in which areas the current WSR provisions are considered to be in need of reform. The results of the consultation were supplemented by two meetings and telephone interviews. They form one of the foundations of the in-depth analysis of the following selected aspects of the WSR, for which specific measures for the further development of the WSR have been developed:

- Differentiation between the WSR and the EU Animal by-products Regulation (EC) No 1069/2009;
- Clarification of term "under jurisdiction";
- Definition of illegal shipment;
- Increase of the 20 kg limit below which waste subject to Article 18 of the WSR is exempted from the requirements laid down therein;
- 25 kg limit for laboratory analysis;
- Relevance of Article 3(5) of the WSR;
- Competencies of the competent authority of transit;
- Alternatives for the shipment route within the context of general notification;
- Possible relaxation of the requirements laid down in Article 18 of the WSR for manufacturer-organised take-back systems;
- Disclosure of the producer for third-party transactions in respect of Article 18 procedures/disclosure of trade secrets in the case of third-party transactions;
- Calculation of retention periods for documents;
- Return of waste when a shipment is illegal;
- Electronic data interchange;
- Differences in the classification of waste;
- Classification of waste and share of contaminants in waste.

Overall, it can be said that the WSR plays an important role in the context of international, European and national circular economy policies. The basic considerations that led to the

[1] With regard to the enforcement of the WSR, the German Environment Agency acts as the competent authority for the transit of waste shipments subject to prior written notification. In the context of the BC, the German Environment Agency also fulfils the tasks of the "Focal point" in accordance with Article 5 of the BC.

adoption of the Basel Convention (BC) are still valid; the fundamental justification of the WSR, in particular the control and monitoring system for transboundary waste shipments, is not generally questioned in Germany, and has not specifically been challenged in the consultation within this project.

The WSR needs to be understood in the framework and the context of agreements under international law. In this respect, certain factual and procedural aspects are predetermined and legislative leeway is limited, including at EU level. The EU is nevertheless a relevant player in this field. While there was comparably limited feedback on the enforcement and the conditions of enforcement in Germany, a lot of discussion took place in view of the upcoming reform of the WSR.

Most of the feedback from the consultation concerned coherence and efficiency as well as a harmonized interpretation and application of the WSR. In summary, the aspects identified by stakeholders can be assigned to the following categories:

1. Need for a harmonized approach of certain provisions or concepts by the competent authorities (e.g. illegal shipments and return of waste, electronic data interchange, share of contaminants in waste);
2. Need for clarification and improvement with regard to the wording of the regulations (e.g. calculation of time limits);
3. Comments in light of the political issue of the extent of control in the circular economy.

Regarding the latter aspect: The WSR – at least the part that is not predetermined by international law – can also be a control element when making decisions on the extent to which the path to a circular economy is taken by optimising the existing control and supervisory powers of the authorities. Examples for this are:

- Increase in the 20 kg limit below which waste covered by Article 3(2) of the WSR is exempt from the requirements specified therein;
- Competencies of the competent authority of transit;
- Alternatives for the shipment route within the context of general notification;
- Relaxation of requirements for manufacturer-organised take-back systems in the area of Green-listed waste for recycling;
- Clarification of the issue of disclosure of the producer for third-party transactions in respect of Article 18 procedures/disclosure of trade secrets in the case of third-party transactions.

1 Introduction

1.1 Project background

Introduction

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on **Shipments of Waste (Waste Shipment Regulation – WSR)** transposes the requirements of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal as well as OECD Decision C (2001) 107 into Union law.

Following international law, the WSR prohibits certain transboundary shipments of waste and provides a **procedural framework** with two applicable types of procedures, which are to be used depending on the waste concerned, the planned method of waste management and the states involved.

The **application and implementation** of the WSR poses specific **challenges** for economic operators and authorities. The classification of waste in the annexes to the WSR (which is crucial for determining the applicable procedure) is complex. Definitional issues and the divergent application of the WSR in practice, as well as the varied interpretation and application of other legislation on waste by authorities in the Member States, are particularly apparent in transboundary scenarios. Relevant topics in this context include the application and implementation of the WSR in relation to **illegal shipments**, **the cooperation between authorities** in respect of notification procedures and inspections, and existing **barriers to enforcement**. Since 2017, the German federal states are obliged by Article 50(2a) of the WSR to establish inspection plans with extensive content and documentation requirements. These inspection plans must be reviewed at least every three years and, where appropriate, updated.

The WSR also forms part of the general European and national **circular economy framework**, which aims to increase the use of waste as a secondary raw material (key words: waste hierarchy, resource policy and "recycling society").

The transport covered by the WSR is of significant importance. According to the figures available at https://www.umweltbundesamt.de/en/topics/waste-resources/transfrontier-movement-of-wastes-destined-for/statistics-concerning-transfrontier-shipment-of, the following volumes were recorded for 2017:

Table 1: Statistics concerning transfrontier shipment of waste (imports)

Imports into Germany	
	2017
Waste subject to prior written notification	6,036,855 t
Waste not subject to notification	16,480,000 t

Source: https://www.umweltbundesamt.de/en/topics/waste-resources/transfrontier-movement-of-wastes-destined-for/statistics-concerning-transfrontier-shipment-of

Table 2: Statistics concerning transfrontier shipment of waste (exports)

Exports out of Germany	
	2017
Waste subject to prior written notification	3,607,830 t
Waste not subject to notification	22,174,000 t

Source: https://www.umweltbundesamt.de/en/topics/waste-resources/transfrontier-movement-of-wastes-destined-for/statistics-concerning-transfrontier-shipment-of

Inspections and barriers to enforcement

In accordance with Article 50(2) of the WSR, provisions must be made, inter alia, for inspections of facilities and undertakings and for random checks on shipments of waste or on the related recovery or disposal. This means that the inspections required in compliance with the Regulation should firstly be implemented both at the location of the specified facilities and during shipment and secondly take the form of random checks.

Although support is provided through Correspondents' Guidelines at EU level as well as through the LAGA guidance on implementing the WSR, the application and enforcement of the WSR in relation to illegal shipments and the cooperation between authorities in respect of notification and inspections and the associated barriers to enforcement are a recurring issue. In Germany, the problem is exacerbated by the fact that in accordance with the general jurisdiction regulations in the German constitution (Basic Law = Grundgesetz), as well as the provisions of the German Waste Shipment Act specifically, the German federal states have a far-reaching responsibility to enforce the WSR. In light of this, effective enforcement of the WSR therefore does not only require cooperation between the authorities of the states involved, but – in the case of shipment routes through the German federal states – cooperation between the authorities of the various federal states themselves, as well as cooperation with the German Federal Office for Goods Transport, the customs authorities, the police and other state supervisory authorities.

EU Regulation 660/2014 has introduced a number of elements to Article 50 of the WSR requiring stricter enforcement controls in Member States to avoid illegal shipments, particularly with regard to the differences between waste and non-waste. In accordance with the new Article 50(2a) of the WSR, Member States had to ensure by 1 January 2017 that one or more inspection plans with extensive content and documentation requirements had been established in their geographical territory. The inspection plans must be reviewed at least every three years and, where appropriate, updated.

Review of the WSR by the European Commission

In accordance with the first sentence of Article 60(2a), the European Commission must carry out a review of the WSR by 31 December 2020. In that review, the Commission shall also, inter alia, evaluate the inspection plans introduced in the Member States as of 2017, as well as their effectiveness in combating illegal shipments.

1.2 Objective and subject of the research project

In light of the above, the objective of this project is to summarise and evaluate the enforcement of the WSR in Germany based on specific regulatory areas, with a view to:

identifying existing barriers which impede a more efficient fight against illegal shipments and submitting appropriate proposals (proposed modifications to the WSR and accompanying or supplementary measures, such as Correspondents' Guidelines).
submitting appropriate proposals for more efficient enforcement (proposed modifications to the WSR and accompanying or supplementary measures, such as Correspondents' Guidelines),
outlining starting points for strengthening circular economy.

A purposeful evaluation of the implementation of the WSR was carried out by actively drawing on the professional expertise of the competent enforcement authorities and the stakeholders through surveys and interviews.

1.3 Structure of the report

Subsequent to Chapter 1 (Introduction), this report is structured as follows:

- Chapter 2 illustrates the development, objectives and structure of the WSR.
- Chapter 3 describes the approach taken in the project.
- Chapter 4 presents the results of the investigations. These are divided into
  - Evaluation of inspection plans,
  - Expert surveys in the form of an online questionnaire, expert discussions and interviews, and
  - Analysis and discussion of suggestions for measures.
- Chapter 5 contains a list of sources.
- The following annexes are attached to this Report:
  - Inventory of inspection plans,
  - Consultation questionnaire,
  - Consultation, expert discussion and interview participants.

2 The Waste Shipment Regulation

2.1 Development of regulation on international waste shipments

The mid-1970s saw highly frequent improper transboundary shipments of industrial waste ("toxic waste scandals").[2] In the absence of European regulations on controlled transboundary waste shipments, there was in particular an increase in exports of waste from industrialised countries to developing countries without the necessary controls on such exports. In a number of cases, this led to significant effects on the environmental and risks to health, and the topic of transboundary waste shipments became a global issue.

At international level

The BC[3] of 1989 regulates the transboundary movement of hazardous wastes and their disposal and was the first international agreement regulating global waste shipments. Its key points include reducing the generation of waste (Article 4(2)(a)), the management of waste at the point of origin where possible (Article 4(2)(b)), generally minimising the risks associated with the transboundary shipment of hazardous waste (Article 4(2)(c)), reducing transboundary shipment to the minimum consistent with environmentally sound and efficient waste management (Article 4(2)(c)) and the general control and monitoring of transboundary shipments. The Basel Convention applies to hazardous wastes as defined in Article 1(1) of the BC and "other wastes" (Article 1(2) of the BC), which includes household waste and residues arising from the incineration of household waste. In particular, the BC states that the shipment of hazardous wastes and other wastes is only permitted when all the states involved have been informed in advance and have agreed to such import, export and, where relevant, transit. Shipments to states that are not parties to the BC are not permitted, unless there are agreements in accordance with Article 11 of the BC that correspond to the provisions of the said Convention. The BC contains regulations on the potential take-back of wastes if a shipment cannot be completed as planned (Article 8 of the BC) or due to illegal traffic (Article 9 of the BC). Conferences of the Parties are held every two years to discuss the implementation and development of the BC.

At OECD level, OECD Decision C (2001) 107/FINAL[4] on the control of transboundary movements of wastes destined for recovery operations applies. This relates to the transboundary shipment of wastes destined for recovery operations and makes a distinction between

- a simplified procedure and
- the (more complex) notification procedure.

According to this Decision, wastes on the Green List (Annex 3, Chapter II, Section (2)(a) of the OECD Decision) which are destined for recovery operations are, in accordance with Chapter II, Section C, subject solely to the existing controls normally applied in commercial transactions (Green Control Procedure). The risks to human health and the environment arising from the shipment of such wastes are deemed to be low. Wastes on the Amber List are subject to notification, which is referred to as the Amber Control Procedure and carried out in accordance with Chapter II, Section D. To promote the trade of secondary raw materials, the OECD Decision

[2] See in particular Wuttke, Grenzüberschreitende Abfallverbringung [Transboundary Waste Shipment], 2013, available at: https://www.umweltbundesamt.de/sites/default/files/medien/421/dokumente/grenzueberschreitende_abfallverbringung_wuttke.pdf.

[3] http://www.basel.int/

[4] https://www.oecd.org/env/waste/theoecdcontrolsystemforwasterecovery.htm

contains some procedural simplifications in respect of its applicability as regards shipments destined for recovery. The OECD Decision is a multilateral agreement in accordance with Article 11 of the BC. As the United States is not a party to the BC, the OECD Decision enables the trade of waste between the USA and other OECD states.

At European level

Prior to these international legal activities, the Council of the European Community as the competent body for the internal market had already adopted Directive 84/631/EEC on the transfrontier shipment of waste with Article 114 TFEU (ex Article 95 TEC).

In 1993, Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community incorporated the developments in international law on the grounds of the jurisdiction over environmental protection arising from Article 192 TFEU (ex Article 175 TEC). Council Regulation (EEC) No 259/93 was replaced by the WSR of 14 June 2006 with effect from 12 July 2007.

2.2 Objectives and structure of the WSR

Objective and structure

According to recital (1), the objective of the WSR is the protection of the environment. The Regulation was therefore based on the EU's jurisdiction for environmental protection.

The WSR is divided into seven titles, plus annexes:

- Title I consists of general provisions which contain the scope and definitions and apply for all types of waste shipment.
- Title II concerns shipments within the Community with or without transit through third countries. This constitutes the main part of the WSR. Generally speaking, a distinction can be made between two procedures:
  - Green-listed wastes in Annexes III, IIIA and IIIB of the WSR are subject to the general information requirements laid down Article 18 of the WSR if the amount of waste shipped exceeds 20 kg (Article 3(2) of the WSR). The information procedure requires that the waste shipment must be accompanied by the document from Annex VII and that before the shipment begins, a contract regarding the recovery of the waste has to be concluded and submitted to the competent authority on request. A copy of the Annex VII document must be retained for three years. This is to guarantee to a certain minimum level of control and monitoring. Furthermore, the provisions of Article 19 of the WSR (Prohibition on mixing waste during shipment) and Article 49 of the WSR (Protection of the environment) do not apply for waste subject to notification.
  - The prior written notification and consent procedure applies for shipments of waste destined for disposal and for shipments of waste destined for recovery which are stated in Annexes IV and IVA or which are not listed (i.e. wastes not classified under one single entry in Annexes III, IIIB, IV or IVA and wastes not classified as mixtures of wastes under one single entry in Annexes III, IIIA, IIIB, IV or IVA).
  - The procedure is initiated by the notifier by way of a corresponding application (notification). Following a check as to whether the submitted notification is complete,

the competent authority of destination transmits an acknowledgement to the notifier, the competent authority of dispatch and the competent authority (or authorities) of transit. Thereafter, the 30-day period within which a decision on the notification is to be taken begins in accordance with Article 9(1) of the WSR. The main options available to the authorities are consent without conditions, consent with conditions in accordance with Article 10 of the WSR and objection in accordance with Articles 11 and 12 of the WSR. Furthermore, each individual shipment must be accompanied by a movement document subject to specific requirements regarding content and transmission. There is the option of submitting general notifications in accordance with Article 13 of the WSR. The shipment can only begin after all written and, if applicable, tacit consents have been granted by the relevant authorities in respect of the individual application, because this only concerns waste with high risk potential. The competent authority of dispatch, the competent authority of transit (if applicable) and the competent authority of destination must all cooperate in this regard.

- Title III contains provisions for shipments exclusively within the Member States with corresponding control mechanisms.
- Titles IV to VI regulate shipments out of the Community to third countries, into the Community from third countries and transit through the Community from and to third countries. They lay down certain prohibitions on imports and exports. These primarily concern states that are not members of the OECD, the EU or the EFTA.
- Lastly, Title VII contains other provisions of an administrative nature.

Within the context of international law

The WSR must be considered within the context of international law.

- On one hand, the EU is a Party to the BC.
- On the other hand, most EU Member States are members of the OECD.

With the WSR, which is directly applicable as an EU Regulation, the EU therefore fulfils its obligations under international law to implement international regulations. In this sense, the provisions of international law form the framework for what the EU is allowed to regulate in the WSR; at the same time, it defines how much leeway there is when reviewing the WSR (and, specifically, how much there will be in the upcoming revision). The WSR may contain stricter rules than the BC or the OECD Decision, however.

3 Procedure

3.1 Evaluation of inspection plans

In accordance with Article 50(2a) of the WSR, the 16 German federal states have published inspection plans online. An inventory of these plans with information on the issuing authority, the date of adoption and scope of application is attached to this report as Appendix A.1.

- The project team evaluated the ways in which these plans address the individual elements of Article 50(2a) of the WSR
- At the same time, the plans were assessed in respect of whether or not they contain findings or opinions that could be used as a source for identifying relevant aspects.

This assessment can be found in Chapter 4 of this Report.

3.2 Gathering of issues, allocation to subject areas and prioritisation

3.2.1 Introduction

- In order to determine the project's priorities,
- to prepare for the targeted consultation with the authorities and stakeholders, and
- to select the topics which we produced an in-depth analysis of,

a number of aspects related to illegal shipment, efficiency of enforcement and circular economy under the WSR were identified. These were then discussed with the client and relevant topics for the consultation were selected. Suggestions for measures were discussed for the vast majority of these topics as well (see Chapter 3.5). In some cases, however, the objective of the consultation was to determine how satisfied the operators closely involved with the WSR are with the design and application of the current provisions and whether they see any need for improvement; this concerns the subject areas

- pre-consented recovery facilities (Article 14 of the WSR),
- interim recovery and disposal (Article 15 of the WSR) and
- the fundamental structure of the procedure in accordance with Article 3(2) of the WSR ("Article 18 procedure").

3.2.2 Sources

The following sources were used to identify issues:

- The German federal states' inspection plans pursuant to Article 50(2a) of the WSR;
- German legal literature on the WSR, research projects by the German Environment Agency and projects and schemes in English (list in Chapter 5);

- Opinions of Member States, authorities, associations and companies during the consultation on the recently concluded European Commission evaluation project on the WSR[5];
- European Commission reports on enforcement of the WSR;
- Project team expertise.

Some sources have proven to be significantly more helpful than others. No legal policy proposals were submitted in the inspection plans drawn up by the German federal states and the COM reports. A number of interesting suggestions were made, however, for example during the consultation on the evaluation of the WSR at EU level. The project team also received lots of information from the client.

3.2.3 Definition of subject areas and depiction in MS Excel

Based on the discussion in the initial meeting, the topics were divided into the following seven fields:

- Procedural framework,
- Notification,
- Article 18 procedure,
- Prohibitions on exports,
- Overarching aspects of enforcement and inspection,
- Other.

To obtain a clear overview of the topics, an Excel table was produced with the following columns, in which all the topics are incorporated into one list:

- Topic; Source,
- Allocation to one of the subject areas,
- Relevant Article of the WSR,
- Paragraph of the relevant Article,
- Suggested change to the WSR,
- Comments.

The topics identified were treated per Article to identify and eliminate any duplications (in particular suggestions on the same topic from different sources).

With regard to the list of topics, it is particularly noticeable that:

- The majority of topics relate to the applicable WSR, and most to a specific Article directly.

[5] https://ec.europa.eu/info/consultations/public-consultation-evaluation-waste-shipment-regulation_en

- The topics discussed mostly concern notification, overarching aspects of enforcement and inspection, and the Article 18 procedure.
- Most topics stem from information provided by the client.
- Regarding the three objectives to be achieved by suggestions for changes to the WSR in this project, issues geared towards more efficient enforcement are amongst the most prevalent at present.
- Suggestions entailing a fundamental overhaul of the system are rather rare. In most cases, the focus is on improving the application of the established WSR system (including some improvements of a rather legal nature).

A range of the most relevant topics was selected in consultation with the client. Of these, 17 topics were then chosen for the consultation process:

- 14 topics with suggestions for measures (see Chapter 4.3.1 of this report), and
- three topics without suggestions for measures (see Chapter 4.3.2 of this report).

Although the consultation did not cover further topics, the Report analyses and discusses additional issues from various dimensions (Chapters 4.3.3 and 4.3.4) too.

3.3 Survey with an online questionnaire

3.3.1 Creation of the online questionnaire

Specific questions regarding selected aspects were prepared based on the relevant Article of the WSR and a survey was produced using the web tool SurveyMonkey. The online questionnaire contains the following key elements:

- General section: Introduction to the project, objectives of the project and questionnaire, information on completing the questionnaire, deadline for responses;
- A question to identify the stakeholder group (to enable subsequent allocation during evaluation);
- The data protection notice;
- Depending on the purpose of the relevant question, certain questions were posed either
  - as open-ended or closed-ended questions or
  - as general questions or questions regarding a specific issue;
- Logical sequence: The need to answer irrelevant successive questions was avoided by using the “Skip” feature and specific referral to the next question.

The questions related to the different articles of the WSR. To provide some context, questions were preceded by an introduction containing information, inter alia, on the international legal framework. When formulating the questions, it was particularly important to get an impression of which topics the stakeholders (authorities and associations) consider relevant, including

against the backdrop of the upcoming revision of the WSR. The questionnaire contained the same questions for all stakeholders.

It is attached to this Report as Appendix A.2.

3.3.2 Invitation to the survey

To obtain a wide range of opinions, experts from various sectors related to waste shipment were involved in the survey, including ministries of the German federal states, enforcement authorities, associations of hazardous waste producers and disposers of hazardous and non-hazardous waste. Customs departments were not involved in this survey because they were involved in the research project through a separate survey (see Chapter 3.4).

To attain a higher number of responses to the online questionnaire, notice of the survey was given in advance with a letter of recommendation from the client. This email was intended to provide initial information on the project and the desired involvement of experts.

The final invitation was sent on 8 April 2019 to 105 selected stakeholders. In addition to the link to the questionnaire, the email also contained the entire questionnaire in two formats (Word and PDF) in order to facilitate the completion of the online questionnaire. The invitation indicated that the link could also be shared with other relevant colleagues. The survey remained open for six weeks.

3.3.3 Method of evaluating the survey

Responses were recorded in an Excel table. The first step was to perform a statistical analysis (see Chapter 4.2.1). This analysis led to general results, such as the number of responses or participation in the online questionnaire by stakeholder type.

The closed-ended questions (yes/no/no comment), which preceded each subject area, were also evaluated. The aim of these questions was to establish the relevance of each regulatory area.

Example:
"Do you consider the question of the applicability of Regulation (EC) No 1069/2009 (Animal by-products Regulation) to be a relevant problem?"

The evaluation of the yes/no responses as well as an initial screening of the open-ended questions conveyed an initial impression of the array of opinions:

- Which subject areas are controversial and highly discussed?
- Which subject areas appear to be of less relevance for the stakeholders?
- Where does consensus prevail?

Based on this initial evaluation, the topics were sorted by relevance (high, medium and low relevance).

Arrangement of an expert discussion and survey in the form of telephone interviews

In September 2019, an expert discussion on the project was held in Berlin. During this discussion, a group of representatives of associations on one hand and authorities on the other looked at and discussed the method and interim results in two workshops. A list of the organisations to which the participants belong is attached as Appendix A.3.2.

Lastly, semi-structured telephone interviews with selected experts were carried out.

3.4 Survey of customs offices

Due to the intensive involvement of customs departments in the implementation of waste shipments, they were questioned separately and in addition to the general survey, i.e. as a separate group of stakeholders. The original plan was to obtain responses regarding the role of customs offices from at least two customs departments. The customs departments instead provided *one* consolidated written response. The role of the customs offices and the evaluation of the responses is discussed in Chapter 4.3.4.

3.5 Analysis and discussion of suggestions for measures

The results of the telephone consultation were supplemented by information from two meetings. They form one of the foundations of the in-depth analysis of the following selected aspects of the WSR in Chapter 4 of this Report, in which specific suggestions for measures were also produced:

- Differentiation of the WSR from the EU Hygiene Regulation (Regulation (EC) 1069/2009);
- Clarification of the term "jurisdiction";
- Definition of illegal shipment;

- Increase of the 20 kg limit below which waste subject to Article 18 of the WSR is exempted from the requirements laid down therein;
- 25 kg limit for laboratory analysis;
- Relevance of Article 3(5) of the WSR;
- Competencies of the competent authority of transit;
- Beginning and end of tacit consent;
- Alternatives for the shipment route within the context of general notification;
- Possible relaxation of the requirements laid down in Article 18 of the WSR for manufacturer-organised take-back systems;
- Disclosure of the producer for third-party transactions in respect of Article 18 procedures/disclosure of trade secrets in the case of third-party transactions;
- Calculation of retention periods for documents;
- Returns;
- Electronic data interchange;
- Differences in the classification of waste;
- Introductory remarks on Annex V of the WSR;
- Classification of waste and share of contaminants in waste.

The analysis and the development of suggestions for measures (Chapter 4.3) are based on the following:

- Identification of existing challenges in enforcement and application of the WSR;
- Consideration of the applicable international legal framework (i.e. BC and OECD Decision);
- Consideration of the perspectives provided by the stakeholders consulted in a suitable way; and
- Development of recommendations as input for upcoming revision of the WSR at EU level.

The subchapters of Chapter 4, for which suggestions for measures were developed, are therefore structured as follows:

- Overview of the *relevance* expressed by the respondents, where the topic was covered by the consultation;
- *Context* of the topic (what is it about? Which specific problem should be discussed here?);
- *International law* (in particular: To what extent do the provisions of the BC or the OECD Decision form a binding framework?);

- Description of the *problems perceived and any suggestions* (namely from the consultation); and
- *Discussion* of the arguments and description of the possible relevant and practical solutions for the problems identified in consideration of the applicable legal and technical constraints and development of *suggestions for measures*. The design of the suggestions for measures here also depends on the subject matter:
  - The above also involved checking whether a suggestion for an amendment is an improvement when compared with maintaining the current legal position.
  - In some cases, the suggested changes for developing the WSR were not possible in light of international legal constraints.
  - In the light of specific current developments and decisions on some aspects, such as the conclusions of the ECJ on animal by-products and the applicability of the WSR and the EU Regulation on Animal by-products (ECJ of 23 May 2019 (C-634/17))[6], specific suggestions for wording were made.
  - In other cases, several possible options for specific proposed measures were illustrated.
  - The associated challenges were highlighted, particularly in relation to those provisions which are seen less as problematic from a legal perspective but for which it is more (or also) a question of whether there should be "more control than before or the same level of control as before".

By explicitly referring to these elements, this study takes at its starting point the first phases of evaluation of EU legal provisions as part of the EU initiative for better regulation[7]. One fundamental difference between the approach taken in this study and a formal evaluation is that this study focuses on the challenges of enforcement and application of the WSR *in Germany*. The study does not therefore involve an explicit evaluation based on the usual criteria of efficiency, effectiveness, relevance, coherence and added value at EU level. Certain aspects of these criteria were taken into account implicitly during the analysis and when making the recommendations (e.g. efficiency and coherence). An explicit evaluation of these criteria and a complete impact assessment is not within the scope of this study, however, and should be performed at EU level.

[6] ReFood GmbH & Co. KG v. Landwirtschaftskammer Niedersachsen (2019); C-634/17, ECLI:EU:C:2019:443; http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-634/17.

[7] https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en

4 Results

4.1 Evaluation of inspection plans

4.1.1 Introduction

Article 50(2a) was newly added to the WSR by Regulation (EU) No 660/2014. According to it, Member States must ensure by 1 January 2017 that one or more inspection plans have been established for their geographical territory in respect of the inspections to be carried out pursuant to Article 50(2a) of the WSR, either separately or as a clearly defined part of other plans. In Germany, inspection plans are produced by the federal states in accordance with Article 11a of the German Waste Shipment Act.

4.1.2 Evaluation

4.1.2.1 Adoption of plans, applicability, scope

All German federal states have enacted inspection plans and published them online.
An inventory is attached to this Report as Appendix A.

In accordance with the WSR and the German Waste Shipment Act, the plans must be reviewed at least every three years and, where appropriate, updated. Some of the German federal states' plans contain a validity period, either from the end of December 2016 to the end of December 2019 or from January 2017 to January 2020. In all the plans, the geographical territory to be stated in accordance with Article 50(2a)(b) of the WSR is the territory of the relevant federal state.

Most control plans span 10 to 20 pages (Bavaria being the shortest at seven pages and Lower Saxony being the longest at 32 pages).

4.1.2.2 Requirements as regards content of inspection plans pursuant to Article 50(2a) of the WSR

Article 50(2a) of the WSR lays down the following requirements for inspection plans:

- Inspection plans must initially be based on a risk assessment covering specific waste streams and sources of illegal shipments and considering, if applicable and where appropriate, intelligence-based data such as data on investigations by police and customs authorities and analyses of criminal activities.
  That risk assessment shall aim, inter alia, to identify the minimum number of inspections required (such a minimum number is not mentioned as one of the elements of the content of a plan, however).

- Every inspection plan shall include the following elements:

  - The objectives and priorities of the inspections, including a description of how these priorities have been identified;

  - The geographical area covered by that inspection plan;

  - Information on planned inspections, including on physical checks, such as inspections of cargo;

- The tasks assigned to each authority involved in inspections;
- Arrangements for cooperation between the authorities involved in inspections;
- Information on the training of inspectors on matters relating to inspections; and
- Information on the human, financial and other resources for the implementation of that inspection plan.

4.1.2.3 Illustration of the elements stated in Article 50(2a) of the WSR in the federal states' plans

Below is a description of how these mandatory elements are captured in the federal states' plans (with the exception of geographical territory, see section 4.1.2.1 above in this regard).

Risk assessment as a basis

According to Article 50(2a) of the WSR, the starting point for planning is a risk assessment based specifically on the relevant territory. The following, inter alia, are ultimately based on this risk assessment:

- The minimum number of inspections (and the resources used);
- The priorities selected; and
- The sensible arrangement of cooperation between authorities and training.

In this sense, a comprehensive, specific risk assessment actually forms the basis of all other elements of the plan.

It is not mandatory to describe the risk assessment in the inspection plan. Some of the federal states' plans do address this, however, with differing degrees of prominence. Where there is no separate "Risk assessment" chapter (examples include North Rhine-Westphalia, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Schleswig-Holstein and Saarland), a substantive risk assessment is sometimes carried out as part of the "Objectives and priorities" chapter.

Descriptions of the risk assessment process differ greatly. While the content of most plans is based on the criteria of the European network IMPEL[8] (i.e. risk potential based on probability of occurrence and potential harm to the environment and human health), the depth of description varies. The plans for Brandenburg, Baden-Württemberg, Hesse, Hamburg and Lower Saxony are examples of plans containing extensive descriptions of the criteria.

Some include an extensive examination of conditions in the relevant federal state and distinguish according to the role of the federal state in shipment arrangements (import/export/transit); examples can be found in the plans for Brandenburg, Baden-Württemberg, Hesse and Hamburg. In some plans, such as those for Baden-Württemberg, Hamburg and Lower Saxony, these remarks on the role of the federal state are also underpinned by statistical data, differentiated by means of transport (Hamburg, similarly Lower Saxony). Rhineland-Palatinate reports the use of PRTR data for the risk analysis. In some cases, the risk assessment is actually rather implicit (e.g. Bavaria).

Key elements of the risk analysis include further information on the potential damage and volume of relevant waste streams, as well as frequently associated information on typical

[8] European Union Network for the Implementation and Enforcement of Environmental Law.

countries of destination for exports of these waste streams. Naturally, deviations occur here due to different conditions in different states. Often mentioned in this regard are:

- Waste electrical and electronic equipment (WEEE) and specifically: Refrigerating devices containing CFCs (Africa);
- Scrap tyres (Africa);
- Old cars and car parts (Africa, Eastern Europe, former Soviet Union);
- Old batteries, catalysts (Africa);
- Green-listed wastes, including corresponding plastic fractions (main destination Asia).

In this regard, Saxony's plan, rather unusually, does not report any noticeable features in respect of specific countries of dispatch/destination or specific waste streams.

Objectives and priorities

The objectives stated in the plans differ only slightly. The aim of inspections is to detect, uncover and sometimes also prevent illegal waste shipments and other violations of legal shipment regulations. In some cases, there is also an explicit reference to the BC ("Reduction in exports of hazardous wastes to developing countries" (e.g. in Bavaria)).

The topic "Result of risk assessment" feeds into the issue of priorities, which in turn, naturally, depend on the conditions of the relevant state. A distinction can be made between three types:

- Most plans (e.g. Brandenburg, Hesse, Hamburg, Mecklenburg-Western Pomerania, Lower Saxony and Saxony) take a three-step approach ("high/medium/low" or similar) for specific scenarios (based on specific operators, specific types of waste, specific facilities, etc.). Schleswig-Holstein states that it has a monitoring programme with three priority tiers, but that this is not made public.
- Other plans demonstrate scenarios that are classified as "high" priority (e.g. Baden-Württemberg, North Rhine-Westphalia).
- In some cases, prioritisation is indirect or implicit (e.g. Berlin, Rhineland-Palatinate, Saarland).

Taking the approach described above, higher priorities result from greater risk potential, usually in relation to notification and, in particular, the scope of application of the BC.

Information on planned inspections

All existing plans refer, even if not explicitly, to the requirement laid down in Article 50(3) of the WSR and posit the aspiration to monitor all operators in the waste management chain in principle (producers, carriers, collectors, dealers, brokers). All the plans also distinguish between inspections which are carried out regularly and as required.

With regard to installation inspections, some plans refer to the IED inspection plans which are also provided for in Article 52a of the German Federal Immission Protection Act (Brandenburg, Hamburg, Rhineland-Palatinate, Thuringia). Baden-Württemberg and Hesse provide information on how the results of IED inspections are linked for the purpose of inspections within the context of the WSR.

Mecklenburg-Western Pomerania reports that it combines inspections under emissions control law and waste regulations by way of administrative provisions (see also the information on cooperation between various authorities in the next section of this chapter). Certain plans describe the process of monitoring waste shipment (e.g. Brandenburg, Berlin). None of the plans contain quantitative information on the number or frequency of inspections.

Authorities involved, duties and cooperation

Based on the different administrative structures in the federal states, the plans exhibit unique features in respect of competences and duties of the authorities.

Cooperation with federal authorities (customs, German Federal Office for Goods Transport) is described in accordance with the provisions of Article 11(2).

Obvious use of synergies in relation to installation monitoring (both on the producer side and in respect of waste management plants) with the inspections required in accordance with the German Federal Immission Protection Act and the IED inspection plans are outlined in some plans.

Training

The federal states' plans often overlap in respect of reports about training. As nationwide German authorities, both the German Federal Office for Goods Transport and customs provide training nationally, i.e. for participants from all federal states. The plans contain reports of various internal training courses and workshops held by the state police which are relevant to waste shipment, including in particular specialised training on the WSR directly (such as in Baden-Württemberg, „Überwachung von Abfalltransporten und grenzüberschreitende Abfallverbringung" [Monitoring of waste shipments and transboundary waste movement]). Some plans, for example, in Brandenburg and Mecklenburg-Western Pomerania, report external training. Hesse provides information on the introduction of a quality management system with written standards for key processes.

Information on mandatory training or information on the level of the training completed is not provided in the plans.

Human, financial and other resources for the implementation of the inspection plan

This area remains rather vague in most plans.

In fact, it is frequently merely stated that a sufficient number of qualified employees are available, whereas information on the planned deployment of these employees or on costs is almost completely absent (Baden-Württemberg provides information on how many case handlers there are within individual authorities). Certain plans give assurances of adequate inclusion in the budget (e.g. Hesse, Hamburg).

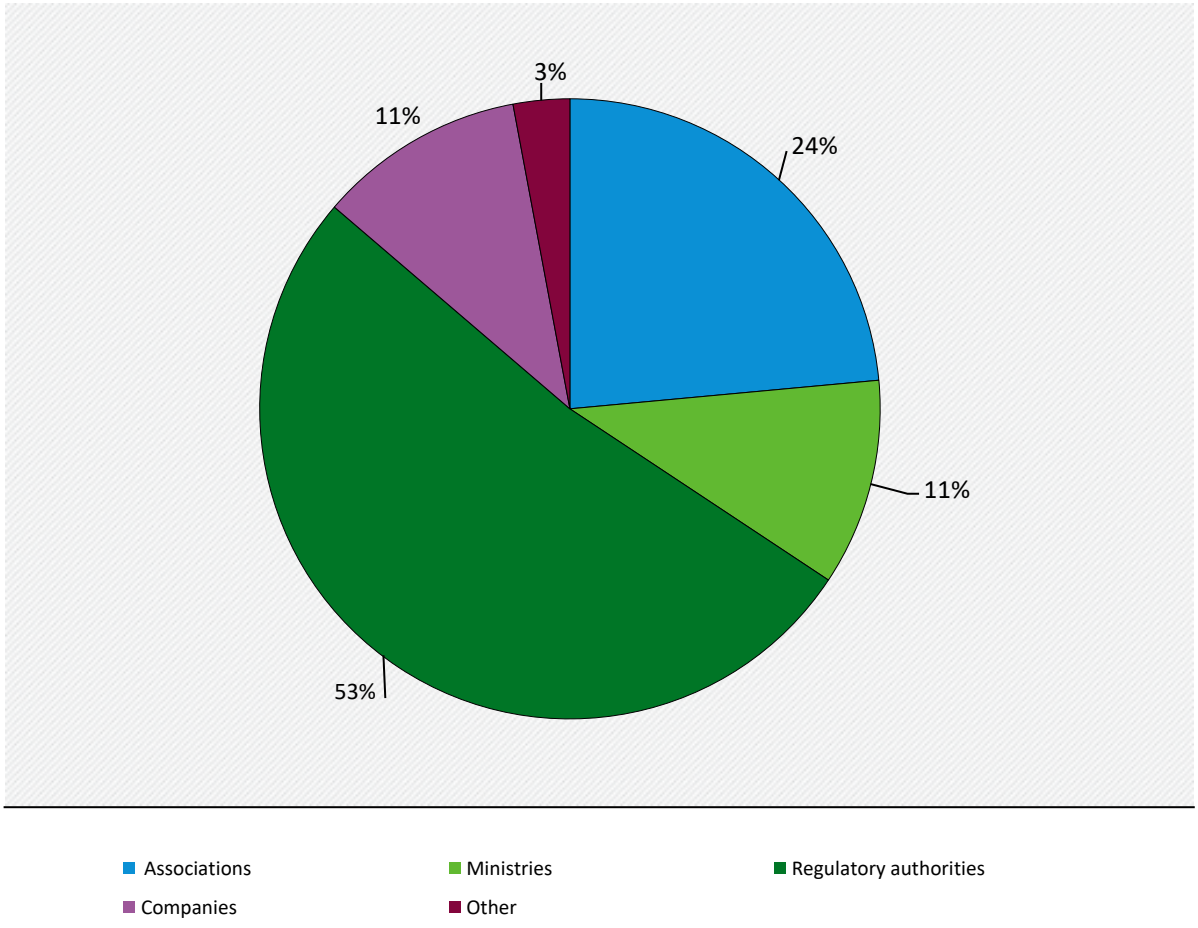
4.2 Expert surveys with an online questionnaire, arrangement of an expert discussion and interviews

4.2.1 General results of the online consultation

105 invitations to the online questionnaire led to 47 responses (response rate 45%). It should be noted that some stakeholders sent joint answers in cooperation with other stakeholders.

After excluding empty or incomplete questionnaires, a total of 38 were analysed. With 20 questionnaires (53%), the competent authorities make up the stakeholder group with the highest response rate. A further nine questionnaires (24%) were returned by associations, four from ministries of German federal states (11%) and five from companies (14%), of which one was a state-authorised company entrusted with sovereign tasks. The ratio of authorities to private stakeholders was therefore 63:11. Participation by stakeholder groups is illustrated in the figure below.

Figure 1: Online questionnaire – response rate by stakeholder types



Source: Own research, Ramboll

A list of the organisations to which the consultation participants belong is attached as Appendix A.3.1.

Particularly noteworthy is the high rate of participation amongst the authorities of the German federal states. Except for Mecklenburg-Western Pomerania, Saarland and Schleswig-Holstein, responses were received from almost all federal states. This meant that a broad range of opinions and experiences, varying by region, were included in the evaluation.

4.2.2 General results of the expert discussion and interviews

In September 2019, an expert discussion on the project was held in Berlin. During this discussion, a group of representatives of associations on one hand and authorities on the other looked at and discussed the method and interim results over the course of two workshops. The feedback from the discussion was included in the evaluation. A list of the organisations to which the participants belong is attached to this Report as Chapter A.3.2.

Semi-structured telephone interviews with selected experts were also carried out, with a focus on

- Subject areas of high relevance;
- Answers which required further clarification; and
- Interesting suggestions for solutions which require more in-depth information.

These interviews provided an opportunity to ask the interviewees individual questions (see the list in Appendix A.3.2).

4.3 Analyses and suggestions for measures on certain issues within the context of waste shipment legislation

4.3.1 Analysis and discussion of suggestions for measures on certain issues within the WSR

4.3.1.1 Article 1(3)(d) of the WSR: Differentiation between the WSR and Regulation (EC) No 1069/2009 laying down hygiene rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation)

Result of the consultation on relevance

Differentiation between the WSR and Regulation (EC) No 1069/2009 (Regulation laying down hygiene rules as regards animal by-products and derived products not intended for human consumption)

Background: The Animal by-products Regulation also provides a regime for the approval of transboundary shipments. The current wording of the regulation leads to definitional problems such as those currently being faced in the pending procedure before[9] the Court of Justice of the European Union (Request for a preliminary ruling C-634/17).

[9] Please note: The question posed in the consultation is documented here. In the legal case concerned, following the consultation, the ECJ issued its judgment (Judgment of the Court of 23 May 2019, ReFood GmbH & Co. KG v. Landwirtschaftskammer Niedersachsen, C-634/17, ECLI:EU:C:2019:443; http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-634/17).

Do you consider the question of the applicability of Regulation (EC) No 1069/2009 (Animal by-products Regulation) to be a relevant problem?

Yes: 22

No: 7

No comment: 9

Context

The differentiation between the scope of the WSR and Regulation (EC) No 1069/2009 was stressed as a relevant issue by the majority of the respondents. This concerns the matter of whether a certain material is subject to the regulations on transboundary shipment under the WSR or Regulation (EC) No 1069/2009. The latter already contains detailed provisions on the consignment, channelling and shipment of animal by-products. The exclusion of animal by-products in the WSR was intended to prevent any overlap between the regulations, because such materials can also be considered as waste according to the definition in Article 2(1) of the WSR. The legislator's intention here was to ensure that materials which are already subject to special Community regulations are not covered by the WSR as well. This was never intended to be a way of bypassing the WSR, however. Distinguishing between which products fall under which regulation seems to be a problem in certain cases.

Such uncertainties were the subject of a preliminary ruling procedure of the ECJ (case C-634/17). The judgement in this case was issued on 23 May 2019 (see below).

International legal regulations

Neither the BC nor the OECD Decision contains special regulations regarding animal by-products.

Problems perceived

Besides general problems of allocation, the authorities also mentioned the following aspects during the consultation:

- Problems in particular regarding the issue of which regulations the shipment of processed manure is subject to (Article 2(2)(k) of Regulation (EC) No 1069/2009 explicitly states that the provisions of this regulation apply for manure, but does not specify any regulation with regard to processed manure);
- Ambiguity as to whether the Animal by-products Regulation is applicable when animal by-products are mixed with other wastes.

Discussion and suggestions for measures

Under para. 62 of the ECJ judgment of 23 May 2019 (case C-634/17)[10], the Court concluded:

> *"Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 1(3)(d) of Regulation No 1013/2006 must be interpreted as meaning that shipments of animal by-products falling within Regulation No 1069/2009 are excluded from the scope of Regulation No 1013/2006, except in cases where Regulation No 1069/2009 expressly provides for the application of Regulation No 1013/2006."*

[10] ReFood GmbH & Co. KG v. Landwirtschaftskammer Niedersachsen (2019), Case C-634/17, ECLI:EU:C:2019:443; http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-634/17.

In light of this, close alignment with these regulations is expected during the upcoming revision of the WSR. For example, Article 1(3)(d) of the WSR could be reworded as follows:

> *"The following shall be excluded from the scope of this Regulation (...):*
>
> *d) Shipments of animal by-products falling within Regulation No 1069/2009, unless Regulation No 1069/2009 expressly provides for the application of this Regulation".*

4.3.1.2 Article 2(15) and (25) and Article 18 of the WSR: Clarification of "under the national jurisdiction of a country"

Result of the consultation on relevance

Article 2(15) and (25); Article 18 of the WSR: Clarification of "under the national jurisdiction of a country"

Background: Some provisions of the WSR refer to the "jurisdiction" of the states involved to which certain relevant operators are subject (such as Article 2(15) and (25) and Article 18(1)). In some cases, this is understood to mean that there must be a place of business in the relevant country, but this is disputed.

Is the concept of being "under the national jurisdiction of a country" unclear?

Yes: 24

No: 9

No comment: 5

Context

The concept of being "**under the national jurisdiction**" of a Member State is crucial for understanding the key terms defined in Article 2 of the WSR.

For example, Article 2(15)(a) of the WSR defines a *notifier* as follows:

> *"in the case of a shipment originating from a Member State, any natural or legal person under the jurisdiction of that Member State who intends to carry out a shipment of waste or intends to have a shipment of waste carried out and to whom the duty to notify is assigned."*

In Article 2(15)(b) of the WSR, the notifier in the case of import into, or transit through, the Community of waste that does not originate in a Member State is defined as

> *"any... natural or legal persons under the jurisdiction of the country of dispatch who intends to carry out a shipment of waste or intends to have, or who has had, a shipment of waste carried out".*

Article 2(25) reads:

> *"[For the purposes of this Regulation] 'area under the national jurisdiction of a country' means any land or marine area within which a state exercises administrative and regulatory responsibility in accordance with international law as regards the protection of human health or the environment."*

The term is also used within the context of the procedure laid down in Article 3(2) of the WSR, see Article 18(1)(a) of the WSR.

There is no common understanding of what "under the national jurisdiction" of a Member State or country means. In some cases, this is understood to mean that there must be a place of business in the relevant country, but this is disputed.

International legal regulations

Article 2(9) of the BC contains a definition of an "area under the national jurisdiction of a State", which is similar to the term "area under the national jurisdiction of a country". Here, "national jurisdiction" is essentially used in the same way, i.e. to mean any land or marine area within which a state exercises administrative responsibility in accordance with international law as regards the protection of human health or the environment.

Chapter II, Section A(5) and (11) of the OECD Decision uses definitions that are similar to "under the national jurisdiction of a country".

- Number 5 defines "transboundary movement" as any movement of wastes from an area under the national jurisdiction of a Member country to an area under the national jurisdiction of another Member country.
- Number 11 also contains the wording "the national jurisdiction of any Member country", here in relation to the OECD area; the wording "under the national jurisdiction of a country" also has the same meaning as the wording "under the national jurisdiction of a State".

Problems perceived

The majority of the respondents (public as well as private stakeholders) stated that the concept of the "jurisdiction of a Member State" or an "area under the national jurisdiction of a country" needs to be clarified to ensure that the provisions are applied in a consistent, predictable way by operators and competent authorities.

One key issue in this area is the question of whether the concept of "jurisdiction" requires a company to have a registered place of business in the country concerned. There was no unanimity amongst those consulted in this regard. It is possible that if this requirement for a registered place of business did apply, it could constitute a restriction on freedom to provide services (Article 56 TFEU).

The Correspondents' Guidelines No 10 assign responsibility for this issue to the Member States, which definitely has not contributed to greater legal certainty. It is also considered problematic that violations of the requirement for a registered place of business are sometimes punishable by fines, although even this is unclear.

Further and additional aspects mentioned included:

- Varied interpretation of the term "jurisdiction" leads to inconsistent application of the law, even within Germany;
- Danger of the use of shell companies to bypass the jurisdiction of the relevant state;
- Occurrence of problems if the consignee and the recovery facility are not in the same country of destination; and
- Failure by small companies to give notification because it seems too complex to them.

Suggestions made by those consulted

The following suggestions were also made in this regard during the consultation:

- Clarification as to whether or not a company's registered office must be in the country of dispatch in order to fall under the jurisdiction there;
- Suggested wording "company registered in a state" instead of "jurisdiction";
- Suggested wording "under the jurisdiction of the authority of dispatch" to enable the effective and timely enforcement of legal shipment obligations and, where applicable, obligations to return waste on the person who arranges the shipment;
- Both the competent authority of dispatch and the competent authority of destination should have access to the person who arranges the shipment;
    - Instead of the jurisdiction requirement, a valid address for service or at least proof that a PO box has been set up could be the minimum requirement for parties shipping waste;
    - In practice, companies' registered offices are often in the country of dispatch; regulation could be aligned with common practice;
    - Introduction of a simple certificate, analogous to international trade rules, which contains a list of notifiers and thus replaces the requirement for a "registered office".

Discussion and suggestions for measures

In the experts' opinion, a practical solution should

- facilitate harmonised, coherent interpretation of the term "under the jurisdiction" and therefore enable clear, coherent application of the provisions of the WSR which refer to this term; and
- enable the competent authorities to hold the relevant operators in the waste shipment and management chain accountable as regards their obligations in accordance with the WSR.

Based on these two elements, the suggestion is to specify and expand the definition of the term "under the jurisdiction". In the experts' opinion, it makes sense to lay this down with mandatory effect, i.e. to amend the legal text of the WSR and not simply provide non-mandatory guidance in the form of Correspondents' Guidelines.

The content and definition of the term "under the jurisdiction" is a fundamental issue as regards whether it is sufficient for operators based in the EU to be established in *any* EU Member State, or whether they must have their registered office in specific Member States. In light of the freedom to provide services and the freedom of establishment in accordance with EU treaties and the judicial cooperation between the Member States, the experts believe that the former would be sufficient.

Alternative options would be:

- Necessary, but also sufficient, to be registered as a dealer/broker in the country of dispatch;
- Requirement for a place of business in the country of dispatch limited to cases in which the notification procedure applies.

4.3.1.3 Article 2(35) of the WSR: Definition of "illegal shipment"

Result of the consultation on relevance

Article 2(35) of the WSR: Definition of illegal shipment

Background: In the event of illegal shipment in accordance with Article 2(35) of the WSR, Article 24 of the WSR requires the return of waste in principle. The BC requires a provision on the cases in which the return of waste is required. Within this framework, there could be the possibility of making a distinction between minor violations on the one hand and intentional (criminal) violations on the other hand.

Do you think it would be practical to amend the definition of an illegal shipment?

Yes: 19

No: 18

No comment: 1

Context

The definition of "illegal shipment" is provided in Article 2(35) of the WSR and specified in greater detail by a number of subparagraphs (a to g). Essentially, these concern various aspects that are not complied with throughout the applicable procedure.

The consequence of such a breach of procedure is that the shipment is illegal. Articles 24 and 25 of the WSR therefore apply; this constitutes an obligation to take back the illegally shipped waste, which is subject to costs.

Another potential consequence is that all competent authorities in accordance with Article 11(1)(c) and Article 12(1)(d) of the WSR refuse a shipment carried out in connection with a notifier or consignee previously convicted of illegal shipment.[11]

International legal regulations

Article 2(21) of the BC, in conjunction with Article 9(1), defines "illegal shipment" as "illegal traffic" and states that these shipments are illegal if they are carried out

- without notification pursuant to the provisions of the BC to all States concerned;
- without the consent pursuant to the provisions of the BC of a State concerned;
- with consent obtained from States concerned through falsification, misrepresentation or fraud;
- and do not conform in a material way with the documents; or
- result in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of the BC and of general principles of international law.

The provisions of the WSR exceed the criteria laid down in the BC.

Chapter II, Section D(3) and (4) of the OECD Decision lays down the arrangements in the event of shipment of Amber-listed wastes that cannot be completed as intended, such as in the event of illegal shipment of Amber-listed wastes. However, the OECD Decision states that waste should

[11] Oexle/Epiney/Breuer, VVA (WSR) (2010), Article 2, para. 146.

be taken back in accordance with Chapter II, Section D(3) and (4) of the Decision if no alternative provisions have been made for the recovery of these wastes in an environmentally sound manner in the country of import or the country of transit. The OECD Decision therefore appears to prioritise seeking alternative provisions for illegal shipments in the country of import or transit over taking back the waste.

Problems perceived

For most of the respondents, the definition is problematic primarily because of the link with the take-back required in accordance with Article 24 of the WSR. A considerable number of the respondents questioned and criticised the fact that shipments that are considered illegal due to formal errors (minor violations) have to be returned in accordance with Article 24 of the WSR; in practice, when it comes to enforcement in Germany, pragmatic solutions are often sought, taking aspects of proportionality into account, particularly in relation to the Article 18 procedure.

One of the institutions giving feedback brought up the matter of environmental impacts. It stated that there would be a negative impact on the environment in cases in which an obligation to take back waste arises merely due to formal errors, even though the shipment would be lawful if the formal error were rectified:

- In environmental terms, the take back of waste is often not the best choice, even in the event of material illegality.
- Based on case law, the conditions for imposing a fine are, increasingly, not met in the case of formal errors.

Suggestions made by those consulted

- Limitation of illegality of a shipment solely in the case of material violations and therefore amendment of definition in accordance with Article 2 (to which Article 24 of the WSR refers);
- Formulation of exemptions for alleged illegal shipments which are actually only due to formal errors;
- Determination of legality of shipments always at the cargo's current location;
- Introduction of a proper method of waste management under the control authority's jurisdiction instead of mandatory obligation to return waste in accordance with Article 50 of the WSR;
- Differentiation between complete lack of Annex VII documentation and Annex VII documents that have merely been completed incorrectly, and therefore based on the severity of the violation;
- Greater distinction between criminal and administrative law and introduction of conditions for fines in the WSR;
- Enactment of other options instead of taking back waste in line with Article 22 of the WSR (no take-back if not possible to do so).

Discussion and suggestions for measures

Clearly, as described, the main challenges lie in the link between the definition of "illegal shipment" and the obligation to take back waste in accordance with Article 24 of the WSR. In this regard, the experts feel it is important to point out that the obligation to take back waste in accordance with the WSR applies for illegal shipments under both types of procedures, while under international law, this is only the case for Amber-listed wastes; in this respect, there is some leeway as regards the WSR reform.

In terms of primary focus on taking back waste, the sequence laid down in Article 24 seems to be stricter than that in Chapter II, Section D(3) and (4) of the OECD Decision, in which alternative arrangements between the authorities involved take priority. In respect of this, it was stated in the workshop that a joint, environmentally sound solution could often also be sought and found in the case of illegal transboundary shipments, whereas return shipments of waste are usually "political" in nature; in such cases, an agreement would therefore be rather unrealistic if it were the legal rule.

In light of this, the following amendments were suggested in order to form a legal foundation for pragmatic solutions that are already being implemented in practice:

- Article 24 of the WSR could be revised in such a way that a distinction is made between (a) the conditions for taking back wastes subject to the Article 18 procedure and (b) wastes subject to notification.
  - The conditions for taking back illegal shipments of waste which are subject to the Article 18 procedure could be amended when doing so. Here, the mechanisms applicable for waste shipments subject to notification could only be imposed in certain cases (such as those specified in Article 18b(1) of the German Waste Shipment Act). Otherwise, and specifically for formal errors in Annex VII documents made as a result of negligence, a revision could provide for flexible powers to request new documents on the part of the authorities involved.
  - In the case of illegal shipments of Amber-listed wastes, Article 24 of the WSR could be aligned with Chapter II, Section D(3) and (4) of the OECD Decision to provide for arrangements between the competent authorities as the top priority.

4.3.1.4 Article 3(2) of the WSR: Increase in 20 kg limit

Result of the consultation on relevance

Article 3(2) of the WSR: Increase in 20 kg limit
Background: Below a weight of 20 kg, wastes under Article 3(2) and Article 18 of the WSR are exempted from the requirements laid down therein. If this limit was increased, the regulations of Article 18 of the WSR would not apply to shipments of larger volumes**.**

Do you think it is appropriate to increase this de minimis limit?

Yes: 16

No: 19

No comment: 3

Context

Article 3(2) of the WSR lays down what is known as a de minimis limit of 20 kg per waste type for shipment within the Community for recovery, with or without transit through third countries. The wastes affected by this can be found in Article 3(2) of the WSR in conjunction with Annexes III, IIIA and IIIB. The 20 kg limit does not relate to the total volume of waste, but is calculated for each individual waste type being shipped based on the waste identification code of the Green waste list. Below this limit, the shipment is exempt from any procedural requirements.[12]

International legal regulations

The BC does not apply for wastes which are subject to Article 18 of the WSR.

The OECD Decision does not contain an explicit 20 kg de minimis limit for Green-listed wastes. The Green control procedure as defined by Chapter 2, Section C of the OECD Decision essentially corresponds to the simplified procedure in accordance with Article 3(2) in conjunction with Article 18 of the WSR. The OECD Decision does not exclude a de minimis limit as such. To achieve the regulatory objective, however, the information requirement cannot be revoked for larger volumes of waste if the de minimis limit is increased.

Problems perceived and suggestions made by those consulted

It is noteworthy that in relation to this issue, a number of the respondents' arguments did not centre on the 20 kg limit stated in Article 3(2) of the WSR but on the 25 kg limit laid down in Article 3(4) of the WSR (see Chapter 4.3.1.5). Based on the respondents' responses, it can be concluded that this 25 kg exemption within the context of notifications of shipments for the purpose of laboratory analysis therefore appears to have been discussed more intensively amongst the respondents than the 20 kg de minimis limit laid down in Article 3(2) of the WSR. Generally speaking, it was mainly the industrial stakeholders who considered it preferable to increase the 25 kg limit.

Suggestions made by those consulted

- The environment agency of one of the federal states feels that 20 kg is a practically irrelevant volume;
- Suggestions have been made in respect of a different exemption volume based on waste type.

Discussion and suggestions for measures

The exemption limit laid down in Article 3(2) of the WSR is one example of the conflict between extensive controls on waste shipments on the one hand and the facilitation of a circular economy by reducing authorities' official control and supervisory powers on the other hand. In this respect, the discussion takes on a clear political dimension here.

On this basis, the experts suggest leaving Article 3(2) of the WSR and therefore the exemption volume of 20 kg unchanged. Implementing an exemption based on a different minimum volume for each waste group could be overly burdensome and does not seem very practical.

[12] Oexle/Epiney/Breuer, VVA (2010), Article 3, para. 35.

4.3.1.5 Article 3(4) of the WSR: Increase in 25 kg limit (laboratory analysis)

Context

Article 3(4) of the WSR contains one other exemption, according to which waste explicitly intended for laboratory analysis is not subject to the procedure laid down in Article 3(1) of the WSR. Instead, these wastes are subject to the simplified procedure laid down in Article 18 of the WSR. To prevent the stricter notification requirement being bypassed and to comply with the OECD Decision, the legislator provided for a maximum limit on this type of waste shipment for laboratory analysis of 25 kg.

The background of this regulation is that it is often only following the laboratory analysis of the waste type concerned that it can be determined with certainty whether the waste is suitable for recovery or disposal. The legislator proceeds from the basis that this maximum volume of 25 kg was rather generous, as the wording only mentions the minimum volume needed to perform the analysis properly, subject to the 25 kg limit. The regulation therefore exhibits the character of a strict exemption.[13]

International law

The BC does not contain any such regulations concerning a volume-related exemption for the purpose of laboratory analysis. Chapter 2, Section D(1)(c) of the OECD Decision states that waste shipments for the purpose of laboratory analysis cannot exceed a maximum limit of 25 kg in each particular case.

Problems perceived and suggestions made by those consulted

Although the 25 kg limit for laboratory analysis was not the subject of the consultation, some feedback given in comments on the 20 kg limit laid down in Article 3(2) of the WSR suggested that those consulted wanted to discuss this regulation. Amongst the stakeholders, opinions are divided as regards whether an increase in the 25 kg limit is appropriate. Most industrial stakeholders support an increase in the 25 kg limit, whereas official stakeholders are divided and the majority does not really desire an increase in this limit. The authorities feared that an increase in the 25 kg could give rise to a greater possibility of notification being bypassed and they therefore mostly rejected it.

- In particular, it became apparent during the workshop that all the stakeholders considered a 25 kg limit to be generally sufficient in order to assess the physical or chemical properties of the wastes or to determine the suitability of the wastes for recovery operations. By contrast, some stakeholders explicitly desired an expansion of the content of the exemption regulation to include test trials, and they felt that the exemption limit requires great adjustment in this respect. The suggested volumes were to be differentiated by waste type, but could well amount to 1,000 kg; certain suggestions went as far as 100,000 kg, possibly staggered based on waste type.
- One other solution suggested by the respondents was to omit the volume restriction altogether and to submit waste intended for laboratory analysis to the procedure laid down in Article 18 of the WSR (Green list) as a matter of principle.

[13] Oexle/Epiney/Breuer, VVA (2010), Article 3, para. 45 et seq.

Discussion and suggestions for measures

Application of the Article 18 procedure to wastes subject to notification and intended for laboratory analysis, as well as an expansion of the scope to include test trials in the WSR, would, in the experts' opinion, fail due to international legal limits and the clear wording of the OECD Decision. Since, on the other hand, there was consensus in the workshop that a maximum volume of 25 kg is generally a suitable volume for a laboratory analysis, the experts recommend retaining the current regulation during the upcoming revision of the WSR at EU level.

Based on perspective, consideration could be given to triggering a reform of the OECD Decision in line with some stakeholders' desires for simplified shipments of wastes subject to notification for test trials.

4.3.1.6 Article 3(5) of the WSR: Special regulation on shipment of mixed municipal waste

Result of the consultation on relevance

Article 3(5) of the WSR: Special regulation on shipment of mixed municipal waste

Background: Article 3(5) of the WSR states that the shipment of mixed municipal waste (waste entry 20 03 01) collected from private households, including where such collection also covers such waste from other producers, to recovery or disposal facilities shall be subject to the same provisions as shipments of waste destined for disposal. This enables objections to be made based on Article 11(1)(i) of the WSR.

Should Article 3(5) of the WSR be retained?

Yes: 24

No: 3

No comment: 11

Context

Article 3(5) of the WSR implies that even in the case of municipal waste shipped for recovery purposes (waste entry in the EU waste catalogue or the German Waste Catalogue Ordinance (Abfallverzeichnis-Verordnung, AVV) 20 03 01), it is assumed that it is being shipped for disposal purposes and is consequently subject to stricter requirements. This relates to the extensive grounds for objection laid down in Article 11 of the WSR, which, as implied by Article 3(5) of the WSR, also apply if the waste is being shipping for recovery purposes, specifically the grounds for objection laid down in Article 11(1)(i) of the WSR. According to this, an objection to a shipment can be raised simply on the grounds that the waste concerned is mixed municipal waste. Article 3(5) of the WSR therefore falls entirely within the context of European regulations on self-sufficiency and proximity (Article 16 of the WFD). At national level, this corresponds to the approach that the management of mixed municipal waste as part of a service of public interest is a sovereign task assigned to public waste management providers (see in particular Article 20 of the German Circular Economy Act).

International law

In accordance with Article 1(2) of the BC, household wastes are considered "other wastes" within the meaning of Annex II. They are therefore deemed wastes which require special consideration. The BC therefore applies to mixed municipal waste in principle. The BC does not contain any more detailed regulations on "other wastes" similar to Article 3(5) of the WSR.

According to Chapter II, Section B(2)(b) of the OECD Decision, household waste (Y46) is subject to the Amber Control Procedure. Consequently, notification in accordance with Chapter II, Section D(2) is required when shipping household wastes. The OECD Decision does not contain any further special regulations on household wastes.

Problems perceived and suggestions made by those consulted

Some waste management associations have been asserting for some time that the market for mixed municipal waste should be liberalised and Article 3(5) of the WSR should be deleted without substitution.

By contrast, authorities have described a problem that they would expect to arise if Article 3(5) of the WSR was deleted:

- the risk that free trade of mixed municipal waste would make diligent waste management more difficult, particularly planning and codifying capacities for thermal processing and the subsequent management of mineral residues.

Discussion and suggestions for measures

One noticeable feature of the feedback provided during the consultation is the huge majority of respondents that consider Article 3(5) of the WSR relevant and does not find the application of it problematic.

In the experts' opinion, the regulation forms part of the legislation that ensures orderly national/regional waste management planning and compliance with the European principles of self-sufficiency and proximity; the latter were left unchanged in the 2018 reform of the WFD. From a national perspective in particular, the special position of mixed municipal waste is justified in light of Article 20 of the German Circular Economy Act and, in conjunction with self-sufficiency regulations, enables appropriate decisions to be made in individual cases of shipments of mixed municipal waste abroad.

The regulation should therefore be left unchanged.

4.3.1.7 Article 9 of the WSR: Competencies of the competent authority of transit

Result of the consultation on relevance

Article 9 of the WSR: Competencies of the competent authority of transit
Background: The competencies of the competent authority of transit lag behind the competencies of the authorities of dispatch and destination. In particular, the competent authority of transit does not have the option to prevent/delay the shipment if the information requested is not provided.

Do you see any relevant problems as regards the existing competencies of the competent authorities of transit?

Yes: 5

No: 19

No comment: 14

Context

The key elements of the role performed by the competent authorities of transit with regard to notification arise from the following provisions:

Article 7(1) of the WSR states that once notification has been carried out properly, the competent authority of dispatch transmits a notification to all competent authorities of transit.

Article 8(1) of the WSR states:

> *"Following the transmission of the notification by the competent authority of dispatch, if any of the competent authorities concerned considers that additional information and documentation is required as referred to in the second subparagraph, point 3 of Article 4(2), it shall request such information and documentation from the notifier and inform the other competent authorities of such request."*

Article 9(1) of the WSR states:

> *"The competent authorities of destination, dispatch and transit shall have 30 days following the date of transmission of the acknowledgement by the competent authority of destination in accordance with Article 8 in which to take one of the following duly reasoned decisions in writing as regards the notified shipment:*
>
> *a) consent without conditions;*
>
> *b) consent with conditions in accordance with Article 10; or*
>
> *c) objections in accordance with Articles 11 and 12.*
>
> *Tacit consent by the competent authority of transit may be assumed if no objection is lodged within the said 30-day time limit."*

International law

Article 6(4) of the BC states:

> *"Each State of transit which is a Party shall promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. The State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit. However, if at any time a Party decides not to require prior written consent, either generally or under specific conditions, for transit transboundary movements of hazardous wastes or other wastes, or modifies its requirements in this respect, it shall forthwith inform the other Parties of its decision pursuant to Article 13. In this latter case, if no response is received by the State of export within 60 days of the receipt of a given notification by the State of transit, the State of export may allow the export to proceed through the State of transit."*

According to Chapter II, Section D(2), Case 1(c) of the OECD Decision, the competent authorities of the countries concerned may request additional information if the notification is not complete. Upon receipt of the complete notification document referred to in Chapter II, Section D(2), Case 1(a), the competent authorities of the country of import and, if applicable, of the country of export shall transmit an acknowledgement to the exporter with a copy to the competent authorities of all other countries concerned within three (3) working days of the receipt of the notification.

Chapter II, Section D(2), Case 1(d) states that the competent authorities of the countries concerned have thirty (30) days to approve, according to their domestic laws, the proposed transboundary movement of wastes. The thirty (30)-day period for possible objection shall commence upon issuance of the acknowledgement of the competent authority of the country of import.

It is the experts' understanding that the powers of control granted under the BC for Parties of transit in respect of stopping shipments exceed those provided for by the WSR if more information is required. Under the OECD Decision, however, countries of dispatch and destination have the option to consider the request complete. Besides this, countries of transit can merely object to the shipment.

Problems perceived and suggestions made by those consulted

Some of the industrial stakeholders consulted felt that the role of countries of transit should be restricted somewhat:

- Some countries of transit make use of the option to object too extensively, which leads to delays and costs;
- The inconsistent procedure due to certain national regulations of the countries of transit leads to delays, difficulties with planning and increased costs.

Discussion and suggestions for measures

The position of the competent authorities of transit within the context of notification is linked to the actions and decisions of the competent authorities of dispatch and destination to a considerable extent, particularly when notification is considered to have been carried out properly. Furthermore, the competent authority of transit can only make a reasoned decision to consent to the shipment, consent with conditions, or object to the shipment. It is, however, the experts' understanding that this regulation corresponds to Case 1, Chapter II, Section D(2)(c) and (d) of the OECD Decision, and that a unilateral reinforcement of the role of competent authorities of transit at EU level would contradict this.

Whether or not reinforcing the role of competent authorities of transit should be considered is also a political consideration within the context of the conflict between more extensive controls on waste shipments on the one hand and the facilitation of circular economy by reducing authorities' official control and supervisory powers on the other hand.

In any case, it would be possible to discuss the practice of requests for additional information by competent authorities amongst the Member States – as part of the work carried out by IMPEL (European Union Network for the Implementation and Enforcement of Environmental Law), for example – and to share ideas about the role of these authorities to develop a shared understanding of it.

4.3.1.8 Article 13(1)(c) of the WSR: Shipment route and changing routes within the context of general notification

Result of the consultation on relevance

Article 13(1)(c) of the WSR: Shipment route and changing routes within the context of general notification
Background: In the case of general notification, the "route of shipment" in accordance with Article 13(1)(c) must be the same for each shipment. International law: Neither the BC nor the OECD Decision provides any specific details on the use of the same shipment route in the case of general notifications. However, Article 6 of the BC does contain a provision stating these must be "shipped (...) via the same customs office of exit of the State of export via the same customs office of entry of the State of import."

Do you think it is sensible for the WSR to contain the requirement for the "same route of shipment"?

Yes: 16

No: 15

No comment: 7

Context

Article 13(1)(c) of the WSR states that in the case of general notification, the "route of shipment" must be the same for each shipment.

International law

Article 6(6) of the BC requires shipments subject to a general notification to be shipped via the same customs office of exit of the State of export via the same customs office of entry of the State of import and, in the case of transit, via the same customs office of entry and exit.

Cases 1(m) and (n) and Case 2(g) in Chapter II, Section D(2) of the OECD Decision contain provisions on general notifications. They state that a general notification for cases where wastes with essentially similar physical and chemical characteristics are to be sent periodically to the same recovery facility by the same exporter, and acceptance of such when these criteria are met, can be issued for a period of up to one year. Revocation of such acceptance is subject to the specific information requirements of the competent authorities. However, such revocation should not be considered the same as the relatively short-notice change in the route of shipment due to unforeseen circumstances in accordance with Article 13(2) of the WSR.

In the case of transboundary movements to pre-consented recovery facilities, Chapter II, Section D(2), Case 2(g) of the OECD Decision states that general notifications can be issued for up to three years. For revocation and otherwise, reference is made to Chapter II, Section D(2), Case 1. This does not contain any regulations that contradict Article 13(1)(c) and (2) of the WSR either.

The notification documents in the relevant annexes to the BC and the OECD Decision require a list of specific customs offices of exit or export. These details are in line with the requirements set out in the annexes to the WSR.

Problems perceived

Opinions were also mixed here, particularly amongst the authorities that responded (while industry representatives wanted far more flexibility). While some of the regulations were considered appropriate on the grounds of transparency and opportunities for control on the part of the enforcement authorities, it was particularly apparent from the feedback provided during the workshop that targeted inspections would be carried out at facilities instead of on specific routes.

Other arguments included:

- The opportunity should be provided to take an alternative route in case of traffic obstructions;
- Change to general conditions of shipment because a long period of time can elapse between when the general notification is filed and the specific shipment itself, and the shipment route might be changed in the meantime;

- Problems in the event of transportation by train and ship, because providing customs offices and points of entry and exit is already problematic here;
- No consistency amongst various Member States as regards submission of notifications.

Suggestions made by those consulted

- Instead of providing the entire shipment route, only details of frontier crossings should be provided. This would enable identification of the states of transit involved. Alternative routes should be possible;
- Restriction of the regulation on specifying the customs offices to be passed to increase flexibility and enable alternative routes, e.g. due to current traffic conditions;
- Option to specify alternative routes as a less severe measure than specifying the exact route entirely or relaxation of this with the effect that only certain offices passed are provided;
- Checking whether specifying the route of shipment also applies beyond the scope of general notifications.

Suggested measures

Official inspections of waste shipments along routes *based on* specified routes do not seem to be the rule. In light of the reality of logistics acknowledged on all sides (particularly with regard to alternative means of transport), as well as in light of the leeway provided under international law, it is suggested that Article 13(1)(c) of the WSR be amended as follows: For shipments covered by a general notification, it is only necessary to pass the same customs offices of entry and/or exit and/or export.

4.3.1.9 Article 18 of the WSR: Facilitation of manufacturer-organised take-back systems

Result of the consultation on relevance

Article 18 of the WSR: Facilitation of manufacturer-organised take-back systems

Background: Manufacturer-organised take-back systems enable secondary raw materials to be recorded correctly by type. Relaxations of the requirements laid down in Article 18 of the WSR could offer incentives to increase the introduction and use of such systems.

Do you see any relevant problems involved in the organisation of manufacturer-organised take-back systems for shipments of waste in accordance with Article 18 of the WSR?

Yes: 9

No: 16

No comment: 13

Context

The take-back of waste within the context of manufacturer-organised take-back systems is subject to requirements under waste shipment legislation with regard to the waste. One possibility could be relaxing the requirements of the WSR with regard to the take-back of waste

subject to the Article 18 procedure. This could offer incentives to increase the introduction and use of such systems.

International law

The BC only applies to hazardous waste and "other wastes" within the meaning of Article 1(1) and (2) for which notification in accordance with Article 6 of the BC is required. Article 18 of the WSR lays down a simplified procedure for Green-listed waste in accordance with Chapter II, Section B(2)(a) of the OECD Decision. When establishing simplification measures for manufacturer-organised take-back systems, a distinction must be made between the various categories of waste and the provisions of the relevant procedure must be observed.

The OECD Decision does not contain any special regulations on manufacturer-organised take-back systems. It distinguishes between Green and Amber control procedures. The Green Control Procedure in accordance with Chapter II, Section C applies for waste covered by Article 18 of the WSR.

Problems perceived and suggestions made during the consultation

The comments made in this regard relate to the anticipated and potential difficulties that could arise in the event of such a special regulation for manufacturer-organised take-back systems:

- Improper use and/or classification of waste because manufacturer-organised take-back systems use different definitions compared to those in the annexes to the WSR;
- Problems with the shipment of pure fractions because the purity of fractions is not regulated consistently throughout Europe;
- No clear regulations on who is responsible for manufacturer-organised take-back systems because the person who arranges it and the consignee may be the same, or multiple collection points may be considered as the arranging entity.

Suggestions for measures

In the experts' opinion, manufacturer-organised take-back systems are generally promising in terms of product responsibility. There has been little harmonisation in this area to date, however. This means that in transboundary scenarios, problems can arise due to the possibility of bypassing the regulation and enforcement could become very difficult. One possibility could be making manufacturer-organised take-back systems subject to a registration system and therefore making the quality of such systems subject to requirements. This should be done at WFD level, however, rather than by changing the WSR.

4.3.1.10 Article 18 of the WSR: Disclosure of the producer in the case of third-party transactions

Result of the consultation on relevance

Article 18 of the WSR: Disclosure of the producer in the case of third-party transactions
Background: A third-party transaction occurs when a dealer purchases goods from suppliers and sells them on to customers without having any physical contact with the goods. The goods are supplied to their customers directly by their suppliers (manufacturers or wholesalers). The extent to which disclosing the producer in third-party transactions requires the disclosure of the trade secrets of the person who arranges the shipment under the Article 18 procedure has long been intensively discussed. In its judgment C-1/11, the ECJ expressly left this question open.

Do you see any problems with the application of the regulation?

Yes: 14

No: 15

No comment: 9

Context

Waste legislation is characterised by the fundamental idea of transparency for all those involved, from production to final recovery or disposal of the waste. This fundamental idea is also based on the information requirements laid down in the Annex VII document which accompanies shipments of waste which are subject to the Article 18 procedure.

Specifically, Article 18(1) of the WSR states the following procedural requirements for waste as referred to in Article 3(2) and (4) of the WSR which is intended to be shipped:

> *"a) In order to assist the tracking of shipments of such waste, the person under the jurisdiction of the country of dispatch who arranges the shipment shall ensure that the waste is accompanied by the document contained in Annex VII.*
>
> *b) The document contained in Annex VII shall be signed by the person who arranges the shipment before the shipment takes place and shall be signed by the recovery facility or the laboratory and the consignee when the waste in question is received."*

Section 6 of the document contained in Annex VII of the WSR requires information on the waste producer (original producer, new producer or collector) to be provided, including:

- Name
- Address
- Contact person
- Telephone number
- Email address
- Fax

Article 18(4) of the WSR states that the information referred to in Article 18(1) of the WSR must be treated as confidential where this is required by Community and national legislation.

The requirement for transparency and control as regards transboundary waste shipments and the economic interests of the industries involved gives rise to certain conflicts. For brokers in particular (but not exclusively), contact with original producers constitutes sensitive information that is crucial for the business model. Kropp/Oexle, AbfallR 2011, 36 (38) consider that the European legislator overlooked this problem when drawing up the WSR. Shortly after the WSR entered into force, the Federal Ministry for the Environment submitted a specific proposal to the EU Commission. This proposal was rejected on formal grounds.

The problem was the subject of the ECJ preliminary ruling procedure C-1/11 (*Interseroh Scrap and Metals Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)*). The following questions were submitted to the Court with a reference for a preliminary ruling:

> *(Question 1) "Does Article 18(4) of [Regulation No 1013/2006] also apply to those involved in the shipment process?"*

> *(Question 3) "If question 1 is answered in the affirmative: Is the obligation under Article 18(1) of that regulation on the persons who arrange the shipments to disclose the name of the waste producer or waste collector to the consignee of the waste by means of the document set out in Annex VII limited by Article 18(4) in order to protect business secrets?"*
>
> *(Question 4) "If question 3 is answered in the affirmative: Does the extent of the limitation depend on a weighing up of the interests (on the one hand, the business interests affected, on the other, protection of the environment) on a case-by-case basis?"*

With regard to these questions, the ECJ ruled as follows:

> *"The answer to the first, third and fourth questions is that Article 18(4) of Regulation No 1013/2006 must be interpreted as not permitting an intermediary dealer arranging a shipment of waste not to disclose the name of the waste producer to the consignee of the shipment, as provided for in Article 18(1) of Regulation No 1013/2006 in conjunction with Annex VII to that regulation, even though such non-disclosure might be necessary in order to protect the business secrets of that intermediary dealer.[14]"*

Question1 was followed by another question, which was:

> *"If not, is Article 18(1) of that regulation restricted by [EU] primary law in order to protect business secrets?"*

In response, the ECJ stated:

> *"In those circumstances, any unjustified breach of the protection of business secrets, assuming it were established, would not be such as to limit the scope of Article 18 of Regulation No 1013/2006, but rather to call into question the validity of that provision. The national court has not, however, asked the Court of Justice to rule on the validity of Article 18 of Regulation No 1013/2006, or even expressed any doubt in that regard, and the Court does not have sufficient facts before it to enable it to assess the validity of that provision.[15]*
>
> *Consequently, the answer to the second question is that Article 18(1) of Regulation No 1013/2006 must be interpreted as requiring an intermediary dealer, in the context of a shipment of waste covered by that provision, to complete Field 6 of the shipment document and transmit it to the consignee, without any possibility of the scope of that requirement being restricted by a right to protection of business secrets.[16]"*

International law

The BC provides for a control system for Green-listed waste. The concept of Green-listed waste is introduced by Chapter II, Sections B and C of the OECD Decision. Section C states that transboundary movements of Green-listed waste are subject to all existing controls normally applied in commercial transactions, with the latter not being specified, however. Therefore, the specific provisions laid down in the WSR as regards the scenario addressed in Article 18 of the WSR cannot be determined in an international legal framework.

[14] Interseroh Scrap and Metals Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM) (2012), Case C-1/11, ECLI:EU:C:2012:194, para. 40; http://curia.europa.eu/juris/liste.jsf?num=C-1/11&language=EN

[15] Interseroh Scrap and Metals Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM) (2012), Case C-1/11, ECLI:EU:C:2012:194, para. 46.

[16] Ibid, para. 47.

Problems perceived

Problems within this context were perceived differently by different groups of stakeholders (authorities on one hand, associations/companies on the other). Some respondents (mainly industrial stakeholders) stated that the identity of the waste producer is commercially sensitive information which should be protected against disclosure to the facility at the destination, which is usually a private waste management company. The manufacturer's details in the Annex VII document would enable other operators in the chain (e.g. carriers or treatment facilities) to identity the origin of the waste. Other respondents (mainly authorities) are of the opinion that it is necessary to disclose the identity of the waste producer to guarantee transparency control in the waste management chain.

Interestingly, this subject area is generally the focal point of comments on the Article 18 procedure (see Chapter 4.3.2.3 in this regard).

The authorities also mentioned the following additional aspects:

- Fears that disclosure of the producer might result in competitive disadvantages due to the breach of business secrets and consequently could encourage illegal and/or erroneous actions;
- Frequent covert third-party transactions, as it is often difficult to check whether the management facility is actually an installation or simply a broker;
- Impossibility of plausibility checks on whether the waste intended for shipment can be generated by the producer at all because the checks are delayed when information has to be requested from the competent authority for the dealer or broker.

Suggestions made by those consulted

- No approval of dealers and brokers as person who arranges the shipment;
- Transparency in terms of traceability from the producer to the disposer should take priority over commercial considerations;
- Disclosure to competent authorities only and not to the carrier, consignor and consignee at the same time, as well as an obligation on authorities to treat the data received as confidential.

Discussion and suggestions for measures

According to the ECJ judgment, the current structure and current wording of the WSR provides for a clear obligation to disclose the identity of the waste producer in Field 6 of Annex VII. The ECJ did not provide any guidance for a possible revision of this, however. To do so, the interests of economic operators would have to be weighed up against interests in monitoring and control, the latter in consideration of the fact that this primarily concerns Green-listed waste with low risk potential per se. The experts consider that a solution might be replacing Field 6 with an obligation requiring carriers and intermediary dealers to give the authorities details of the producer's identity, without requiring them to disclose the producer's identity to the consignee of the shipment.

4.3.1.11 Article 20(1) of the WSR: Calculation of retention periods for documents

Result of the consultation on relevance

Article 20(1) of the WSR: Calculation of retention periods for documents

Background: In accordance with Article 20(1), all documents in relation to a notified shipment must be kept for at least three years, from the date when the shipment starts. The date used to calculate the retention period in relation to general notifications is unclear.

Do you consider it necessary to provide clarification of the date required for general notifications?

Yes: 23

No: 6

No comment: 9

Context

Article 20(1) of the WSR states:

> *"All documents sent to or by the competent authorities in relation to a notified shipment shall be kept in the Community for at least three years from the date when the shipment starts, by the competent authorities, the notifier, the consignee and the facility which receives the waste."*

The date used to calculate the retention period in relation to general notifications is unclear.

International law

The BC does not contain any special provisions as regards retention periods for documents.

Chapter II, Section D(2), Case 1(k) of the OECD Decision requires the recovery facility to retain the original of the movement document within the scope of the Amber Control Procedure for three years.

And according to Chapter II, Section D(6)(b) of the OECD Decision, facilities which carry out recovery operations in accordance with R12 and R13 of Annex 5.B as well must retain the original of the movement document for three years.

In both cases, facilities are required to return signed copies of the movement document to the exporter and to the competent authorities of the countries of export and import. The OECD Decision imposes an obligation to retain the movement document for a period of three years on recovery facilities (R12/R13 interim recovery facilities) (but not on exporters and authorities).

The OECD Decision does not contain any provisions as regards the date on which the period begins. Consequently, the OECD Decision would not impede any special provisions within the WSR on the beginning of the period, as long as the three-year requirement is met.

Problems perceived

A large majority of the respondents indicated a need for clarification as regards the date on which the three-year period begins and for how long documents in relation to a general notification must be kept in the European Community. Article 20(1) of the WSR does not state whether this period commences on the date of the beginning of the first or last shipment in such a general notification.

Suggestions made by those consulted

The key clarifications suggested by the respondents were:

- Three years from completion of the last shipment;
- Three years from the final recovery operation.

The retention period should end 3 years from acknowledgement of completion of recovery/disposal operations at the latest.

Two authorities of the German federal states provided suggestions for wording:

Firstly,

> *"The competent authorities, the notifier, the consignee and the facility which receives the waste shall keep all documents sent to or by the competent authorities in relation to a notified shipment in the Community for at least three years from the date when the shipment starts; in the case of notifications according to Article 13 of this Regulation, this applies from the date when the last shipment starts."*

Secondly,

> *"(...) for three years from submission of the last waste management certificate in accordance with Article 16(e) and Article 15(e) of the WSR"*

There was consensus amongst the stakeholders that the period should begin following completion of the last shipment in respect of general notifications.

Suggestions for measures

Based on the feedback given, the experts consider the following suggestion made by one of the parties consulted to be a clear solution:

"The competent authorities, the notifier, the consignee and the facility which receives the waste shall keep all documents sent to or by the competent authorities in relation to a notified shipment in the Community for at least three years from the date when the shipment starts; in the case of notifications according to Article 13 of this Regulation, this applies from the date when the last shipment starts."

This wording ensures that documents are actually retained for a considerable period of time in the case of shipments carried out within the context of a general notification to pre-consented recovery facilities for which the general notification can be extended to three years. Compared to the other suggestion, the experts believe it to be clearer in respect of pre-consented recovery facilities (Article 14 of the WSR).

4.3.1.12 Article 24 of the WSR: Take-back when a shipment is illegal

Article 24 of the WSR: Take-back when a shipment is illegal
Background: Article 24 of the WSR concerns the take-back of waste when an illegal shipment is discovered.

Are there any problems with the handling of suspected illegal shipments?

Yes: 12

No: 17

No comment: 9

Context

Article 24 of the WSR concerns the take-back of waste when an illegal shipment is discovered.

International law

Article 9(2) to (4) of the BC states:

> *"(2) In case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are: (a) taken back by the exporter or the generator or, if necessary, by itself into the State of export, or, if impracticable, (b) are otherwise disposed of in accordance with the provisions of this Convention, within 30 days from the time the State of export has been informed about the illegal traffic or such other period of time as States concerned may agree. To this end the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the State of export.*
>
> *(3) In the case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the importer or disposer, the State of import shall ensure that the wastes in question are disposed of in an environmentally sound manner by the importer or disposer or, if necessary, by itself within 30 days from the time the illegal traffic has come to the attention of the State of import or such other period of time as the States concerned may agree. To this end, the Parties concerned shall co-operate, as necessary, in the management of the wastes in an environmentally sound manner.*
>
> *(4) In cases where the responsibility for the illegal traffic cannot be assigned either to the exporter or generator or to the importer or disposer, the Parties concerned or other Parties, as appropriate, shall ensure, through co-operation, that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the State of export or the State of import or elsewhere as appropriate."*

The delegation of responsibility therefore corresponds to that of the WSR.

Chapter II, Section D(3) of the OECD Decision lays down the procedure for the return of waste in the event that a shipment cannot be completed as intended, such as in the event of an illegal shipment. Priority here is placed on the competent authorities of the country of import informing the competent authorities of the country of export and finding a joint solution for environmentally sound recovery. If a mutual solution is not found, the alternative provisions of (a) and (b) apply. In the event of a return from the state of import to the state of export, the competent authorities of the state of export must allow the return of the waste. The state of export or transit cannot oppose such a return. The return should be carried out within 90 days.

Further notification is required in accordance with (b) in the event of re-export from a state of import to a state other than the original state of export.

Chapter II, Section D(4) of the OECD Decision also covers the duty to return wastes from a country of transit. This includes cases in which the competent authorities of the country of transit discover that a shipment is illegal. According to this section, they must immediately inform the competent authorities of the countries of export and import and any other countries of transit. Again, priority here is placed on reaching a mutual agreement on the environmentally sound recovery of the waste. Only when such an agreement cannot be reached must the competent authorities of the country of export allow the shipped waste to be returned. In this case, the return should also be carried out within 90 days.

Essentially, the provisions of the OECD Decision also correspond to the provisions of the WSR here, even though here, in accordance with the WSR, the primary aim is finding a mutual solution.

Problems perceived

A number of the problems described have previously been described within the context of the definition of illegal shipments (see Chapter 4.3.1.3), particularly the question of whether or not, from an environmental perspective, the prompt management of a discovered illegal shipment is preferable (and sometimes also more reasonable) than a return.

Furthermore, the parties consulted pointed out that the take-back requirements laid down in the WSR pose challenges in practice. From the authorities' perspective, the key issues are:

- Delegating responsibilities;
- Identifying notifiers;
- Communication with authorities;
- Determining the addressee is difficult; often, the "notifier de jure" or the "person who arranges the shipment" cannot be identified. Authorisation to oblige those involved in the shipment (carriers, haulage companies, contractors for the organisation of the shipment, shipping agencies, shipping companies) to take back and arrange the management of the waste is urgently needed (Article 25 of the WSR), particularly if there is no clear waste producer (export of electronic waste of varied nature and origin). Often, the definitions provided in Article 2(15) of the WSR are not applicable to the circumstances of illegal shipments in reality;
- When enforcement authorities stop a truck, there is the problem of how to then deal with the shipment as this falls under the jurisdiction of the relevant German federal state or Member State. The procedures here are highly inconsistent;
- There is no enforcement of shared responsibility in accordance with Article 24(5) of the WSR. Instead, retrieval is always arranged by the competent authority of dispatch;
- Clarification is required in respect of allocation of costs in the event that control authorities are not also waste management authorities.

Issues from the associations' and companies' perspective include:

- Disproportionate nature of return compared to severity of violation;
- Risk of implication of an illegal waste shipment if evidence obligations in accordance with Article 50(4c) and (4d) of the WSR are not fulfilled or not fulfilled on time;
- Problems if authorities cannot agree on the classification of waste;
- Problems with the necessary coordination between countries of dispatch, transit and destination as regards an illegal shipment in the area if the country of transit considers a shipment illegal but the countries of dispatch and destination do not;

- High storage costs for waste during the procedure.

Suggestions made by those consulted

- Authorities should be allowed to determine whether to establish appropriate measures;
- The group of addresses should be expanded at EU level to include the party arranging the shipment, analogous to Article 8(2) of the German Waste Shipment Act;
- Opportunity to find a joint solution as regards how the return should be organised and cooperation between the competent authorities involved, analogous to Article 24(5) of the WSR, to guarantee the recovery or disposal of the waste concerned.

Suggestions for measures

Most of the challenges described appear to be of an executive rather than a legal nature. It appears to be worth considering redefining the concept of the responsible party, which, analogous to Article 8(2) of the German Waste Shipment Act, should be expanded to include the person who arranges the shipment. It also seems sensible to expand the WSR to include cases in which both the stakeholders in the country of dispatch and the stakeholders in the country of destination are held responsible for illegality (there are no explicit provisions in this regard at present). An obvious solution would be declaring both stakeholders responsible and leaving the addressee to be selected at the authorities' discretion.

The return process within the EU can be streamlined further by way of better official coordination and, potentially, guidance at EU level (Correspondents' Guidelines).

4.3.1.13 Article 26 of the WSR: Electronic data interchange

Result of the consultation on relevance

Article 26 of the WSR: Electronic data interchange
Background: There have been requests for data interchange within the EU to be carried out electronically.

Do you consider it appropriate to introduce electronic data interchange?

Yes: 33

No: 0

No comment: 5

Context

According to the wording of Article 26(1) of the WSR, the documents stated therein must be submitted by post unless the authorities agree on another method of data communication in accordance with paragraph 2.

In accordance with Article 26(3) of the WSR, the accompanying documents may be in electronic form with digital signatures. In light of the uncertain nature of further technical development, the legislator has not specified the exact form, as long as the data is made readable in a way that is acceptable to the authorities.[17]

[17] Oexle/Epiney/Breuer, VVA (2010), Article 26, para. 6.

International law

The BC does not contain any formal requirements for the transmission of certain documents.

By contrast, the OECD Decision provides for formal requirements at various points. Chapter II, Section D(2), Case 1(h) of the Decision states that an objection or written consent may be provided by post, email with a digital signature, email without a digital signature followed by post, or fax followed by post. According to Chapter II, Section D(2), Case 1(l) of the OECD Decision, a certificate of recovery to be submitted to the exporter and to the competent authorities of the countries of export and import may be sent by post, email with a digital signature, email without a digital signature followed by post, or fax followed by post.

Chapter II, Section D(6)(c) also states that a certificate of recovery to be submitted to the exporter and to the competent authorities of the countries of export and import may be sent by post, email with a digital signature, email without a digital signature followed by post, or fax followed by post.

For some time, there have been initiatives at EU level to introduce electronic communication in the area of transboundary waste shipment (see Section "Discussion and suggestions measures"). The Correspondents' Guidelines No 11 entered into force on 20 July 2019 describe a harmonised, EU-wide data model used for electronic data interchange in relation to notification documents.

Problems perceived and suggestions made by those consulted

It is widely felt that the current regulations on data interchange need to be revised to take account of the general implementation of electronic communication. Industry representatives repeatedly made reference to the WSR deadlines and the usual postage times. One other comment made this in this regard was that Article 26 of the WSR is not applied consistently by the authorities in the various German federal states and by authorities in other countries. Depending on the authority and the type of document, the relevant documents can also sometimes be sent e.g. as a PDF attachment to an email, even if the PDF file does not have a digital signature.

It is generally expected that current initiatives will eventually lead to the general acceptance of electronic data interchange in the foreseeable future. Some suggestions therefore focused on formulating specific conditions that such a communication system should meet. There were no major distinctions between the suggestions made by the authorities and industry representatives.

- Various participants stated that such an electronic system would only be effective if it was widely used, i.e. by all authorities.
- A uniform procedure (including a numbering system) makes sense to facilitate processes.
- The authorities want electronic data interchange in relation to movement documents, customs declarations, proof of financial guarantees and letters of approval in particular, because this would made enforcement significantly easier.
- It should be noted that the data recorded must be kept to the minimum required. Data protection must be guaranteed.
- All European countries and control authorities must have the same digital equipment to prevent a duplication of processes (paper and digital documentation at the same time).

- It should be possible to connect to the electronic waste recording procedure system.[18]
- The first step should be to permit the transmission of the following documents/information as PDF files by email with a digital signature generally (without the previously required agreement of the authorities concerned in accordance with Article 26(2) of the WSR). With the approval of the competent authorities concerned, it should also be possible to transmit the documents by email without a digital signature and without subsequent submission by post. The following could be envisaged:
  - Confirmation of receipt of waste (Article 26(1)(h) of the WSR);
  - Certificate for recovery or disposal of waste (Article 26(1)(i) of the WSR); and
  - Prior information regarding actual start of the shipment (Article 26(1)(j) of the WSR).
- If the notifier and consignee reach an agreement on electronic data interchange and sign this electronically in accordance with the applicable signature law, the authorities should usually agree to it.

Suggestions for measures

It is clear from the comments made that an electronic system for the exchange of data is generally considered necessary and that one is expected to be introduced in the foreseeable future. It appears that a considerable number of stakeholders would prefer a system that is simpler but works properly and is used consistently and coherently by all competent EU authorities. Sensible amendments to the WSR relating to the introduction of such a system are expected in the upcoming review of the Regulation. In particular, however, the experts recommend deleting from Article 26(2) of the WSR the agreement currently required from the authorities for the use of alternative forms of communication to submission by post.

There are various initiatives concerning this issue at present:

- The EU Correspondents' Guidelines No 11 on electronic data interchange were adopted[19] in July 2019;
- Studies by the EU Commission (e.g. Trasys[20] and Abrarora[21]).

Pursuing these developments and, where applicable, responding to the relevant considerations in a public and private context in Germany is recommended. The above considerations made by the stakeholders could be considered the initial contribution.

[18] https://www.bmu.de/faqs/eanv-elektronische-nachweisfuehrung/

[19] https://ec.europa.eu/environment/waste/shipments/guidance.htm

[20] https://ec.europa.eu/environment/waste/shipments/pdf/1a_Project_Charter_EDI_for_WSR.pdf

[21] https://ec.europa.eu/environment/waste/shipments/pdf/electronic_data_exchange_waste_shipment_regulation.pdf

4.3.1.14 Article 28: WSR: Disagreement on classification issues

Result of the consultation on relevance

Article 28: WSR: Disagreement on classification issues

Background: Article 28 of the WSR concerns a scenario in which the authorities involved cannot agree, e.g. on the classification as regards the distinction between waste and non-waste. In order to resolve this problem, in accordance with Article 28(1)(1), a subject matter shall be treated as if it were waste for the purpose of the procedure if the competent authorities of dispatch and of destination cannot agree.

Do you see any relevant problems with the application of the regulation?

Yes: 4

No: 27

No comment: 7

Context

Article 28 of the WSR concerns a scenario in which the involved authorities of dispatch and destination cannot reach an agreement on the following:

- the distinction between waste and non-waste;
- the classification in Annexes III, IIIA, IIIB or IV;
- the classification of a waste treatment operation as recovery or disposal.

In accordance with Article 28(1)(1), if the competent authorities of dispatch and of destination cannot agree, for the purpose of the procedure the element which triggers the more stringent procedure should be assumed, i.e.:

- In the absence of an agreement on the distinction between waste and non-waste, the subject matter shall be treated as waste;
- In the absence of an agreement on whether notified waste should be classified as waste as listed in Annexes III, IIIA, IIIB or IV, the waste concerned shall be treated as waste as listed in Annex IV;
- In the absence of an agreement on whether waste management should be classified as recovery or disposal, the provisions for disposal apply.

International law

Neither the BC nor the OECD Decision contains provisions on resolving differences in opinion on the part of the authorities involved.

Problems perceived and suggestions made by those consulted

Scenarios involving by-products and end-of-waste status in particular are considered problematic. At present, the number of uniform European provisions in this area provided by EU regulations is very limited. One authority voted in favour of the creation of a European authority with decision-making powers.

Suggestions for measures

In the experts' opinion, the current provisions laid down in Article 28 of the WSR are essential. The problems described regarding practical application cannot, in the experts' opinion, be resolved by amending the WSR. It is rather doubtful whether the Member States could be convinced of the need for a European authority with decision-making powers. In light of this, the recommendation is to leave Article 28 of the WSR unchanged.

4.3.1.15 Annexes III, IIIA and IIIB of the WSR: Classification/share of contaminants

Result of the consultation on relevance

Annex to the WSR: Classification of waste and share of contaminants

Background: In practice, waste always contains a certain share of contaminants (waste that has been included by mistake, contamination, etc.). This poses the question of whether a limit can be set, up to which waste can be classified as Green-listed.

Do you see any relevant problems with the classification of waste as regards the share of contaminants?

Yes: 25

No: 7

No comment: 6

Context

Annexes III, IIIA and IIIB of the WSR are worded as follows:

> *"Regardless of whether or not wastes are included on this list, they may not be subject to the general information requirements laid down in Article 18 if they are contaminated by other materials to an extent which*
>
> *a) increases the associated risks sufficiently to render the waste appropriate for submission to the procedure of prior written notification and consent, when taking into account the hazardous characteristics listed in Annex III to Directive 91/689/EEC; or*
>
> *b) prevents the recovery of the wastes in an environmentally sound manner."*

International law

The BC contains provisions regulating classification in Annexes I, II and, in particular, III (List of Hazardous Characteristics). Annexes VIII and IX substantiate this classification. Furthermore, Article 1(1)(b) of the BC states that wastes that are not listed in Annex II of the Convention but are defined as or regarded to be hazardous wastes by the domestic legislation of the Party are considered hazardous wastes. The BC gives the Parties to the Convention great freedom to determine whether wastes that are not listed as hazardous wastes in Annex I (including the wastes listed in Annex III) constitute hazardous wastes in accordance with Article 1(1)(b) of the BC.

Chapter II, Section A, No. 2 of the OECD Decision contains a definition that is analogous to the BC as regards hazardous waste. This also gives the Member States a certain amount of freedom as regards the categorisation of waste. Chapter II, Section B(8) of the OECD Decision specifically states that a mixture of wastes for which no individual entry exists shall be subject to the following control procedure:

"(i) a mixture of two or more Green wastes shall be subject to the Green Control Procedure, provided the composition of this mixture does not impair its environmentally sound recovery.
(ii) a mixture of a Green waste and more than a de minimis amount of an Amber waste or a mixture of two or more Amber wastes shall be subject to the Amber Control Procedure, provided the composition of this mixture does not impair its environmentally sound recovery."

Problems perceived

The question of how the share of contaminants should be taken into account when categorising waste is considered a relevant topic by both industry representatives and authorities. The respondents also pointed out that there are no consistent regulations on classification and shares of contaminants within the scope of the WSR. The stakeholders also pointed out that the authorities of the Member States apply different interpretations/approaches as regards to the share of contaminants.

Feedback from authorities

- Particular problems also occur in relation to post-consumer wastes, where the share of contaminants depends on the sorting/process technology and specifications used.
- There is disagreement regarding the criteria on which this should primarily be based – either "varietal purity" or "danger level".
- There is also disagreement regarding whether limits should be applied to the transport unit or batch, and in which unit the share of contaminants should be provided (percentage by volume or weight). Therefore, some do not expect any decisions to be made in the foreseeable future.
- In practice, it is not realistic to expect that Green-listed wastes do not contain any contaminants or other wastes whatsoever. It is therefore down to individual authorities to set a limit on which share of contaminants will be tolerated. This leads to legal uncertainty.
- To enable those involved in transboundary shipments to make sound decisions, clear regulations should be provided on the level of contaminants that waste can contain. This should include specifying a lower percentage (inspections carried out during shipment controls must enable decisions to be made on the spot), for instance 5%, which seems broadly attainable across industry based on the current state of the art. National legislation would also be welcomed here (analogous to the Federal Waste Management Plan [Bundesabfallwirtschaftsplan] of 2017, Part 2, Austrian Federal Ministry for Sustainability and Tourism, see 70 et seq. therein).
- Problems are perceived in particular in respect of the differentiation between contaminants and waste that has been included by mistake on one hand and changes to the danger level on the other.

Suggestions made by those consulted

In light of the difficulties perceived, several stakeholders (both public and private) suggested a more practicable solution based on uniform threshold values for contaminant shares indicating the relevant reference values.

The authorities suggest:

- Specific limits on the share of contaminants lie between 1% and 5%; these limits should be dependent on how the interfering substance negatively impacts high-quality recovery, depending on the type of waste;
- Harmonisation of limit values on contaminants by issuing Correspondents' Guidelines;
- Limit values should be determined based on the examination of major waste streams.

Industry representatives suggest:

- Sampling to determine the level of interfering substances should always be carried out consistently at the location of waste recovery operations;
- Establishment of a centralised authority in Germany to coordinate the various competent authorities' responsibilities and attain uniform limit values.

Suggestions for measures

The description of the problem shows that the difficulties essentially lie in the inconsistent and sometimes also very low official limits on contaminations (some authorities still only tolerate contamination up to a maximum of 1% to 3%). One suggestion made by several stakeholders was that uniform threshold values could apply for permitted shares of contaminants. Such harmonisation should be carried out at European level because otherwise, the necessary legal certainty for transboundary waste shipments would, naturally, not be achieved in this area. On one hand, this harmonisation should take into account that wastes typically and usually have some proportion of contaminants. Contamination is typical of and inherent in waste. On the other hand, it should be taken into account that setting very low limits on contaminants would hugely curtail the scope of application of Article 18 of the WSR and the Green list, because exceeding such limits results in a notification requirement. From the perspective of environmental protection, moving Green-listed wastes over into the notification procedure in this way is unjustified if the contaminants do not increase the risk potential of the wastes and do not prevent recovery as intended (see also the preliminary remark on Annexes III, IIIA and IIIB of the WSR at the beginning under "Context"). The enforcement authorities and affected industries should be involved in any such harmonisation based on waste type.

4.3.2 Analysis of other selected aspects of the WSR

The following sections concern aspects that were covered by the consultation (without any suggestions for measures).

4.3.2.1 Article 14 of the WSR: Pre-consented recovery facilities

Article 14 of the WSR: Pre-consented recovery facilities

Background: Article 14 of the WSR enables competent authorities to issue pre-consents for specific recovery facilities.

Do you see any relevant problems with the application of the regulation?

Yes: 8

No: 25

No comment: 5

Context

In accordance with Article 14(1) of the WSR, the competent authorities of destination, under whose jurisdiction specific recovery facilities fall, can decide to issue pre-consents. Pre-consent is limited to a specific period; a fixed length of time is not specified, however. Following a pre-consent, in accordance with Article 14(2) of the WSR the period of validity of consent can be extended to up to three years in the case of a general notification. In accordance with Article 14(4) of the WSR, the time limit for consent, consent with conditions or objections by all the competent authorities involved is reduced from 30 days to seven working days.[22]

International law

The BC does not contain any explicit regulations on pre-consents. Article 4 of the Convention simply states that a high level of protection must be maintained generally and that the notification procedure must not be undermined or bypassed.

In the OECD Decision, transboundary movements to pre-consented recovery facilities are covered in Chapter II, Section D(2), Case 2. Pre-consents can be issued if the competent authority has not raised any objections to the transboundary movement of specific types of waste to a specific recovery facility. In accordance with Part D.(2), Case 2, they can "be limited to a specified period of time". In accordance with Chapter II, Section D(2), Case 2(g) of the OECD Decision, shipments can cover a period of up to three years in the case of a general notification. In this respect, the provisions of the OECD Decision are therefore in line with those of Article 14 of the WSR.

Problems perceived

A number of the respondents (mainly authorities) raised questions relating to the mechanism of pre-consented recovery facilities in accordance with Article 14 of the WSR. The problems addressed include:

- No precise definition of "specific recovery facilities";
- No regulations on which details operators of recovery facilities must provide;
- Difficulties with the application of the LAGA implementation guidance M 25 under no. 3.1.12 in respect of Article 14 of the WSR, because this excludes certain facilities in which interim recovery is carried out; Article 14 of the WSR does not cover this;

[22] Oexle/Epiney/Breuer, VVA (2010), Article 14, para. 7.

- Article 14 of the WSR bears no relevance as regards fees; to attain this, Article 29 of the WSR would have to be amended accordingly;
- The time limit for consent of seven working days from receipt of acknowledgement as stated in Article 14(4) of the WSR seems too short;
- Varied implementation of the regulation by individual competent state authorities;
- Frequent refusal of consent for notifications with a period of more than one year although pre-consent for the waste management plant has been issued in accordance with Article 14 of the WSR, with the result that it is necessary to renew notification every year.

Suggestions made by those consulted

- Extension of the time limit for consent to 30 days, in line with the time limits for notifications for facilities without pre-consent;
- Introduction of a fee element in conjunction with Article 29 of the WSR;
- Suggested wording of Article 14(2) of the WSR: "In the case of a general notification submitted in accordance with Article 13, the competent authorities shall agree to a period of a validity of up to three years in accordance with Article 9(4) and (5)";
- Introduction of the fast-track procedure, which was tested in the North Sea Resources Roundabout. This involves an international Green Deal adopted by four neighbouring North Sea countries (Netherlands, Belgium, United Kingdom and France), with the aim of simplifying transboundary waste shipment to increase the secondary use of materials. For recovery facilities that have pre-consent in accordance with Article 14 of the WSR, the fast-track procedure should be introduced to enable transboundary waste shipments to be processed faster. The aim is to process these in a maximum of seven working days.[23]
  A processing time of 19 working days was achieved during the aforementioned tests.[24]

Appraisal

In practical terms, Article 14 is a highly relevant regulation. In the experts' opinion, the main problem lies in the use of the term "specific recovery facility", which is not only not defined in the WSR but is completely foreign to the entire field of waste legislation too. This results in considerable legal uncertainty in practice. We recommended clarifying the term (which type of recovery facilities should be included?) or even deleting it.

[23] https://www.wastematters.eu/uploads/media/DWMA_North_Sea_Resources_Roundabout_is_paying_off.pdf

[24] https://www.euric-aisbl.eu/news-events/news/item/276-first-nsrr-fast-track-notification-for-waste-electrical-and-electronic-equipment-weee-is-a-fact

4.3.2.2 Article 15 of the WSR: Interim treatment

Article 15 of the WSR: Interim treatment

Background: Article 15 of the WSR lays down additional provisions for waste destined for interim recovery or disposal operations.

Do you see any relevant problems with the application of the regulation?

Yes: 19

No: 10

No comment: 9

Context

Article 15 of the WSR lays down additional provisions for waste destined for interim recovery or disposal operations. Article 15(1) of the WSR states:

> *"Shipments of waste destined for interim recovery or disposal operations shall be subject to the following additional provisions:*
>
> *a) Where a shipment of waste is destined for an interim recovery or disposal operation, all the facilities where subsequent interim as well as non-interim recovery and disposal operations are envisaged shall also be indicated in the notification document in addition to the initial interim recovery or disposal operation.*
>
> *b) The competent authorities of dispatch and destination may give their consent to a shipment of waste destined for an interim recovery or disposal operation only if there are no grounds for objection, in accordance with Articles 11 or 12, to the shipment(s) of waste to the facilities performing any subsequent interim or non-interim recovery or disposal operations.*
>
> *c) Within three days of the receipt of the waste by the facility which carries out this interim recovery or disposal operation, that facility shall provide confirmation in writing that the waste has been received.*
>
> *This confirmation shall be contained in, or annexed to, the movement document. The said facility shall send signed copies of the movement document containing this confirmation to the notifier and to the competent authorities concerned.*
>
> *d) As soon as possible, but no later than 30 days after completion of the interim recovery or disposal operation, and no later than one calendar year, or a shorter period in accordance with Article 9(7), following the receipt of the waste, the facility carrying out this operation shall, under its responsibility, certify that the interim recovery or disposal has been completed.*
>
> *This certificate shall be contained in, or annexed to, the movement document.*
>
> *The said facility shall send signed copies of the movement document containing this certificate to the notifier and to the competent authorities concerned.*
>
> *e) When a recovery or disposal facility which carries out an interim recovery or disposal operation delivers the waste for any subsequent interim or non-interim recovery or disposal operation to a facility located in the country of destination, it shall obtain as soon as possible but no later than one calendar year following delivery of the waste, or a shorter*

period in accordance with Article 9(7), a certificate from that facility that the subsequent non-interim recovery or disposal operation has been completed.

The said facility that carries out an interim recovery or disposal operation shall promptly transmit the relevant certificate(s) to the notifier and the competent authorities concerned, identifying the shipment(s) to which the certificate(s) pertain."

International law

The BC does not contain any provisions regulating the interim recovery or disposal of waste.

Chapter II, Section D(6) of the OECD Decision contains provisions relating to exchange (R12) and accumulation (R13) operations. Due to the fact that key elements of Article 15 of the WSR are based on the requirements of Chapter II, Section D(2), Case 2 of the OECD Decision, the options to amend Article 15 of the WSR are limited.

Problems perceived

Difficulties in the application of Article 15 of the WSR were reported by both authorities and industry representatives:

- Laborious procedure when final treatment takes place in various facilities because it is unrealistic to expect each flow of material to be kept separate in waste management facilities;
- Assigning wastes to individual shipments once interim recovery operations have been completed is often no longer possible, particularly when multiple successive interim procedures are not performed in one batch operation –> certification in accordance with Article 15(e) of the WSR is often not practical;
- Control of the fate of waste by way of a completed form in accordance with Article 15(e) of the WSR is problematic because the import authorities are also responsible for monitoring the waste management plant's flow of waste and this often cannot be guaranteed in the event of the subsequent treatment of separated waste flows;
- When upstream management facilities forward waste on to final treatment facilities, it is no longer possible to distinguish which individual flows of waste can be found in the final treatment facility. In this case, it is difficult for the operator of the final treatment facility to confirm whether specific waste is contained in a specific volume;
- Problems often arise regarding compliance with the 3-day time limit for confirmation of receipt in accordance with Article 15(c) of the WSR because the regulation does not provide for prior requests with the competent authority as to where final recovery takes place;
- Difficulties with fulfilling the requirements of the regulation, both on the part of the authorities and of the companies.

The majority of the respondents (especially authorities) pointed out that the provisions laid down in Article 15 of the WSR do not reflect the reality of waste management in practice; criticism related in particular to the provisions of Article 15(1)(e) of the WSR.

In the case of multiple consecutive interim treatment operations, fulfilling official requirements and monitoring the flows of waste that were originally registered is considered difficult or even

impossible. The flows that are initially registered are mixed together with similar flows or treated in such a way that it is difficult to identify them at the end of the chain.

Suggestions made by those consulted

Some comments related to Article 15(e) of the WSR:

- Article 15(e) of the WSR should be deleted and Article 15(f) of the WSR should be amended accordingly;
- Instead of the form in accordance with Article 15(e) of the WSR, it should be sufficient to provide the subsequent waste management plant.

Two suggestions were made during the consultation for fundamentally new approaches to the regulation of shipments destined for interim recovery or disposal operations. One involved a complete rewording:

- "All outbound flows of material with their percentage shares shall be provided in the notification documents in the case of interim procedures. The subsequent waste management routes up to the point of final management shall also be specified for all flows of waste. Once waste management for a notification is complete, the operator of the initial treatment plant must demonstrate that the volume accepted from a notification was also forwarded on to the subsequent waste management plant based on the specified percentage distribution of the waste generated in its facility. This can take the form of a material balance. Release of a financial guarantee can be conditional on this proof. In the event of any doubt in the accuracy of the information, the supervisory authorities can always still check the flows of quantities via the national verification procedure."

Other suggestions concern eliminating the distinction between interim and final treatment. This would mean that interim dealers are considered producers of new flows of waste for which a notification must be provided.

- Deletion of Article 15 of the WSR with reinforcement of responsibility of operators in corresponding procedures (D13 – D15 and R12, R13) and submission to national legal regulations on waste management;
- Elimination of the distinction between interim and final recovery/disposal and reinforcement of responsibility of the initial waste management plant that accepts waste;
- Termination of a shipment in the initial waste management plant; if other facilities are used, new consent procedure required or recourse to national regulations -> clarity regarding responsible operators.

Appraisal

Due to the fact that key elements of Article 15 of the WSR concern the implementation of the requirements of Chapter II, Section D(2), Case 2 of the OECD Decision, the options to amend Article 15 of the WSR are limited. This applies in particular for suggestions relating to the deletion of Article 15(e) of the WSR, which, as the experts understand it, cannot be implemented without amending the OECD Decision first.

4.3.2.3 Article 18 of the WSR: Information requirement for specific waste

Article 18 of the WSR: Information requirement for specific waste

Background: The Article 18 procedure imposes an additional burden on authorities and economic operators.

Do you see any relevant problems with the application of the Article 18 procedure?

Yes: 18

No: 15

No comment: 5

Context

In accordance with Article 3(2) of the WSR, the Article 18 procedure regulates the following wastes destined for recovery:

> *"a) waste listed in Annex III or IIIB;*
>
> *b) mixtures, not classified under one single entry in Annex III, of two or more wastes listed in Annex III, provided that the composition of these mixtures does not impair their environmentally sound recovery and provided that such mixtures are listed in Annex IIIA, in accordance with Article 58."*

International law

The BC does not contain any provisions regarding the procedure in accordance with Article 18 of the WSR because the Convention is only applicable to hazardous and "other" wastes within the meaning of Article 1(1) and (2) of the BC.

The Green Control Procedure set out in Chapter II, Section B(2)(a) of the OECD Decision essentially corresponds to the procedure under Article 18 of the WSR. Chapter II, Section C of the OECD Decision states that all existing controls normally applied in commercial transactions apply. There are no further restrictions.

Problems perceived

It should be noted that most of the difficulties mentioned concern the application of the Article 18 procedure quite specifically instead of casting doubt on the actual grounds for it. One authority considered the limited competence of the competent authorities a problem.

Apart from this, both authorities and industry representatives mentioned third-party transactions as a problem, specifically with regard to the issue of "disclosing the producer" (see Chapter 4.3.1.10 in particular in this regard). The suggestions made by those consulted also relate to this group of problems and are therefore described within the context of the specified chapter.

Suggestions made by those consulted

Authorities:

- Legal clarification of the requirement to disclose all contacts and not just the party arranging the shipment;
- No brokers and dealers permitted;

- Distinction between information requirement for authorities and customers -> Authorities should have access to more information.

Associations/companies:

- Distinction between the information available to authorities and the information that carriers, consignors and consignees receive, because authorities are obliged to maintain confidentiality and business secrets cannot therefore be disclosed to competitors.

Appraisal

The Article 18 procedure is well-practised and economic operators do not consider the effort it requires unreasonable. The different practical handling of the share of contaminants in waste (which can result in a latent curtailment of the scope of application of the Article 18 procedure) is a problem; see Chapter 4.3.2 in this regard. One other suggestion involved streamlining the Annex VII form in light of the discussion surrounding formal errors and the punishment of them, for example, by deleting the requirement to provide a fax number.

4.3.3 Other selected aspects

Approach taken by the WSR and the BC to "non-listed" wastes

In accordance with Article 3(1)(b) iii) and iv) of the WSR, the following wastes are always subject to notification:

- wastes not classified under one single entry in either Annex III, IIIB, IV or IVA;
- mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA.

In accordance with the BC, in the case of wastes that are destined for transboundary shipment and not found on the lists contained in Annexes VIII and IX it depends on whether these wastes fulfil the definition of "hazardous wastes" in Article 1(1) of the BC, i.e.

"*a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and*

b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit."

In this regard, the provisions of the WSR exceed those of the BC, because they

- do not make any reference to Annex I of the BC and are not just based on characteristics regarding danger;
- generally make non-listed waste subject to notification and are not based on whether the unclassified waste is defined as or considered to be hazardous wastes by the domestic legislation of the Party of export, import or transit.

The BC does not place any restrictions on mixtures of waste. The term "mixture" is not defined in the BC and is only used in the annexes, where it clearly does not relate to mixtures of waste.

Chapter II, Section B(8) of the OECD Decision does contain regulations on mixtures of waste, however:

> *"A mixture of wastes, for which no individual entry exists, shall be subject to the following control procedure:*
>
> *(i) a mixture of two or more Green wastes shall be subject to the Green Control Procedure, provided the composition of this mixture does not impair its environmentally sound recovery;*
>
> *(i) a mixture of a Green waste and more than a de minimis amount of an Amber waste or a mixture of two or more Amber wastes shall be subject to the Amber Control Procedure, provided the composition of this mixture does not impair its environmentally sound recovery."*

Compared to this, the WSR goes beyond the OECD Decision in respect of mixtures of (two or more) Green wastes in the sense that wastes are always subject to notification if they are not listed as an individual entry.

Approach taken by the BC and the WSR in respect of Annex II of the BC and the export ban

Annex II of the BC, "Categories of waste requiring special consideration", contains two entries:

- Y46 Wastes collected from households;
- Y47 Residues arising from the incineration of household wastes.

In accordance with Article 2(1) of the BC, wastes that are in a group contained in Annex II and that are destined for transboundary shipment are considered "other wastes" within the meaning of the BC. Provisions on "other wastes" can be found in a number of the regulations laid down in the BC, particularly in the definitions (Article 2(8), (17), (18) and (19)). The Parties' key obligations in particular (arising from Article 4, Article 6 and Article 7 in conjunction with Article 6 of the BC) relate to "hazardous wastes and other wastes", a concept in which these two terms are inseparable. By contrast, the prohibition on exports in Article 4(a) of the BC for wastes destined for disposal and recovery relates solely to hazardous wastes and not to "other wastes" within the meaning of the BC.

Annex II to the BC is incorporated into the WSR by way of Annex V, Part 3, List A and addressed in Article 36(1)(b) of the WSR; according to this, the export of wastes destined for recovery from the Community to countries to which the OECD Decision does not apply is prohibited. In this regard, the WSR exceeds the BC. In terms of content, this prohibition should be considered within the context of EU regulations on self-sufficiency, as apparent from the European Commission proposal for the WSR (COM/2003/0379 final);

> *"Clearly, the Community should not export household waste and incineration residues to non-OECD countries. This is in accordance with the principle of self-sufficiency laid down in Article 5 of Directive 75/442/EC, as amended [now: Article 16 of Directive 2008/98/EC]."*

Reporting obligations of the Contracting States and Member States under the BC and the WSR

The Member States' obligations to report to the Commission regarding the implementation of the WSR are set out in Article 51 of the WSR. According to this, the Member States must submit to both the Commission and the Secretariat of the Basel Convention reports as well as information based on a separate questionnaire **every year**. This combination of the reporting obligation under the Basel Convention and the information requirements in accordance with Annex IX of the WSR constitutes the Member States' main reporting duty.

Table 3 provides an overview of the information to be transmitted in accordance with Annex IX at EU level in addition to the BC:

Table 3: Additional information to be provided in accordance with Annex IX of the WSR

	Content
Article 11(1)(a)	Objections all shipments of wastes destined for disposal – application of the principles of proximity, priority for recovery and self-sufficiency
Article 11(1)(e)	Objections to all shipments of wastes destined for disposal – prohibition on import of waste
Article 11(1)(g) Table 2	Objections to all shipments of wastes destined for disposal – insufficient consistency with the German Waste Shipment Act
Article 11(3) Table 1	Objections to all shipments of wastes destined for disposal – exemptions from the application of the principles of proximity, priority for recovery and self-sufficiency; production of small quantities of hazardous waste
Article 12(5) Table 3	Objections to the shipment of wastes destined for disposal – insufficient consistency with Article 12(1)(c) (non-compliance with national legal regulations)
Article 14 Table 4	Information on competent authorities' decisions on pre-consent
Article 33	Information on supervision and control exclusively within a Member State's jurisdiction
Articles 24/50(1)	Information on illegal shipment of waste
Article 50(2)	Summary of information on inspection results
Article 50(2a)	Information on inspection plans
Article 6	Financial guarantee
Article 55 Table 6	Information on customs offices

Appraisal

The following measures are suggested:

- Development of a concept for potentially streamlining the reporting process in consideration of the purpose of the report;
- Synchronisation of the reporting cycle (same reporting frequency for the Member States and the Commission).

Article 1(1) of the WSR: Formulation of the scope

Article 1(1) of the WSR reads:

> *"This Regulation establishes procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination."*

This description of the scope currently lacks any indications that part of the notification also covers recovery or disposal following shipment. However, this is covered by the notification (first sentence of Article 4(6) of the WSR), and is addressed in Article 49(1) of the WSR, "Protection of the environment" as well.

In terms of international law, the BC makes reference to recovery/disposal following shipment in its title ("Convention on the Control of Transboundary Movements of Hazardous Wastes *and their Disposal*")

Appraisal

For clarity, to raise awareness amongst the stakeholders and to achieve alignment with the BC, Article 1(1) of the WSR could, in the experts' opinion, be amended so that it relates not just to shipment but explicitly to recovery and disposal too.

Article 9(5) of the WSR: Beginning and end of tacit consent

Article 9 of the WSR contains detailed provisions on how the competent authorities of destination, dispatch and transit should grant consent for the notified shipments. This Article also contains provisions on deadlines for transport, return or disposal. In this context, Article 9(1) of the WSR states that tacit consent from the competent authorities of transit can be accepted if this authority does not raise an objection within the specified 30-day time limit. Article 9(5) of the WSR states that tacit consent to a planned shipment expires one calendar year after the expiry of the 30-day time limit referred to in paragraph 1.

Article 9(5) of the WSR is based on Article 6(4) of the BC and Chapter II, Section D(2), Case 1(f) of the OECD Decision. The fourth sentence of Article 6(4) of the BC states:

"*(...) if f at any time a Party decides not to require prior written consent, either generally or under specific conditions, for transit transboundary movements of hazardous wastes or other wastes, it shall forthwith inform the other Parties of its decision immediately pursuant to Article 13. i] In this latter case, if no response is received by the State of export within 60 days of the receipt of a given notification by the State of export, the State of export may allow the export to proceed through the State of transit. Chapter II, Section D(2), Case 1(f) of the OECD Decision states that the transboundary shipment of waste can begin once the thirty (30)-day time limit has expired if no objections have been raised (tacit consent). Tacit consent expires within one calendar year from the end of the 30-day period.*"

Appraisal

Article 9(5) of the WSR closely reflects the applicable international framework, particularly the provisions of Chapter II, Section D(2), Case 1(f) of the OECD Decision. The options to amend Article 9(5) of the WSR are therefore extremely limited. Any change to the period for tacit consent would require a change to the applicable international legal framework.

Annex V to the WSR: Introductory notes

Annex V to the WSR begins with the following introduction:

> *"1. This Annex applies without prejudice to Directives 91/689/EEC and 2006/12/EC.*
>
> *2. This Annex consists of three parts, Parts 2 and 3 of which apply only when Part 1 is not applicable. Consequently, to determine whether a specific waste is listed in this Annex, an initial check must be made to ascertain whether the waste is listed in Part 1 of this Annex, and, if it does not, whether it is listed in Part 2, and, if it does not, whether it is listed in Part 3.*

Part 1 is divided into two sub-sections: List A lists wastes which are classified as hazardous by Article 1(1)(a) of the Basel Convention, and therefore covered by the export prohibition, and List B lists wastes which are not covered by Article 1(1)(a) of the Basel Convention, and therefore not covered by the export prohibition.

Thus, if a waste is listed in Part 1, a check must be made to ascertain whether it is listed in List A or in List B. Only if a waste is not listed in either List A or List B of Part 1, must a check be made to ascertain whether it is listed either among the hazardous waste listed in Part 2 (i.e. types of waste marked with an asterisk) or in Part 3, and if this is the case, it is covered by the export prohibition.

3. Wastes in List B of Part 1 or wastes listed among the non-hazardous waste in Part 2 (i.e. wastes not marked with an asterisk) are covered by the export prohibition if they are contaminated by other materials to an extent which

a) increases the associated risks sufficiently to render the waste appropriate for submission to the procedure of prior written notification and consent, when taking into account the hazardous characteristics listed in Annex III to Directive 91/689/EEC; or

b) prevents the recovery of the wastes in an environmentally sound manner."

Context

The introductory notes to Annex V should be seen as working instructions to ensure the uniform application of the Annex. Annex V comes into play in Article 36 of the WSR, which sets out export prohibitions for exports to states that are not subject to the OECD Decision. General export prohibitions have a widespread effect for the shipment of waste. A precise testing sequence is recommended in the interests of consistency. The introduction is structured in steps. If the checks described in the introduction are carried out accurately list by list, the desired result will be achieved, i.e. it will be established whether the relevant material is subject to an export prohibition or not.

International legal regulations

Part 1, List A of Annex V to the WSR corresponds to Annex VIII to the Basel Convention. Part 1, List B of Annex V to the WSR is identical to Annex IX of the Basel Convention. Part 3, List A corresponds almost exactly to Annex II of the Basel Convention and Part 3, List B essentially corresponds to the wastes in Annex 4, Part II of the OECD Decision.

Appraisal

The wording of the current version of the introductory explanatory texts is complex and refers to obsolete EU regulations. Revised wording, which would also make clear the underlying structure, could read as follows:

"This Annex applies without prejudice to Directive 2008/98/EC.

This Annex consists of three parts. To determine whether a specific waste is listed in this Annex, the following sequence of checks should be applied precisely. First, check whether the waste is listed in Part 1 of this Annex. If this is not the case, check whether it is listed in Part 2. If this is also not the case, check whether it is listed in Part 3. Only if the waste is not listed in any of the three parts does the export prohibition of Article ... not apply.

If a waste is listed in Part 1, check which list it is on.

List A contains wastes that are covered by the export prohibition.

List B contains wastes that are not covered by the export prohibition.

If a waste is not listed in Part 1, check whether it is listed amongst the hazardous waste in Part 2 (i.e. types of waste marked with an asterisk) or in Part 3.

If the waste is listed in Part 2 or 3, the export prohibition applies.

Wastes in List B of Part 1 or wastes listed among the non-hazardous waste in Part 2 (i.e. wastes not marked with an asterisk) are covered by the export prohibition if they are contaminated by other materials to an extent which

a) increases the risks associated with the waste sufficiently to render it appropriate for submission to the procedure of prior written notification and consent, when taking into account the hazardous characteristics listed in Annex III to Directive 2008/98/EC, or

b) prevents the recovery of the wastes in an environmentally sound manner."

4.3.4 Aspects within the context of the customs offices' role

Customs enforcement duties in accordance with the WSR

In accordance with the WSR, customs departments are involved in the enforcement of waste shipment as they have a number of duties. Table 4 illustrates the customs authorities' duties in accordance with the WSR.

Table 4: Customs authorities' duties

Title	Chapter	Section	Article
Title IV – Exports from the community to third countries	CHAPTER 1 – Exports of waste for disposal		Article 35 – Procedures when exporting to EFTA countries
Title IV – Exports from the community to third countries	CHAPTER 2 – Exports of waste for recovery	Section 1 – Exports to non-OECD Decision countries	Article 37 – Procedures when exporting waste listed in Annex III or IIIA
Title IV – Exports from the community to third countries	CHAPTER 2 – Exports of waste for recovery	Section 2 – Exports to OECD-Decision countries	Article 38 – Exports of waste listed in Annexes III, IIIA, IIIB, IV and IVA
Title V – Imports into the community from third countries	CHAPTER 1 – Imports of waste for disposal		Article 42 – Procedural requirements for imports from a country Party to the Basel Convention or from other areas during situations of crisis or war
Title V – Imports into the community from third countries	CHAPTER 2 – Imports of waste for recovery		Article 44 – Procedural requirements for imports from an OECD Decision country or from other areas during situations of crisis or war

Title	Chapter	Section	Article
Title V – Imports into the community from third countries	CHAPTER 2 – Imports of waste for recovery		Article 45 – Procedural requirements for imports from a non-OECD Decision country Party to the Basel Convention or from other areas during situations of crisis or war
Title VI – Transit through the community from and to third countries	CHAPTER 1 – Transit of waste for disposal		Article 47 – Transit through the Community of waste destined for disposal
Title VI – Transit through the community from and to third countries	CHAPTER 2 – Transit of waste for recovery		Article 48 – Transit through the Community of waste destined for recovery
Title VII – Other provisions	CHAPTER 1 – Additional obligations		Article 55 – Designation of customs offices of entry into and exit from the Community

Source: Guidelines for customs controls on transboundary shipments of waste Public summary

In summary, the duties stated in Table 4 can be divided into

1. Regular duties/involvement in notification:

- Prior to import/export into/out of the EU, the competent authorities in the EU give their consent for shipment to the customs office of export and exit or the customs office of entry;
- Upon import/export into/out of the EU, the carrier presents the movement document to the customs office of export and exit or the customs office of entry;
- As soon as the waste has left the EU and once the necessary (entry) customs formalities have been carried out, the customs office of exit or entry sends a stamped copy of the movement document to the competent authorities of dispatch (in the case of export) or to the competent authorities of destination and transit within the EU (in the case of import).

2. Cooperation with customs departments as regards controls [25]

- In the event of a suspected violation of the WSR or the German Waste Shipment Act, the customs office gathers the information required to clarify this;
- Professional advice from the state authority, competent authorities of destination/dispatch or German Environment Agency;
- If the customs department suspects an illegal shipment or another violation:
  - It informs the state authority of the territory in which controls are carried out;

[25] https://www.laga-online.de/documents/handlungsanleitung_zoll_02_2008_1503988946.pdf

- It also informs the competent authority of destination (import) or competent authority of dispatch (export) if necessary;

- Seizure by customs departments: in the case of shipments with risk potential;
- No seizure if there is no illegal shipment;
- Decision on how to proceed:
  - Wait for feedback from the state authorities;
  - If it is possible to rectify the error independently, this is permitted;
  - Otherwise, it is handled as the state authority declares.

Result of consultation with the customs departments

The result of the customs departments survey was as follows:

Transmission of decision on shipment by authorities

1. Context: In accordance with Article 35(3)(b) of the WSR, the competent authority of dispatch and, where applicable, the competent authority of transit in the Community must send to the customs office of export and customs office of exit from the Community a stamped copy of their decision to consent to the shipment concerned.

   The same applies in the case of an import of waste subject to notification. In accordance with Article 42(3)(b) of the WSR, the competent authority of destination and, where applicable, the competent authority of transit in the Community must send to the customs office of entry into the Community a stamped copy of their decision to consent to the shipment concerned.

   In accordance with Article 48(2)(a) of the WSR, the first and last competent authority of transit in the Community shall, where appropriate, send a stamped copy of the decisions to consent to the shipment or, if they have provided tacit consent, a copy of the acknowledgement in accordance with Article 42(3)(a) of the WSR to the customs offices of entry into and exit from the Community respectively.

   In light of this, the following feedback was provided: In practice, decisions to consent to shipments of waste are sent by the authorities to the customs departments by post or by email.

   In accordance with Article 16(c) of the WSR, each shipment must be accompanied by the movement document and copies of the notification document containing the written consents given and the conditions of the competent authorities concerned. If the customs office does not receive a copy of the consent of a competent authority, the import or export is still permitted if it is clear beyond doubt from the accompanying documents in accordance with Article 16(c) of the WSR that this consent was granted.

2. To simplify the procedure, the implementation of possible electronic data interchange in accordance with Article 26(4) of the WSR should be accelerated. Alternatively, according to feedback from the customs office, the information could also be provided to the customs offices via an online database, e.g. an extended version of the existing database of the German Environment Agency.

Transmission of copy of the movement document by the customs offices

Context: In accordance with Article 35(3)(d) of the WSR, as soon as the waste has left the Community the customs office of exit from the Community must send a stamped copy of the

movement document to the competent authority of dispatch in the Community stating that the waste has left the Community.

The same applies in the case of an import of waste subject to notification. In accordance with Article 42(3)(d) of the WSR, the customs office of entry into the Community must send a stamped copy of the movement document to the competent authorities of destination and transit in the Community, stating that the waste has entered the Community.

In accordance with Article 48(2)(b) of the WSR, as soon as the waste has left the Community the customs office of exit from the Community shall send a stamped copy of the movement document to the competent authority(ies) of transit in the Community, stating that the waste has left the Community.

In practice (according to the feedback), these submissions are carried out in such a way that the customs offices of entry and exit acknowledge the import/export and, in the case of transit, the entry/exit of the waste concerned by way of a signature and stamp in the appropriate field in the movement document (or at least in the copy submitted) and make a note of the registration number of the customs declaration. The processed copy of the movement document is sent to the competent authority by post.

In the customs authorities' opinion, this regulation is appropriate because, based on the movement documents provided, the competent waste authority can check whether the waste was actually shipped out of the EU or, in the case of shipment into the EU, that the permitted volume was not exceeded.

In response to the question of whether amending the regulation would be desirable, the customs authorities answered that they would welcome the option of electronic data interchange in accordance with Article 26(4) of the WSR in order to simplify the procedure.

3. Issues regarding involvement of customs offices

In practice, the sequence of controls for a waste shipment is as follows:

Import:

The customs office of entry checks whether all documents required in accordance with the relevant waste legislation have been submitted, compares these with the details in the customs declaration and, where necessary, performs goods-based inspections.

In the case of waste subject to notification, the customs office of entry confirms import by way of a signature and stamp in field 21 of the movement document (or at least in the copy submitted) and makes a note of the registration number of the customs declaration. The processed copy of the movement document is sent to the competent authority.

In the event of suspected violations and/or illegal shipments, the competent waste authorities are informed in line with the mutually agreed instructions.

Export:

The customs office of export and entry checks whether all documents required in accordance with the relevant waste legislation have been submitted, compares these with the details in the customs declaration and, where necessary, performs goods-based inspections.

In the case of waste subject to notification, the customs office of exit confirms export by way of a signature and stamp in field 20 of the movement document (or at least in the copy submitted) and makes a note of the registration number of the customs declaration. The processed copy of the movement document is sent to the competent authority.

In the event of suspected violations and/or illegal shipments, the competent waste authorities are informed in line with the mutually agreed instructions.

Transit:

The customs office of entry and exit checks whether all documents required in accordance with the relevant waste legislation have been submitted, compares these with the details in the customs declaration and, where necessary, performs goods-based inspections.

The customs office of entry and exit indicates "GERMANY" in field 22 of the movement document, confirms the entry and exit by way of a signature and stamp and makes a note of the registration number of the customs declaration (or at least in the copy of the movement document submitted). The processed copy of the movement document is sent to the German Environment Agency and, if the customs office of entry/exit is in another member state, to the competent authority of transit there.

In the custom offices' opinion, its role within the context of controls in relation to the WSR is appropriate because it performs the duty of customs by monitoring the transboundary movement of goods. Within the context of its duty of cooperation, this also relates to compliance with the provisions of waste legislation.

The customs departments do not see any problems and do not report suggestions for amendments in respect of this regulation.

General comments

4. Besides this, the customs departments noted the following:

The competent waste authorities can usually only be contacted on working days during normal office hours. Customs checks are also carried out in the evening and at weekends, however. It would be very helpful to maximise the competent waste authorities' availability outside normal office hours too.

Joint discussions between customs and competent waste authorities should be intensified.

One customs office suggested adding a field for the notification number on page 2 (to establish a link with page 1), as well as more space on page 2 for the customs office's comments (e.g. customs declaration number, customs office procedure number).

5 List of sources

German legal literature on matters of waste shipment regulation since 2007

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Arcadis et al	The efficient functioning of waste markets in the European Union − legislative and policy options − final report	Arcadis Report 2016 ABAROA Report	2016
BiPRO et al	Report on Analysis of the Implementation/Enforcement of Annex VII and Article 18 and 49-50 of the Waste Shipment Regulation in all Member States, including a Summary Report of National Provisions	BiPRO Report 2.1.1	2011
BiPRO et al	Report on Identified Problems and Solutions for Implementation/Enforcement of Annex VII and Articles 18, 49 And 50, including an Impact Analysis	BiPRO Report 2.1.2	2011
BiPRO et al	Current Implementation of Financial Guarantees and Equivalent Insurance in all Member States, including an Impact Analysis	BiPRO Report 2.1.4	2010
CRI	Transboundary shipments of waste in the European Union − Reflections on data, environmental impacts and drivers	CRI Report	2012
ICF	Study to Support the Review of Environmental Monitoring and Reporting Obligations	ICF Report	2016
IEEP et al	Study on Inspection Requirements for Waste Shipments	IEEP Report I	2009
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A Appendix

A.1 Inventory of inspection plans

Table 5: Inspection plans – Last updated end of 2019

German federal state	Issuing body	Date of adoption	Valid until	Link
Brandenburg	Ministerium für Ländliche Entwicklung, Umwelt und Landwirtschaft [Ministry for Rural Development, Environment and Agriculture]	20/12/2016	20/12/2019	Link
Berlin	Senatsverwaltung für Umwelt, Verkehr und Klimaschutz [Senate Department for the Environment, Transport and Climate Protection]	01/01/2017	01/01/2020	Link
Baden-Württemberg	Ministerium für Umwelt, Klima und Energiewirtschaft ([Ministry of the Environment, Climate Protection and the Energy Sector]	01/01/2017	01/01/2020	Link
Bavaria	Bayerisches Staatsministerium für Umwelt und Verbraucherschutz [Bavarian State Ministry of the Environment and Consumer Protection]	not specified	not specified	Link
Bremen	Senator für Umwelt, Bau und Verkehr [Senator for the Environment, Construction and Traffic]	10/12/2018	10/12/2021	Link
Hesse	Ministerium für Umwelt, Klimaschutz, Landwirtschaft und Verbraucherschutz [Ministry of the Environment, Climate Protection, Agriculture	31/10/2016	31/10/2019	Link

German federal state	Issuing body	Date of adoption	Valid until	Link
	and Consumer Protection]			
Hamburg	Behörde für Umwelt und Energie [Environment and Energy Authority], Amt für Umweltschutz [Office for Environmental Protection]	31/12/2016	31/12/2019	Link
Mecklenburg-Western Pomerania	Landesamt für Umwelt, Naturschutz und Geologie [Regional Office for the Environment, Conservation and Geology]	19/12/2016	19/12/2019	Link
Lower Saxony	Ministerium für Umwelt, Energie und Klimaschutz [Ministry of the Environment, Energy and Climate Protection]	31/01/2017	31/12/2019	Link
North Rhine-Westphalia	Ministerium für Klimaschutz, Umwelt, Landwirtschaft, Natur- und Verbraucherschutz [Ministry for Environment, Agriculture, Conservation and Consumer Protection]	01/01/2017	31/12/2019	Link
Rhineland-Palatinate	Ministerium für Umwelt, Energie, Ernährung und Forsten [Ministry of the Environment, Energy, Food and Forests]	01/01/2017	01/01/2020	Link
Schleswig-Holstein	Gesellschaft für die Organisation der Entsorgung von Sonderabfällen mbH	01/01/2017	01/01/2020	Link
Saarland	Landesamt für Umwelt, Naturschutz und Geologie (State Office for the Environment and Occupational Safety)	01/01/2017	01/01/2020	Link

German federal state	Issuing body	Date of adoption	Valid until	Link
Saxony	Staatsministerium für Umwelt und Landwirtschaft [State Ministry of the Environment and Agriculture]	01/01/2017	01/01/2020	Link
Saxony-Anhalt	Landesverwaltungsamt [State Administration Department]	11/01/2017	31/12/2019	Link
Thuringia	State Administration Department	01/01/2017	01/01/2020	Link

A.2 Consultation questionnaire

1. Introduction

WELCOME TO THE EXPERT CONSULTATION "CONTRIBUTIONS TO THE FURTHER DEVELOPMENT OF THE WASTE SHIPMENT REGULATION"

Regulation (EC) No. 1013/2006 on shipments on waste (Waste Shipment Regulation – WSR) transposes the requirements of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal as well as OECD Decision C(2001) 107 into Union law. The EU Commission shall review the WSR by 31 December 2020 and, on this basis, prepare legislative proposals to strengthen enforcement and combat illegal shipments.

In light of this, the German Environment Agency has initiated the research project "Contributions to the further development of the EC Waste Shipment Regulation" (Project No. (FKZ) 3718 33 310 0), which is being carried out by Ramboll Environment & Health GmbH (Munich) in cooperation with the law firm Köhler & Klett (Cologne). The project shall summarise and evaluate the enforcement of the WSR in Germany based on specific regulatory areas and,

- with a view to improving the combatting of illegal shipments, identify barriers inherent in legislation and prepare corresponding proposals;
- make suggestions for measures relating to more efficient enforcement; and
- outline starting points for strengthening circular economy.

The survey will take approx. 25 minutes. On one hand, it aims at gathering experiences, information and opinions on the practice and state of application of the WSR in selected subject areas. On the other hand, it is specifically intended to yield suggestions for measures.

Feel free to forward the link to the survey on to your colleagues.

CONTACT DETAILS

Please contact Maria Burgstaller (mbur@ramboll.com) if you have any questions or comments about the survey or the project.

THANK YOU FOR TAKING PART!

2. Data protection

The data you provide during the survey will only be used for the project "Contributions to the further development of the EC Waste Shipment Regulation" (Project No. (FKZ) 3718 33 310 0). The data will only be seen by employees of the German Environment Agency, Ramboll Environment & Health GmbH and the law firm Köhler & Klett. Use of the data for any other purpose besides this project is not permitted and there are no plans to use the data in this way.

Any further use of personal data and the collection of additional information usually requires the data subject's consent. We would be happy to provide you with Ramboll's Privacy Policy on request.

You have the right to request extensive information about stored personal data concerning you from Ramboll Environment & Health GmbH at any time. You can also ask Ramboll Environment & Health GmbH to rectify, erase and block your individual personal data at any time.

You can exercise your right to object at any time, without providing a reason, and amend or completely withdraw the declaration of consent you have given with future effect. You can send

notice of withdrawal to Ramboll Environment & Health GmbH by post, email or fax. If you do so, the only costs you will incur are postage costs and/or the costs of transmission at the current basic rates.

You can find information on how data is handled at SurveyMonkey here.

3. Preface

The questions relate to the different articles of the WSR. To provide some context, questions are preceded by an introduction.

The issues covered in these introductions include restrictions under international law. The reason for this is that the transboundary shipment and disposal of hazardous waste is governed internationally by the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. To control wastes destined for recovery, Council Decision C(2001) 107/FINAL of the OECD Council (OECD Decision) has also been adopted at OECD level. The purpose of the WSR, inter alia, is to transpose the Basel Convention and the OECD Decision into Union law. In light of this, restrictions under international law must always be taken into account when discussing possible changes to the WSR.

4. Contact details

I work for

1.

- ► an association
- ► a working group/a ministry
- ► a regulatory authority/a company/other (please specify)

2.

Please provide the name of your organisation/institution/company

5. Differentiation between the WSR and Regulation (EC) No 1069/2009 (Animal by-products Regulation)

Background:

3. *The Animal by-products Regulation also provides a regime for the approval of transboundary shipments. The current wording of the regulation leads to definitional problems such as those currently being faced in the pending procedures before the Court of Justice of the European Union (Request for a preliminary ruling C-634/17).*

Do you consider the question of the applicability of Regulation (EC) No 1069/2009 (Animal by-products Regulation) to be a relevant problem?

- ► Yes
- ► No
- ► No comment

6. Differentiation between the WSR and Regulation (EC) No 1069/2009 (Animal by-products Regulation)

In your opinion, what problems are there? Please specify.

Do you have any suggestions for how to improve the regulation (e.g. suggested wording) to enable better differentiation? Please specify.

4.

5.

7. Article 2(15) and (25)003B Article 18 of the WSR: Clarification of "under the national jurisdiction of a country"

Background:

Some provisions of the WSR refer to the "jurisdiction" of the states involved to which certain relevant operators are subject (such as Article 2(15) and (25) and Article 18(1)). In some cases, this is understood to mean that there must be a place of business in the relevant country, but this is disputed.

Is the concept of being "under the national jurisdiction of a country" unclear?

6.

- Yes
- No
- No comment

8. Article 2(15) and (25); Article 18 of the WSR: Clarification of "under the national jurisdiction of a country"

7.

Do you have any suggestions for how to improve the regulation (e.g. suggested wording) to clarify the concept of "under the national jurisdiction of a country"? Please specify.

9. Article 2(35) of the WSR: Definition of illegal shipment

Background:

In the event of illegal shipment in accordance with Article 2(35) of the WSR, Article 24 of the WSR requires the return of waste in principle. The BC (Basel Convention) requires a provision on the cases in which the return of waste is required. Within this framework, there could be the possibility of making a distinction between minor violations on the one hand and intentional (criminal) violations on the other hand.

8.

Do you think it would be practical to amend the definition of an illegal shipment? For example, through a greater distinction between a) aspects that result in the take-back of waste in every case and b) aspects that the operators involved can rectify during ongoing operations

- Yes
- No

- No comment

10. Article 2(35) of the WSR: Definition of illegal shipment

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

9.

11. Article 3(2) of the WSR: Increase in 20 kg limit

Background:

Below a weight of 20 kg, wastes under Article 3(2) and Article 18 of the WSR are exempted from the requirements laid down therein. If this limit was increased, the regulations of Article 18 of the WSR would not apply to shipments of larger volumes.

Do you think it is appropriate to increase this de minimis limit?

- Yes

10.

- No
- No comment

12. Article 3(2) of the WSR: Increase in 20 kg limit

To which amount [kg] should the limit be increased and why?

11.

13. Article 3(5) of the WSR: Special regulation on shipment of mixed municipal waste

Background:

Article 3(5) of the WSR states that the shipment of mixed municipal waste (waste entry 20 03 01) collected from private households, including where such collection also covers such waste from other producers, to recovery or disposal facilities shall be subject to the same provisions as shipments of waste destined for disposal. This enables objections to be made based on Article 11(1)(i) of the WSR.

12.

Should Article 3(5) of the WSR be retained?

- Yes

13.

- No
- No comment

Please give the reason(s) for your answer

14. Article 9 of the WSR: Competencies of the competent authorities of transit

Background:

The competencies of the competent authority of transit lag behind the competencies of the authorities of dispatch and destination. In particular, the competent authority of transit does not have the option to prevent/delay the shipment if the information requested is not provided.

Do you see any relevant problems as regards the existing competencies of the competent authorities of transit?

- ► Yes
14. ► No
- ► No comment

15. Article 9 of the WSR: Competencies of the competent authorities of transit

Which problems do you see as regards the application of the regulation? Please specify.

15.

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

16.

16. Article 13(1)(c) of the WSR: Shipment route and changing routes within the context of general notification

Background:

In the case of general notification, the "route of shipment" in accordance with Article 13(1)(c) must be the same for each shipment.

International law:

Neither the BC nor the OECD Decision provides any specific details on the use of the same shipment route in the case of general notifications. However, Article 6 of the BC does contain a provision stating these must be "shipped (...) via the same customs office of exit of the State of export via the same customs office of entry of the State of import."

17.

Do you think it is sensible for the WSR to contain the requirement for the "same route of shipment"?

- ► Yes
- ► No
- ► No comment

Please give the reason(s) for your answer

17. Article 13(1)(c) of the WSR: Shipment route and changing routes within the context of general notification

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

18. Article 14 of the WSR: Pre-consented recovery facilities

18. *Background:*

Article 14 of the WSR enables competent authorities to issue pre-consents for specific recovery facilities.

Do you see any relevant problems with the application of the regulation?

- Yes

19.

- No
- No comment

19. Article 14 of the WSR: Pre-consented recovery facilities

Which problems do you see as regards application? Please specify.

20.

21. Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

20. Article 15 of the WSR: Interim treatment

Background:

22. *Article 15 of the WSR lays down additional provisions for waste destined for interim recovery or disposal operations.*

Do you see any relevant problems with the application of the regulation?

- Yes

23. - No
- No comment

21. Article 15 of the WSR: Interim treatment

Which problems do you see as regards application? Please specify.

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

22. Article 18 of the WSR: Information requirement for specific waste

Background:

24.

The Article 18 procedure imposes an additional burden on authorities and economic operators.

Do you see any relevant problems with the application of the Article 18 procedure?

- Yes

25.

- No
- No comment

23. Article 18 of the WSR: Information requirement for specific waste

Which problems do you see as regards the application of the Article 18 procedure? Please specify.

26.

27. Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

28. **24. Article 18 of the WSR: Information requirement for specific waste**

Do you consider the Article 18 procedure to be feasible for shipments into the EU and for transit through the EU? Please specify.

29.

Do you consider the Article 18 procedure to be effective for shipments into the EU and for transit through the EU? Please specify.

25. Article 18 of the WSR: Information requirement for specific waste

Background:

Manufacturer-organised take-back systems enable secondary raw materials to be recorded correctly by type. Relaxations of the requirements laid down in Article 18 of the WSR could offer incentives to increase the introduction and use of such systems.

Do you see any relevant problems involved in the organisation of manufacturer-organised take-back systems for shipments of waste in accordance with Article 18 of the WSR?

- ► Yes
- ► No

30. ► No comment

26. Article 18 of the WSR: Facilitation of manufacturer-organised take-back systems

Which problems do you see as regards application? Please specify.

31. Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

32.

27. Article 18 of the WSR: Disclosure of the producer in the case of third-party transactions

Background:

A third-party transaction occurs when a dealer purchases goods from suppliers and sells them on to customers without having any physical contact with the goods. The goods are supplied to their customers directly by their suppliers (manufacturers or wholesalers). The extent to which disclosing the producer in third-party transactions requires the disclosure of the trade secrets of the person who arranges the shipment under the Article 18 procedure has long been intensively discussed. In its judgment C-1/11, the ECJ expressly left this question open.

33. Do you see any problems with the regulation?

- ► Yes
- ► No

34. ► No comment

28. Article 18 of the WSR: Disclosure of the producer in the case of third-party transactions

35. Which problems do you see as regards the application of the regulation? Please specify.

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

29. Article 20(1) of the WSR: Calculation of retention periods for documents

Background:

In accordance with Article 20(1), all documents in relation to a notified shipment must be kept for at least three years, from the date when the shipment starts. The date used to calculate the retention period in relation to general notifications is unclear.

Do you consider it necessary to provide clarification of the date required for general notifications?

- ► Yes

36. - ► No

- ► No comment

30. Article 20 of the WSR: Calculation of retention periods for documents

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

37.

31. Article 24 of the WSR: Return within the context of notification

Background:

Article 24 of the WSR concerns the take-back of waste when an illegal shipment is discovered.

38. Are there any problems with the handling of suspected illegal shipments?

- ► Yes

- ► No

- ► No comment

39. **32. Article 24 of the WSR: Return within the context of notification**

Which problems do you see as regards the application of the regulation? Please specify.

40.

41. **33. Article 24 of the WSR: Return within the context of notification**

What experience do you have of handling suspected illegal shipments in cooperation with the states concerned? Please specify.
Should detailed regulations be introduced regarding seizure for the purpose of evidence and providing guidance for secure storage?

- ► Yes

- ► No

- ► No comment

Comments

Would you like there to be any regulations on dealing with escorts?

- ► Yes
- ► No

42. ► No comment

Comments

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

43.

34. Article 26 of the WSR: Electronic data interchange

Background:

There have been requests for data interchange within the EU to be carried out electronically.

44. Do you consider it appropriate to introduce electronic data interchange?

- ► Yes
- ► No
- ► No comment

Comments

35. Article 26 of the WSR: Electronic data interchange

Background:

45. *Article 28 of the WSR concerns a scenario in which the authorities involved cannot agree, e.g. on the classification as regards the distinction between waste and non-waste. In accordance with the first sentence of Article 28(1), if the competent authorities of dispatch and of destination cannot agree, the subject matter shall be treated as if it were waste.*

Do you see any relevant problems with the application of the regulation?

- ► Yes
- ► No
- ► No comment

36. Article 28 of the WSR: Disagreement on classification issues

Which problems do you see as regards the application of the regulation? Please specify.

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

46.

47. **37. Annex to the WSR: Classification and share of contaminants**

Background:

In practice, waste always contains a certain share of contaminants (waste that has been included by mistake, contamination, etc.). This poses the question of whether a limit can be set, up to which waste can be classified as Green-listed.

International law:

The BC contains provisions regulating classification in Annexes I, II and, in particular, III (List of Hazardous Characteristics). The OECD Decision contains further criteria in addition to the annexes to the BC. According to this, the level of danger is only to be determined based on the characteristics. Shares of contaminants are therefore not a decisive factor per se.

48. Do you see any relevant problems with the classification of waste as regards the share of contaminants?

- Yes
- No
- No comment

49. **38. Annex to the WSR: Classification and share of contaminants**

Which problems do you see as regards the application of the regulation? Please specify.

50.

Do you have any suggestions for how to improve the regulation (e.g. suggested wording)? Please specify.

51.

39. Conclusion

Do you have any more general feedback on the WSR and its application, or any more suggestions on how to amend it? Do you have any other comments? Please specify.

40. Conclusion

Thank you for taking part in our survey!
Your response is extremely important to our study.

A.3 Consultation participants and interviewees

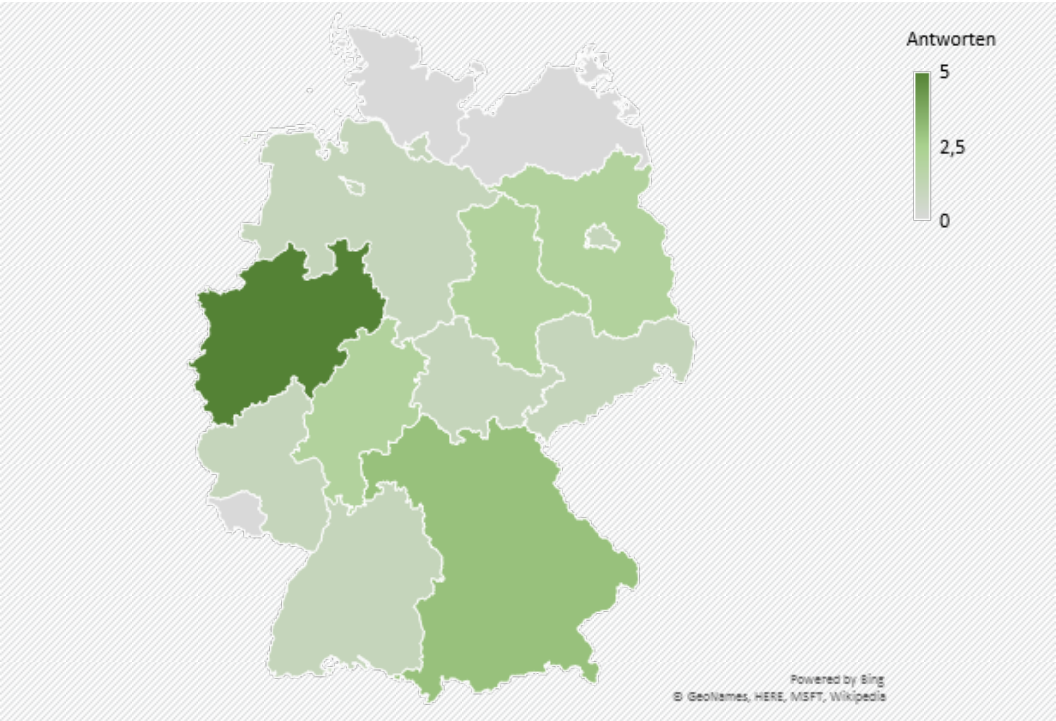
A.3.1 Consultation participants

Table 6: List of responses to online survey

Type	Name
Competent authority	Bremen Senator for the Environment, Construction and Traffic
Competent authority	SAA Sonderabfallagentur Baden-Württemberg GmbH
Competent authority	Government of Middle Franconia
Competent authority	Free and Hanseatic City of Hamburg, Environment and Energy Authority
Competent authority	Regional Government [Bezirksregierung] of Arnsberg
Competent authority	Government of Swabia
Competent authority	Berlin Senate Department for the Environment, Transport and Climate Protection
Competent authority	State Administration [Landesdirektion] of Saxony
Competent authority	Regional Government of Cologne
Competent authority	Regional Council [Regierungspräsidium] of Darmstadt
Competent authority	Regional Council of Kassel
Competent authority	SAM Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH
Competent authority	Regional Government of Münster I
Competent authority	Regional Government of Münster II
Competent authority	Thüringer Landesamt für Umwelt, Bergbau und Naturschutz [Thuringia State Office for the Environment, Mining and Conservation]
Competent authority	State Administration Department of Saxony-Anhalt
Competent authority	Sonderabfallgesellschaft Brandenburg/Berlin mbH
Competent authority	NGS – Niedersächsische Gesellschaft zur Endablagerung von Sonderabfall mbH
Competent authority	Regional Government (not specified)
Competent authority	Regional Government (not specified)
Ministry	Ministry for Rural Development, Environment and Agriculture of the State of Brandenburg

Type	Name
Ministry	Ministry of Climate Protection, Environment, Agriculture, Conservation and Consumer Protection of the State of North Rhine-Westphalia
Ministry	Ministry of Environment, Agriculture and Energy of the State of Saxony-Anhalt, Unit [Referat] 44 Kreislaufwirtschaft [Circular Economy]
Ministry	Bayerisches Staatsministerium für Umwelt und Verbraucherschutz [Bavarian State Ministry of the Environment and Consumer Protection]
Association	Interessengemeinschaft der Thermischen Abfallbehandlungsanlagen in Deutschland (ITAD) e.V.
Association	Wirtschaftsvereinigung Stahl [Steel Federation]
Association	BDSAV Bund Deutscher Sonderabfallverbrennungsanlagen e.V.
Association	Verband der Chemischen Industrie e.V. (VCI)
Association	bvse-Bundesverband Sekundärrohstoffe und Entsorgung e.V.
Association	Bundesverband der Deutschen Entsorgungs-, Wasser- und Rohstoffwirtschaft e.V. (BDE)
Association	Verband der Chemischen Industrie e.V. (VCI)
Association	WirtschaftsVereinigung Metalle [Metal Federation]
Association	Verband Deutscher Metallhändler e.V.
Company	Indaver Deutschland GmbH
Company	GSB Sonderabfall-Entsorgung Bayern GmbH
Company	REMONDIS SAVA GmbH
Company	Lobbe Entsorgung West GmbH & Co. KG
State-authorised company entrusted with sovereign tasks	Gesellschaft für die Organisation der Entsorgung von Sonderabfällen mbH (GOES)

Figure 2: Distribution of responses by authorities by federal state



Source: Own research, Ramboll

A.3.2 Expert discussion participants and interviewees

Expert discussion participants

The following table provides information on the organisations to which the participants in the expert discussion belong, categorised into ministries/authorities and other stakeholders.

Table 7: Organisations of the participants in the expert discussion

Authorities	Stakeholder's organisation
(Brandenburg/Berlin) SBB Sonderabfallgesellschaft Brandenburg/Berlin mbH	BDE Bundesverband der Deutschen Entsorgungs-, Wasser-, und Rohstoffwirtschaft e.V.
(Berlin) Senate Department for the Environment, Transport and Climate Protection	BDE Bundesverband der Deutschen Entsorgungs-, Wasser-, und Rohstoffwirtschaft e.V.
(Baden-Württemberg) SAA Sonderabfallagentur	Fachverband Sonderabfallwirtschaft (BVSE)
(Hesse) Ministry of the Environment, Climate Protection, Agriculture and Consumer Protection	Bundesverband Deutscher Sonderabfallverbrennungsanlagen [German Federation of Special Waste Incineration Plants]
Regional Council of Darmstadt	ITAD Interessengemeinschaft der Thermischen Abfallbehandlungsanlagen in Deutschland e.V.
(Hamburg) Environment and Energy Authority, Waste Management department (Abteilung Abfallwirtschaft)	BDVS Bundesvereinigung Deutscher Stahlrecycling- und Entsorgungsunternehmen e.V.

Authorities	Stakeholder's organisation
(Mecklenburg-Western Pomerania) Regional Office for the Environment, Conservation and Geology	Sonderabfallentsorgung Bayern
(Lower Saxony) Sonderabfall-Management-Gesellschaft	Alba Grenzüberschreitende Abfallverbringungen
(North Rhine-Westphalia) Ministry for Environment, Agriculture, Conservation and Consumer Protection	Müller Guttenbrunn
Regional Government of Cologne	Metal Federation
(Saxony) State Administration	Verband Deutscher Metallhändler [German Metal Traders' Federation]
(Saxony) State Administration	Verband der Chemischen Industrie [Chemicals Industry Association]/BASF
(Saxony-Anhalt) Ministry of Environment, Agriculture and Energy	Bundesverband der Deutschen Industrie [Federation of German Industries]
(Saxony-Anhalt) State Administration Department of Saxony-Anhalt	Steel Federation
(Schleswig-Holstein) Gesellschaft für die Organisation der Entsorgung von Sonderabfällen [Association for the Organisation of Special Waste Disposal]	
(Thuringia) State Administration Department	

Interviewees

Table 8: Interviewee contacts

Organisation
GSB Sonderabfall-Entsorgung Bayern GmbH
Ministry of Climate Protection, Environment, Agriculture, Conservation and Consumer Protection of the State of North Rhine-Westphalia
Government of Swabia
Regional Council of Darmstadt
SAM Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH
Verband der Chemischen Industrie e.V. (VCI)
Verband Deutscher Metallhändler e.V.