

**FROM CRADLE TO GRAVE –  
THE REGULATION AND ENFORCEMENT OF  
WASTE SHIPMENTS**

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## 1. **International Background to Waste Shipment Regulation**

### **Hazardous Waste**

- 1.1 The tightening of environmental regulation and the escalation of disposal costs in industrialised countries in the 1970s and 1980s resulted in an increase in the illegal trade of hazardous waste with developing countries. Following public outcry at the discovery in Africa and other parts of the developing world of deposits of toxic wastes imported from abroad, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted in 1989 to combat this growing problem.<sup>1</sup>
- 1.2 The main objectives of the Convention are to:
- a. Reduce transboundary movements of hazardous wastes and other wastes;
  - b. Treat/dispose of hazardous waste as close as possible to the source of generation (the Proximity Principle); and
  - c. Minimise the generation of hazardous and other wastes.
- 1.3 Under the Convention, transboundary movements of hazardous wastes or other wastes can only take place if prior written notification is sent by the State of export to the competent authorities of the States of import and transit (if appropriate). Each shipment of hazardous waste or other waste must be accompanied by a movement document from the point at which a transboundary movement begins to the point of disposal. Hazardous waste shipments made without such documents are illegal. The Convention was ratified in Ireland in February 1994.

### **Shipments of Waste for Recovery**

- 1.4 Since March 1992, transboundary movements of waste destined for recovery operations between member countries of the OECD have been supervised and controlled under a specific Intra OECD Control System, which has undergone a series of revisions and is now set out in Council Decision C(2001)107/FINAL Concerning the Control of Transboundary Movements of Wasted Destined for Recovery Operations.
- 1.5 This Control System aims at facilitating trade of recyclables in an environmentally sound and economically efficient manner by using a simplified

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<sup>1</sup> “History of the Negotiations of the Basel Convention” - <http://www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx>

procedure as well as a risk-based approach to assess the necessary level of control for materials.<sup>2</sup>

- 1.6 The System is based on two types of control procedures:
- a. Green Control Procedure: for wastes that present low risk to human health and the environment and, therefore, are not subject to any other controls than those normally applied in commercial transactions; and
  - b. Amber Control Procedure: for wastes presenting sufficient risk to justify their control.

### **EC Regulation**

1.7 Regulation EC1013/2006 on shipments of waste (“the TFS Regulation”) replaced Regulation EC259/93 on the 14<sup>th</sup> June 2006 and implements into EU law the provisions of the revised OECD Decision and the Basel Convention.

1.8 The Preamble states that:

*“The main and predominant objective and component of this Regulation is the protection of the environment, its effects on international trade being only incidental.”*<sup>3</sup>

1.9 The TFS Regulation applies to shipments of waste:

- a. Between Member States, within the Community or with transit through third countries;
- b. Imported into the Community from third countries;
- c. Exported from the Community to third countries;
- d. In transit through the Community, on the way from and to third countries.<sup>4</sup>

1.10 The TFS Regulation applies from the point of loading the waste until it has been fully recovered or disposed of at the destination facility. Different regimes are applied to shipments of wastes for disposal and for recovery, as well as to hazardous and "green-listed" waste (shipments of non-hazardous waste for recovery within and from the EU). The controls that apply to a waste shipment will depend on the:

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<sup>2</sup> “The OECD Control System for waste recovery” -

<http://www.oecd.org/env/waste/theoecdcontrolsystemforwasterecovery.htm>

<sup>3</sup> Paragraph 1 of the TFS Regulation

<sup>4</sup> Article 1(3) to the sets out the exclusions to the TFS Regulation, which includes, *inter alia*, radioactive waste and animal by-products.

- a. Treatment planned for the waste when it reaches its destination;
- b. Country of destination and the transport route;
- c. Waste type.

- 1.11 The shipment of ‘green-listed’ wastes which are listed in Annex III of the Regulation, for recovery within the EU and OECD, as well as to countries outside of the OECD that have indicated pursuant to Article 37(2) of the Waste Shipment Regulation that they will not prohibit those shipments nor apply the procedure of prior written notification and consent to them, generally do not require the consent of the authorities.<sup>5</sup> The responses of non-OECD countries stating their position concerning the acceptance of such waste has been included in Regulation (EC) No 801/2007.<sup>6</sup>
- 1.12 The procedure requires the shipment of waste to be accompanied by a document containing various details about the composition of the waste, its source, its destination, *etc.* This procedure is often referred to as the Article 18 procedure (from the article in the TFS Regulation which sets out the procedure) or the Annex VII procedure (from the Annex in the TFS Regulation which sets out the information that must accompany the waste).<sup>7</sup>
- 1.13 The person who arranges the shipment of green-listed waste must enter into a contract with the consignee for recover of the waste that is effective when the shipment starts and includes an obligation to take the waste back or ensure its recovery in an alternative way, where the shipment of waste or its recovery cannot be completed as intended or where it has been effected as an illegal shipment.<sup>8</sup> Any incorrect or inconsistent information contained in the Annex VII regarding the importer/consignee, the recovery facility and the countries/States concerned will result in the shipment being deemed illegal.<sup>9</sup>
- 1.14 The TFS Regulation prohibits the export of hazardous wastes referred to in Annex V of the Regulation to non-OECD countries for recovery, as well as a ban on the export of waste for disposal outside of the EU except EFTA (European Free Trade) Countries that are a party to the Basel Convention<sup>10</sup>. The Regulation also prohibits the import of waste into the Community destined for disposal from countries which are not signatories to the Basel Convention.<sup>11</sup>

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<sup>5</sup> Article 3(2) of the TFS Regulation

<sup>6</sup> Amended by Regulation EC 1418/2007, Regulation EC 740/2008 and Regulation EC 967/2009

<sup>7</sup> “*Illegal Exports of Recyclable Waste*”, Irish Planning & Environmental Law Journal, 5.09.14

by Tim O’Sullivan BL

<sup>8</sup> Article 18(2) of the TFS Regulation

<sup>9</sup> Case C-69/15 - Nutrivet D.O.O.E.L. v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség

<sup>10</sup> Articles 34-36 of the TFS Regulation

<sup>11</sup> Article 41 of the TFS Regulation

1.15 The shipment of hazardous wastes listed in Annex IV of the TFS Regulation within the OECD and of wastes destined for disposal is generally subject to notification procedures with the prior written consent of all relevant authorities of dispatch, transit and destination. Where any essential changes are made to a consented shipment, these must be communicated to the competent authority concerned and the consignee immediately and where possible, before the shipment starts.<sup>12</sup> A shipment entering a country at a different border crossing to that consented to as part of the consented notification has been found to constitute an essential change to a shipment.<sup>13</sup>

1.16 The notification procedure also applies to mixtures of ‘green-listed’ waste destined for recovery, with some exceptions.<sup>14</sup> The case of *Omni Metal* considered whether the combination of copper core covered by PVC sheathing contained in scrap wiring required notification. The Court held that the combination of the two materials, which were both included in the ‘green-list’ of waste, did not render the combination ‘green listed’ waste.<sup>15</sup>

1.17 Under the TFS Regulation a shipment of waste will be deemed illegal if it is effected:

- (a) *“Without notification to all competent authorities concerned pursuant to this Regulation;*
- (b) *Without the consent of the competent authorities concerned pursuant to this Regulation; or*
- (c) *With consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud; or*
- (d) *In a way which is not specified materially in the notification or movement documents; or*
- (e) *In a way which results in recovery or disposal in contravention of Community or international rules; or*
- (f) *Contrary to Articles 34, 36, 39, 40, 41 and 43; or*
- (g) *Which, in relation to shipments of waste as referred to in Article 3(2) and (4), has resulted from:*
  - i. the waste being discovered not to be listed in Annexes III, IIIA or IIIB, or*
  - ii. non-compliance with Article 3(4),*

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<sup>12</sup> Article 17 of the TFS Regulation

<sup>13</sup> Case C-487/14 - SC Total Waste Recycling SRL v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség

<sup>14</sup> Article 3(1)(b) and 3(2)(b) of TFS Regulation.

<sup>15</sup> C-259/05 *Omni Metal*

*iii. the shipment being effected in a way which is not specified materially in the document set out in Annex VII.”<sup>16</sup>*

1.18 Articles 24 and 25 of the TFS Regulation set out the framework for the detection, prevention and control of illegal shipments, as well as establishing who will be responsible for the cost of repatriating and recovering such shipments. It provides that in the case of an illegal shipment that is the responsibility of the notifier, the shipment must be taken back by the notifier. If there is no notification document accompanying the shipment, the notifier de jure who should have submitted a notification is responsible for fulfilling the take back obligations.

1.19 The “*notifier*” of a shipment is defined in Article 2(15) as the “*natural or legal person...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.*” The notifier is then selected selected in accordance with the following ranking: -

- (a) The original producer; or
- (b) The licensed new producer who carries out operations prior to shipment; or
- (c) A licensed collector who, from various small quantities of the same type of waste collected from a variety of sources, has assembled the shipment which is to start from a single notified location; or
- (d) A registered dealer who has been authorised in writing by the original producer, new producer or licensed collector specified in 1-3 above to act on his behalf as notifier;
- (e) A registered broker who has been authorised in writing by the original producer, new producer or licensed collector specified in 1-3 above to act on his behalf as notifier;
- (f) Where all persons in 1-5 above are unknown or insolvent, the holder.

Where a shipment that has been notified by a broker or dealer is found to be illegal, the producer, licensed new producer or licensed collector who authorised that dealer or broker to act on his/her behalf will be deemed to be the notifier.<sup>17</sup>

1.20 The concept of shipment has been considered in the case of *EU-Wood Trading* where it was found to include the movement of waste in its entirety:

*“...from the point of departure of the waste in the state of dispatch to the end of its processing in the state of destination.”<sup>18</sup>*

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<sup>16</sup> Article 2(35) of the TFS Regulation.

<sup>17</sup> Article 2(15)(a) of the TFS Regulation

<sup>18</sup> C-277/02 - EU Wood Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinlan-Pfalz mbH

While this case concerned the application of Regulation EC259/93, the same interpretation has since been applied in the 2012 English case of *R v KV*.<sup>19</sup>

## **2. Irish Legislation Giving effect to the TFS Regulation**

### **Dublin City Council as Competent Authority**

- 2.1 The Waste Management (Shipments of Waste) Regulations 2007 (“the 2007 Regulation”) was brought in on the 12<sup>th</sup> of July 2007 to support and give effect to the Waste Shipment Regulation.
- 2.2 Regulation 4 designates Dublin City Council as the competent authority responsible for the implementation of the Waste Shipments Regulation in Ireland. Prior to the 2007 Regulation, the competent authorities for exports of waste were the 34 local authorities, with the competent authority for imports and movements through the State being the EPA.
- 2.3 Dublin City Council established the National Transfrontier Shipment Office and all transfrontier shipments of waste originating in any local authority area in the State that are subject to the prior written notification procedures contained in Article 3(1) of the Waste Shipment Regulation must be notified to the National TFS Office. The National TFS Office is responsible for:
  - a. Supervising and controlling shipments of waste into and out of the State.
  - b. Processing, assessing and monitoring all shipment applications, pre-notifications and movements of waste being exported and imported.
  - c. Maintaining records for all amber waste import and export shipments which take place in a particular calendar year and green list waste returns filed with the NTFSO by registered brokers and dealers.
  - d. Enforcing the Waste Shipment Regulations.
- 2.4 To facilitate controls on persons who arrange shipments of waste the City Council also has responsibility for the registration of brokers and dealers pursuant to the Waste Management (Registration of Brokers and Dealers) Regulations 2008. Under this Regulation any person who arranges for the shipment of waste the subject of the TFS Regulation and the Brokers and Dealers Regulation, on behalf of others or themselves, has a responsibility to only use a broker or dealer who is registered with the competent authority.<sup>20</sup>
- 2.5 The National TFS Office’s enforcement team consists of an environmental manager and six enforcement officers based in the NTFSO in Dublin, and two

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<sup>19</sup> *R v KV* (2012) Env LR 335

<sup>20</sup> Article 15 - S.I. No. 113/2008 - Waste Management (Registration of Brokers and Dealers) Regulations 2008.

enforcement officers based in Cork who are responsible for monitoring shipments entering and leaving ports throughout the country. Under Article 5(f) of the Shipments of Waste Regulation the National TFS Office can request any local authority to cooperate in enforcement activities for the purposes of the TFS Regulation.

- 2.6 The NTSFO has a Memorandum of Understanding in place with the Revenue's Customs Service to assist in the detection of illegal shipments. As of 28<sup>th</sup> July 2016, Commission Implementing Regulation (EU) 2016/1245 was put in place to assist customs officials to identify waste crossing EU borders as non-waste illegally by setting out a preliminary correlation table between customs and waste codes.
- 2.7 The National TFS Office is regularly involved in joint operations with the Revenue Customs Service and Garda Síochana in an effort to intercept illegal export activity and these joint operations have proved particularly effective in detecting illegal shipments of end of life vehicles that are being shipped as non-waste and waste electrical and electronic equipment by conducting background checks on vehicles and carrying out functionality testing on equipment.

### **Powers of Competent Authority**

- 2.8 Regulation 5 of the 2007 Regulation gives authorised officers a number of powers to investigate and control shipments of waste. The following are some of the most commonly used powers:
- Direct a person who undertakes the shipment of waste or who is the consignee of waste imported into the State, to return the waste to its place of origin or to such other place as may be specified in the direction and to take such measures as may be so specified in relation to the waste, including the recovery or disposal of the waste in such manner or at such facility as may be so specified.
  - Prohibit the import or export of any shipment of waste, or of a class or classes of waste, or of any shipment, class or classes of waste intended for any specified purpose, either generally or for such periods as may be specified for the purposes of the TFS Regulation (and in order to comply in particular with articles 12, 13 and 49 thereof), or to comply with recommendations or provisions of the hazardous waste management plan made under section 26 of the Act.
  - Impose on a person undertaking the shipment of waste such charges as are necessary to defray any costs reasonably incurred by it in performing any

function under these Regulations with respect to the waste, including enforcement requirements and charges for consignment forms.<sup>21</sup>

2.9 Regulation 7(3) provides that a person on whom a direction is served by the competent authority under Regulation 5 shall comply with the requirements of the direction, which shall be in writing, within such period, being a period of not less than three weeks, or as may be specified in the direction in cases of urgency.

2.10 Regulation 7(4) provides that:

*“ A direction served by the competent authority pursuant to Regulation 5 may state a sum to be paid to the competent authority towards the costs reasonably incurred by it in the performance of its functions under these Regulations or the TFS Regulation (and including the costs of enforcement)... ”<sup>22</sup>*

2.11 The National TFS Office may raise objections in respect of a notified shipment for recovery or disposal on specified grounds as set out in Article 11 and 12 of the TFS Regulation and shall inform the notifier of its decision and the reason for the objection.

2.12 Where a notification is transmitted by the National TFS Office, the competent authorities of destination may also within 30 days following the transmission of the acknowledgement by the competent authority of destination raise objections on specified grounds<sup>23</sup>.

2.13 Regulation 9 provides that:

- (1) “Any person who contravenes any provision of the TFS Regulation shall be guilty of an offence.*
- (2) Any person who contravenes any provision of these Regulations shall be guilty of an offence.*
- (3) Any person who fails to comply with a requirement, obligation or condition imposed by the competent authority by way of a direction under the TFS Regulation and these Regulations shall be guilty of an offence.”*

2.14 Regulation 11(1) of the Regulations provides that a prosecution for a summary offence under the Regulations may be taken by the competent authority.

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<sup>21</sup> Article 5 - S.I. No. 419/2007 – Waste Management (Shipments of Waste) Regulations 2007

<sup>22</sup> Regulation 10 of the 2007 Regulations

<sup>23</sup> The grounds for objecting to a shipment of waste destined for disposal or recovery are set out in Articles 11 and 12 of the Waste Shipment Regulation.

Regulations 11(2) states that a person guilty of an offence under the 2008 Regulations shall be liable:

- (a) *“on summary conviction, to a Class B fine<sup>24</sup>, or imprisonment for a term not exceeding 3 months, or both, or*
- (b) *on conviction on indictment, to a fine not exceeding €500,000, or imprisonment for a term not exceeding 3 years, or both.”*

### **3. Detection & Enforcement**

#### **Common Offences**

3.1 The most commonly arising offences prosecuted by Dublin City Council concern:

- i. The failure to comply with a direction issued by the competent authority under Regulation 5 of the 2007 Regulations.
- ii. Shipping waste the subject of the prohibition contained in Article 36 of Council Regulation (EC) No. 1013/2006 to a non-OECD country.
- iii. Illegally shipping waste without having submitted a prior written notification to the competent authority contrary to Article 3 of Council Regulation (EC) No. 1013/2006.
- iv. The failure to notify the competent authority of an essential change that has been made to the details and/or conditions of a consented shipment contrary to Article 17 of the Waste Shipment Regulation.

3.2 Article 17 is an important provision in terms of dealing with shipments that have not been effected in accordance with a consented notification. Every discrepancy between details in the notification and movement documents and the actual shipment effected can result in it being deemed illegal. Examples of essential changes can include:

- The amount transported clearly exceeds the amount indicated in the movement document.
- The total quantity transported exceeds the maximum quantity notified.
- The numbered movement document which accompanies a shipment has already been used.
- Transfer of the waste to a recovery or disposal facility other than indicated in the notification document.
- Notification has taken place but the composition of the waste is not as notified.

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<sup>24</sup> Amended by Section 5 of the Fines Act 2010

- 3.3 Besides the penalties that can be imposed upon conviction, the financial consequences of repatriating a consignment of waste that has been found to be illegal and arranging for its alternative recovery of can be significant. In addition, where the National TFS is required to investigate a breach of the TFS Regulation or a repatriated shipment, this will result in a charge being imposed pursuant to Regulation 5 of the 2007 Regulation.

### **Detecting Waste**

- 3.4 Enforcement of the TFS Regulation poses a number of challenges particularly concerning the detection of waste shipments that are being shipped as re-usable equipment falling outside of the scope of the TFS Regulation. To support the detection of such shipments, the European Commission has published a number of correspondents' guidelines to assist in the identification of different waste streams, such as end of life vehicles and waste electrical and electronic equipment.
- 3.5 The European Union (Waste Electrical and Electronic) Regulations 2014 now includes a provision placing the onus of proving that used EEE is not WEEE on the holder of the equipment.<sup>25</sup> Schedule 11 of the 2014 Regulations sets out minimum requirements for shipments of used EEE suspected to be WEEE. In order for such shipments to establish that they are used EEE they must be accompanied by:
- (a) a copy of the invoice and contract relating to the sale and/or transfer of ownership of the EEE which states that the equipment is destined for direct re-use and that it is fully functional;
  - (b) evidence of evaluation or testing in the form of a copy of the records (certificate of testing, proof of functionality) on every item within the consignment and a protocol containing all record information according to point 3;
  - (c) a declaration made by the holder who arranges the transport of the EEE that none of the material or equipment within the consignment is waste as defined by Article 3(1) of Directive 2008/98/EC; and
  - (d) appropriate protection against damage during transportation, loading and unloading in particular through sufficient packaging and appropriate stacking of the load.

Paragraph 5 to the schedule provides that:

*“In the absence of proof that an object is used EEE and not WEEE through the appropriate documentation required in points 1, 2, 3 and 4*

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<sup>25</sup> Regulation 22(4) of the European Union (Waste Electrical and Electronic) Regulations 2014

*and of appropriate protection against damage during transportation, loading and unloading in particular through sufficient packaging and appropriate stacking of the load, which are the obligations of the holder who arranges the transport, the National Transfrontier Shipment Office shall consider that an item is WEEE and presume that the load comprises an illegal shipment. In these circumstances the load will be dealt with in accordance with Articles 24 and 25 of Regulation (EC) No 1013/2006.”*

- 3.6 The TFS Regulation was amended by Regulation (EU) No 660/2014, which introduces measures to strengthen Member States’ inspection systems. Effective from January 2016 the amended Article 4 provides that:

*“In order to ascertain that a substance or object being carried by road, rail, air, sea or inland waterway is not waste, the authorities involved in inspections may, without prejudice to Directive 2012/19/EU of the European Parliament and of the Council, require the natural or legal person who is in possession of the substance or object concerned, or who arranges the carriage thereof, to submit documentary evidence:*

- (a) as to the origin and destination of the substance or object concerned; and*
- (b) that it is not waste, including, where appropriate, evidence of functionality.*

*For the purpose of the first subparagraph, the protection of the substance or object concerned against damage during transportation, loading and unloading, such as adequate packaging and appropriate stacking, shall also be ascertained.”*

Article 4b provides that:

*“The authorities involved in inspections may conclude that the substance or object concerned is waste where:*

- a. the evidence referred to in paragraph 4a or required under other Union legislation to ascertain that a substance or object is not waste, has not been submitted within the period specified by them, or*
- b. they consider the evidence and information available to them to be insufficient to reach a conclusion, or they consider the protection provided against damage referred to in the second subparagraph of paragraph 4a to be insufficient.*

*In such circumstances, the carriage of the substance or object concerned or the shipment of waste concerned shall be considered as an illegal shipment. Consequently, it shall be dealt with in accordance with Articles 24 and 25 and the authorities involved in inspections shall, without delay, inform the competent authority of the country where the inspection concerned took place accordingly.”*

- 3.7 Competent authorities can seek evidence from the person arranging the shipment concerning the interim or non-interim recovery facility to ascertain whether a shipment of waste falling under the general information requirements of Article 18 is destined for recovery operations and the failure to provide such information will result in the shipment being dealt with as an illegal shipment in accordance with Articles 24 and 25 of the TFS Regulation.<sup>26</sup>
- 3.8 The amending Regulation aims to provide enhanced powers to the authorities involved in inspections to enable them to decide on the basis of evidence whether a substance or object is waste and whether a shipment can be considered an illegal shipment of waste. The 2014 Regulation also requires Member States to establish inspection plans by 1 January 2017 based on a risk assessment that would aim, inter alia, to identify the minimum number of inspections required and it is hoped that these measures will achieve a greater level of consistency in the detection of illegal waste shipments across the EU.<sup>27</sup>

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<sup>26</sup> Article 1(3)(e) Regulation (EU) No 660/2014 amending Regulation (EC) No 1013/2006 on shipments of waste

<sup>27</sup> *Report from the Commission to the European Parliament and the Council on the implementation of Regulations (EC) No 1013/2006 of June 2006 on Shipments of Waste.* 17.12.2015