

ILLEGAL WASTE TRAFFICKING

Focus on transboundary
movements of waste

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Illegal waste trafficking

Focus on transboundary movements of waste

Waste Shipment Regulation (WSR) 1013/2006

Basel Convention on the control of Transboundary Movements of hazardous wastes and their disposal

Recent CJEU case law (C-624/17 Tronex and C-241 and 242/12 Shell)

Relevant national cases (i.e. the Netherlands)



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Waste Shipment Regulation (WSR) 1013/2006

- The Waste Shipment Regulation was adopted in 2006 to replace the Waste Shipment Regulation 259/93 that set the legal framework on transboundary shipment of waste in Europe as a response to the need of supervision and control of shipments of waste:
 - **A Regulation rather than a Directive: to ensure simultaneous and harmonised application in all the MS and to achieve the same level playing field for companies.**
- This recast Waste Shipment Regulation of 2006 -with important modifications introduced in 2014 and 2017-, implements into EU law the provisions of
 - the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,
 - the OECD Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations
- The WSR lays down **procedures** for the transboundary shipments of waste.
- **The Regulation bans the export of hazardous wastes to non-OECD countries, as well as placing a ban on the export of waste for disposal.**

To achieve the same level playing field in relation to the environmental controls placed on waste shipments, most stakeholders consider the WSR interaction with the EU internal market as negative, particularly its link to the EU transition to circular economy: it can hinder the creation and promotion of a market for secondary materials with differences in interpretation of the Regulation meaning that the single market is not well integrated.

Waste Shipment Regulation 1013/2006

For a general presentation of the WSR see the following video

ENPE presentation <https://vimeo.com/333388717>



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Waste Shipment Regulation (WSR) 1013/2006

Watch the video on the WSR and read below its most relevant provisions:

- Its Art. 1: the WSR “establishes procedures and control regimes for the shipment of waste,
 - depending on the origin, destination and route of the shipment,
 - the type waste shipped and
 - the type of treatment to be applied to the waste at its destination.
- Its Art. 2 gives definitions that refers to the Waste Directive. It defines “illegal shipment” as any shipment effected:
 - a) Without notification to all competent authorities concerned pursuant to this Regulation, or
 - b) Without the consent of the competent authorities concerned pursuant to this Regulation....
- Art. 50(1) concerns penalties for infringements –administrative and criminal penalties- that must be effective, proportionate and dissuasive.

Waste Shipment Regulation (WSR) 1013/2006

Study: The costs of non implementing EU Environmental law
(2019)

Table 5-7 Environmental targets: The Waste Shipment Regulation

Legislation	Environmental target description	Current target
Waste Shipment Regulation	No target, but a prohibition on uncontrolled shipments of waste which would result in the waste not being treated or disposed in an environmental sound way. Restriction on shipment of hazardous waste outside the EU.	See left

- On the current situation of the illegal waste shipment in the EU Member States, this 2019 Study says that:
 - "There is reported data on the prevalence of illegal shipments, but clearly it is difficult to ascertain the precise level of illegal shipments of waste. This is highlighted by the fact that some Member States reported no illegal shipments of waste, which seems highly unlikely, and instead implies gaps within waste shipment inspections".

In this study, "Some Member States have pointed out that there is a correlation between the growth of cross-border legal waste shipments and the number of waste crime. For instance, in Germany, the increase in cross-border waste shipments since the 1990s correlated with an increase of the number of cases of waste trafficking detected. According to Eurostat, exports of all notified waste (hazardous and non-hazardous) tripled between 2001 and 2016, from 6.3 million tonnes in 2001 to 21.6 million tonnes in 2016. Within these, the amount of hazardous waste shipments from EU Member States to either other EU countries or non-EU countries increased by 63%, from 4.0 million tonnes in 2001 to 6.5 million tonnes in 2016, and hazardous waste shipments are largely intra-EU. This increase might indicate, if the correlation between the growth in legal and illegal waste shipments is correct, that criminal waste activities are increasing in the EU".

Waste Shipment Regulation (WSR) 1013/2006

- **Now the WSR is under evaluation by the European Commission.**
- Its Article 60(2a) calls upon the European Commission to carry out a review of this Regulation by 31 December 2020 and to assess its results and to submit –if appropriate- a legal proposal on its future.
- **The EU Green Deal** mentioned that "EU should stop exporting its waste outside of the EU and will therefore revisit the rules on waste shipments and illegal exports". Thus the Commission intends to review the EU rules on waste shipments to ensure how to facilitate that EU policy on waste shipments promotes recycling in the EU to support the transition to the circular economy, for example through:
 - A better inspection system
 - Measures against illegal shipments
 - And measures to avoid potential environment-and-health-related adverse effects on the environment and public health caused by shipments of waste to third countries outside the EU.
- **The Circular Economy Action Plan** proposes stepping up the enforcement of the WSR and measures to facilitate waste shipment across the EU.
- **It aims to facilitate preparation for the re-use and recycling of European waste via the following two actions:**
 - (1) creating a well functioning EU market for secondary raw materials;
 - (2) addressing waste exports – which are losses of resources and economic opportunities for the recycling industry in the EU through the review of the Waste Shipment Regulation aiming at restricting exports of waste that can be treated domestically within the EU.

The review should take account of inter alia:

- the reports drawn up by the Member States in accordance with Art. 51 of the WSR.
- The effectiveness of Art. 50.2 a of the WSR in combating illegal shipments, taking into account environmental, social and economic aspects.

The REFIT Platform has pointed out at some of the shortcomings of the WSR: Unnecessary administrative burden as well as delays and additional costs for shipments of waste.

So the challenges ahead:

- Enabling a uniform application across MS closely linked with the development of inspection plans that vary in their content and level of resourcing to combat illegal shipments and harmonisation of waste reporting and classification.
- WSR ability to evolve in line with the changing nature of waste markets: its application to secondary materials and the circular economy.

- The lack of transboundary cooperation has led to illegal waste activities targeting those areas where cooperation is considered weakest.

The EU Green Deal also says that the European Commission will promote action by the EU, its MS and the international community to step up efforts against environmental crime.

Waste Shipment Regulation (WSR) 1013/2006

- The Waste Shipment Regulation has been evaluated as well by the Council in the **Eighth Round of Mutual Evaluations on Environmental Crime** that was devoted among other questions to the Illegal Trafficking of Waste.
- **Its Final Report on “The practical implementation and operation of the European Policies on preventing and combating Environmental Crime”** concludes:
 - Waste-related crimes are complex and multifaceted forms of crimes.
 - There is a risk that certain criminal offences in this area remain undetected as this type of crime is rarely self-evident, but more often ‘invisible’ and it is therefore assessed to be a ‘control crime’, which as such has to be tackled proactively.
 - **In the majority of the MS, this form of crime suffer from a general lack of priority at political level.**
 - **Obstacles causing administrative burdens and ineffective implementation.**
 - Paper-based procedures.
 - Non-harmonised approaches and interpretation of WSP provisions and procedures.
 - Procedures to facilitate the implementation of the WSR for operators are not used to their full extent.
 - Lack of uniform enforcement throughout the MS.

The Final Report of the 8th round of mutual evaluations made the following recommendations:

- The Member States should develop methods to collect reliable, updated and comparable statistical data comprising the number of notifications, administrative investigations, prosecutions and convictions.
 - The adoption of guidelines on undefined legal terms to ensure more clarity and to facilitate the work of the competent authorities in the area.
- Enhanced coordination among the law enforcement authorities and the administrative bodies in order to build up or further strengthen an efficient system to tackle illegal activities related to cross-border waste shipments.
- Ensure the presence of specialised and properly trained inspectors, possibly vested with criminal law enforcement powers, and regular inspections, including physical checks of containers carrying waste.

Waste Shipment Regulation (WSR) 1013/2006

Article 3 of the ECD on the offences foresees "Member States shall ensure that the following conduct constitutes a criminal offence, when committed intentionally or with at least serious negligence":

(c) **the unlawful treatment, including disposal and storage, transport, export or import of waste, including hazardous waste**, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(e) **the illegal shipment of waste as defined in Article 2(35)** of Regulation (EC) No 1013/2006 of the European Parliament and Council for profit and in **a non-negligible quantity**, whether the shipment is executed in a single operation or in several operations which appear to be linked.

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This provision allows Member States to limit criminal liability by exempting shipments of negligible quantities of waste from criminal liability. "This leaves considerable discretion to the Member States, acknowledging the diversity of national criminal frameworks and the traditions in the Member States, but brings also a risk of inconsistencies in the practice on the ground" (EC 2020).

Waste Shipment Regulation (WSR) 1013/2006

According to Michel Faure classification of environmental crimes that we analysed in the previous presentation:

The illegal shipment of waste is an **Abstract endangerment crime**:

- Criminalisation enforces prior administrative decisions (permits, authorisations – unlawful shipment of waste).
- The goal is to punish administrative disobedience and to protect both the administrative interest and the environmental interest.
- No condition related with damage must be met.
- **A control crime**', which as such has to be tackled proactively.

Waste Shipment Regulation (WSR) 1013/2006

- **The problems that were pointed out in the first session are present in the implementation and interpretation of the WSR:**
 - **Blank Rules** and the Interrelation between criminal and administrative enforcement and sanctioning for waste crimes:
 - The WSR refers to concepts, definitions and principles developed in the Waste Framework Directive
- **The waste hierarchy**, according to which the following hierarchy shall apply as a priority order in waste prevention and management legislation and policy:
 - a. Prevention
 - b. Preparing for re-use
 - c. Recycling,
 - d. Other recovery
 - e. Disposal as last resort.
- **Principles** that contribute to integrating the different legal instruments and facilitate interaction between waste legislation:
 - **The Proximity Principle:** Wastes should be disposed of as close to the source as possible.
 - **Self-sufficiency principle:** At the European level and, if possible, at Member State Level, Member States need to establish, in cooperation with other MS, and integrated and adequate network of waste disposal facilities.

Waste Shipment Regulation (WSR) 1013/2006

Glossary:

- **Waste:** as defined by Waste Framework Directive: Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ L 312, 22.11.2008).
- **Disposal:** Any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I of Directive 2008/98/EC on waste sets out a non- exhaustive list of disposal operations.
- **Recovery:** Any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy
- **Recycling:** Any operation which reprocesses waste materials into useful products, materials or substances

Waste Shipment Regulation (WSR) 1013/2006 and Environmental Crime

- Other problems in the implementation and interpretation of the WSR:
 - **Problems of definition as examined in the following section regarding:**
 - **The term “negligible waste”**
 - streams of wastes: end of life vehicles, batteries, packaging and packaging waste and WEEE.
 - types of wastes,
 - types of recovery and recycling.
 - Duplicity of codes and the combined nomenclature in the EU and the Basel Convention.
 - Exemptions and derogations from scope of applications: radioactive waste, waste generated on board of ships and vehicles.

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On the Non-negligible quantity

The Reports of the European Commission show:

Most Member States transposed this provision more stringently than required by the Environmental Crime Directive, by not linking criminal liability to the quantity of illegality shipped waste. These Member States rely on the prosecution’s assessment of whether or not a case is sufficiently serious to merit prosecution.

In other Member States, non-negligible quantity was transposed literally or almost literally.

Some Member States have given guidelines on the interpretation of this term. Austria adopted an instruction informing that a non-negligible quantity of waste will be:

“quantities exceeding 25 kilogrammes in the case of hazardous waste that also constitutes dangerous goods within the meaning of the European Agreement concerning the International Carriage of Dangerous Goods by Road.

Quantities exceeding 1.000 kilogrammes in the case of hazardous waste that does not also constitute dangerous goods within the meaning of the ADR;

Quantities exceeding 10 tonnes in the case of non-hazardous waste”

Synergies between the WSR and other Waste Legislation on specific waste streams:

- end of life vehicles,

- batteries,
- packaging and packaging waste and
- WEEE.

The WSR works coherently with those Directives in dealing with the exports of the materials in question.

However, the definitions of hazardous and non-hazardous waste and their interpretation in different MS make the shipments of **certain waste streams** such as batteries difficult.

Some MS may consider certain materials as waste whereas other MS may consider them as non waste:

- Certain shipments may be deemed illegal by a MS of reception.
- While they are not considered to fall under the scope of the WFD and the WSR by the MS of dispatch.

Accessory nature of criminal law with respect to administrative law

- The success of the implementation of criminal offences in the case of the **WSR** depends first and foremost on the success of its administrative enforcement.
- The Reports of the European Commission state that "the prevention of environmental crime and safe havens depends not only on the quality of criminal law enforcement but also on environmental administrative law enforcement. Environmental administrative law contains rules and safeguards to ensure compliance and prevent environmental offences, such as common standards, licensing, controls, inspections and other compliance monitoring".
- The Final Report of the Council states: "It is also essential to have smooth cooperation between the administrative entities and the judiciary, particularly in the reporting of environmental offences to the prosecutors, who decide if the elements of the case meet the criteria for criminal prosecution and for imposing a criminal penalty".

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Because of the nature of the WSR, most controls are procedural and administrative in nature.

The European Commission's proposals for a future reform of the Environmental Crime Directive that will impact on law enforcement of the WSR point to the following reforms and actions:

- Collect statistics and data in relation to environmental crime in all Member States
- Clarify undefined legal terms - such as negligible amounts - to make them more effective and achieve a level playing field across the MS
- Addressing differences in levels of sanction in MS that require:
 - To set out minimum maximum sanction
 - Harmonise the criteria for the level of sanctions to be imposed
- Improving cooperation between law enforcement authorities within the MS, as well as cross-border cooperation.
- The specialisation of environmental law enforcement professionals.
- Clarifying the relationship between criminal and administrative sanctions

The WSR Control System is also based on two types of control procedures:



- The **general information requirements** of Article 18, which is normally applicable to
 - shipments for **recovery** of wastes, listed in Annex III ('green' listed wastes - non-hazardous, such as paper or plastics) or IIIA; and
- The procedure of **prior written notification and consent** for other types of shipments of wastes, including:
 - shipments of wastes listed in Annex IV ('amber' listed wastes containing both hazardous and non-hazardous parts) or in Part 2 of Annex V (European list of wastes, e.g. wastes from mining, quarrying and physical and chemical treatment of minerals); and
 - shipments for **disposal** of wastes listed in Annex III ('green' listed wastes).

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The Final Report of the Council has concluded that “the basic level of training for the authorities competent for waste shipment control is needed to allow them to identify illegal shipments of waste more easily and, once a suspicious shipment has been detected, to compare it with **the cargo declared in the documentation**. For that purpose, specialised training for these actors should include the collection, analysis and expert appraisal of samples.”

Common methods of illegal traffic include making false declarations, the concealment, mixture or double layering of the materials in a shipment and the mislabelling of individual containers. Such methods seek to misrepresent the actual contents of a said shipment and, because of this the meticulous and thorough scrutiny of national enforcement officers is required to detect cases of illegal traffic .

General information procedure for Green Listed Wastes:

- Shipments for **recovery** of wastes, listed in **Annex III 'green' listed** wastes - non-hazardous:
 - Metal bearing wastes arising from melting, smelting and refining of metals (slags from precious metals)
 - Other wastes containing metals: electrical assemblies consisting only of metals or alloys, electronic scrap, vessels and other floating structures for breaking up...
 - Glass waste in non-dispersible form.
 - Ceramic wastes in non-dispersible form
 - Wastes arising from tanning and fellmongery operations
- Shipments for **recovery** of wastes, listed in **Annex IIIA:**
 - Mixtures of two or more wastes listed in Annex III and not classified under one single entry as referred to in Article 3(2).

The notification procedure requires:

- **The prior written consent** of the competent authorities of the countries concerned by the shipment (**country of dispatch, country of transit and country of destination**) to be given within the 30 day notice period.
 - The notifier has a duty **to take back waste shipments** that are found to be illegal or cannot be provided as intended (including the recovery or disposal of waste).
- Exports to non-EU countries of waste for **disposal** are prohibited, except to EFTA countries that are party to the Basel Convention.
- Exports **for recovery of hazardous waste** and waste under Annex II of the Basel Convention are prohibited, except those directed to countries to which the OECD decision applies.
- Imports from non-EU countries of waste for **disposal or recovery** are prohibited, except for countries to which the OECD decision applies; non-EU countries that are party to the Basel Convention; countries that have concluded a bilateral agreement with the EU or EU countries; or Other areas during situations of crisis.

Prior written notification and consent for Amber Listed Wastes

- The procedure of **prior written notification and consent** for other types of shipments of wastes, including:
 - shipments of wastes listed in **Annex IV 'amber' listed wastes** containing both hazardous and non-hazardous parts:
 - Metal bearing wastes
 - Wastes containing principally inorganic constituents, which may contain metals and organic materials,
 - Wastes containing principally organic constituents, which may contain metals and inorganic materials,.....
 - or in **Part 2 of Annex V**,
 - European list of wastes, e.g. wastes from mining, quarrying and physical and chemical treatment of minerals;
 - wastes from agriculture, horticulture, aquaculture, forestry, hunting and fishing, food preparation and processing.
 - Wastes from petroleum refining, natural gas purification and pyrolytic treatment of coal.
- **shipments for disposal of wastes listed in Annex III ('green' listed wastes).**

The WSR Control System

- **Imports** from non-EU countries of waste for **disposal or recovery** are prohibited, except for imports:
 - From countries to which the OECD decision applies;
 - From non-EU countries that are party to the Basel Convention;
 - From countries that have concluded a bilateral agreement with the EU or EU countries; or
 - Other areas during situations of crisis.
- Article 37(1) of the WSR is the legal base of Regulation 1418/2007. Under this Regulation, **for each country to which the OECD Decision C(2001) does not apply**, the Commission requests the following information:
 - i) **a list of waste that could be exported** to that country for recovery;
 - ii) **an indication of the control procedure** applicable to such waste. Where written responses were not received, and in accordance with Article 37.2 of the WSR, such countries were deemed to apply **a procedure of prior written notification and consent**.

Waste Shipment Regulation (WSR) 1013/2006

Article 2(35) "illegal shipment" means any shipment of waste effected:

- a) without notification to all competent authorities concerned pursuant to this Regulation; or
- 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;
- 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).
 - iii. The shipment being effected in a way which is not specified materially in the document set out in Annex VII,

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Article 2(35) "illegal shipment" means any shipment of waste effected:

(f) Contrary to Articles 34, 36, 39, 40, 41 and 43.

•Art. 34: Export of waste for disposal prohibited except to EFTA countries

•Art. 36: Exports of waste for recovery to non-OECD Decision countries are prohibited:

- a) Wastes listed as hazardous in Annex V:
- b) Wastes listed in Annex V, Part 3,
- c) Hazardous wastes not classified under one single entry in Annex V;
- d) Mixtures of hazardous wastes and mixtures of hazardous wastes with non-hazardous wastes not classified under one single entry in Annex V;
- e) Wastes that the country of destination has notified to be hazardous under Article 3 of the Basel Convention;
- f) Wastes the import of which has been prohibited by the country of destination; or
- g) Wastes which the competent authority of dispatch has reason to believe will not be managed in an environmentally sound manner (...) in the country of destination concerned.

- Art. 39: Exports to the Antarctic.
- Art. 40: Exports to overseas countries or territories (disposal and recovery)
- Art. 41: Imports into the Union from Third Countries and destined for disposal are prohibited except from a country Party to the Basel Convention or with an agreement in place or from other areas during of situations of crisis or war.
- Art. 43: Imports of waste for recovery are prohibited except from an OECD Decision country or a Country Party to the Basel Convention or with an agreement in place or from other areas during situations of crisis or war

Article 2(35) “illegal shipment” means any shipment of waste effected:

(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**
 - i. Annex III: **Green listed waste** (wastes subject to the general information requirements laid down in Article 18)
 - ii. Annex IIIA: **Mixture of two or more wastes** listed in annex III and not classified under one single entry as referred to in Article 3(2)
 - iii. Annex IIIB: **Additional Green listed waste** awaiting inclusion in the relevant annexes to the Basel Convention or the OECD Decision
- ii. Non-compliance with Article 3(4).
- iii. The shipment being effected in a way which is not specified materially in the document set out in Annex VII regarding information accompanying shipments of waste as referred to in article 3(2) and (4)

Waste Shipment Regulation (WSR) 1013/2006

Background and practices to be taken into account

- Rob de Rijck, when he was a public prosecutor in charge of the Unit of the Dutch Prosecuting Service in environmental crime and fraud in Rotterdam – one of the main ports in the world and the largest in Europe- wrote an article on the waste shipment legislation before the adoption of the WSR, with the title *"A flaw in the criminal approach of international waste transport in Europe"*. In this referential work, he underlined the idea that "the criminal prosecution of illegal waste transports into, out and within Europe is essentially flawed" because:
 - "On one hand, there is international trade in waste at a very substantial scale, and the system that needs to regulate that trade has been set up by the European Union. On the other hand, however the prosecution of violations of those regulations has been organized exclusively at a national level."
 - He was particular critical with the implementation of the Waste Shipment Regulation 259/93 because initially there was a lack of preliminary rulings in this area: now the ECJ has resolved numerous questions of legal interpretation although a lack of implementation and enforcement of the Waste Shipment Regulation persists.

Waste Shipment Regulation (WSR) 1013/2006

- In its article "*A flaw in the criminal approach of international waste transport in Europe*", he analysed the Omni Metal case – a shipment of composite waste from Germany to China that was stopped in Rotterdam, and highlighted the following ideas:
 - In the defence's speeches, the interpretation of the rules of the Waste Shipment Regulation 259/93 and the Combined Nomenclature was explicitly raised: thus, the counsel for the defendant argued that the container did not carry any waste.
 - In Germany and the Netherlands, the responsible administrative authorities interpreted the rules on composite waste in a totally different way:
 - In the Netherlands, the prosecution office offered a settlement proposal of 11.000 euros to the German transporter but
 - In Germany, the administrative authority resolved the question with a 500 euros fine.
 - In the Netherlands, the Prosecution Service developed a sanction policy that had as a minimum a fine of €450 per transported ton of waste for the crime of "transporting without notifying the competent authorities". For violation of export prohibition or fraud, sentences were higher.



Case C-259/05: Criminal proceedings against Omni Metal Service

Regulation (EEC) No 259/93 - Waste - Cables composed of copper and PVC -
Export to China for purposes of recovery - Heading GC 020 - Mixed waste -
Combination of two materials mentioned in the green list of wastes - Such mixed
waste not included on the green list - Consequences.



Heading GC 020 of the green list of wastes in Annex II to 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, is to be interpreted as covering wire cable only if such wire comes from electronic equipment

.....the fact that composite waste is a combination of two materials both of which are mentioned in the green list of wastes in Annex II to that regulation does not have the effect of making the rules laid down by that regulation concerning the wastes mentioned on that list applicable to such composite waste

Waste Shipment Regulation (WSR) 1013/2006

- Many things have changed since the adoption of the WSR in 2006.
- Previously, the EU did not have a network of prosecutors to coordinate approaches to the prosecution and conviction of WSR offenders that Rob de Rijck contributed to create.
- The global trade in waste in 2016 was 4 times more than in 1992 and its value as secondary raw material was around 100 billion euro.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

- The BASEL Convention seeks to provide enhanced control over the transboundary movement of hazardous and other wastes, so that it may act as an incentive for environmentally sound management (ESM) and reduce the frequency of such movements.
- The Parties are obliged to adopt appropriate measures to minimize the generation of hazardous and other wastes and ensure adequate disposal facilities within the generating State.
- Such measures are intended to ultimately reduce the transboundary movement of wastes



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The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is an international treaty, which was adopted on March 22, 1989 in Basel, Switzerland. It entered in force in 1992 and there are 187 State parties to the convention.

The Basel Convention has incorporated criminal provisions as a way to raise social awareness and condemnation of environmentally harmful actions as well as deterrence. The offenders can be prosecuted criminally when infringing their legal regime.

International environmental agreements deal with the environmental impact of human activities that are considered profitable from an economic point of view and are accepted as part of the risk society characterized by Ulrich Beck in its book *Risk Society, Towards a New Modernity*. The first sentence of this book:

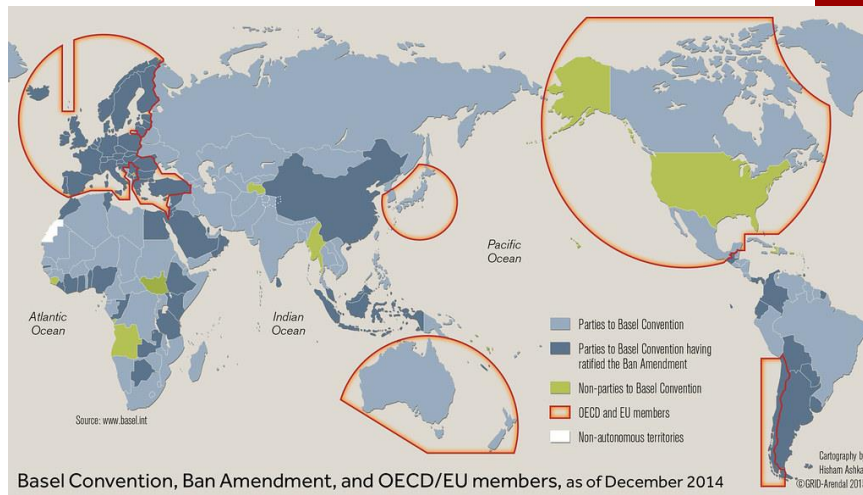
“In advanced modernity the social production of wealth is systematically accompanied by the social production of risks”

New risks attain environment, human health, security, etc. In the case of hazardous waste, their transport is considered an accepted risk whose potential damage must be socialized through systems of liability. However, the growing gravity of these risks and their impact on the environment has moved the legal reaction to the territory of criminal law.

The practice of International environmental agreements shows how frequently systems for enforcing international law have **failed to keep up with companies that operate transnationally**, and how businesses – cruise lines, oil companies, etc. – have been able to take full advantage of **legal uncertainties** and **jurisdictional loopholes**.

For these companies, activities damaging the environment such as transporting waste to developing countries, are profitable and are done to save money and increase their competitive advantage over other companies complying with international and domestic rules.

Organized crime is also a big problem for the enforcement of these agreements, since criminal networks can misuse their systems of permits and authorizations in order to legalize illegal products, and forge them to circumvent the measures adopted by international institutions and States parties.



Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

- The Basel Convention states that the Parties “consider” illegal traffic in hazardous wastes or other wastes as criminal and requires each Party to take appropriate legal, administrative and other measures to prevent and punish such conducts and “Each party shall introduce appropriate national domestic legislation to prevent and punish illegal traffic”.
- Article 4(3) does not actually impose a clear obligation to make illegal traffic criminal. It simply says that parties “consider” it to be criminal.



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The Basel Convention 1989 on the Control of Transboundary Movements of Hazardous Wastes states that its States parties consider **illegal traffic in hazardous wastes and other wastes to be criminal**. For that “Each party shall introduce appropriate national domestic legislation **to prevent and punish** illegal traffic”. The cooperation of States parties is required in order to enforce cross border obligations against illegal traffic. In practice, the enforcement of the Convention **depends equally on the enactment of administrative and criminal law at the domestic level because the offender is a citizen or a company of the State and is the one who operates without a license or violates license conditions**. This legal and supervised traffic is considered not just as a profitable source of revenues from industries for developing countries but also as **a solution to the illegal traffic that could thrive under the shadow of the ban**. The impact of this ban on the proliferation of organized crime will be examined in a further report.

The Basel Convention is a representative of the problems of enforcement of international environmental law just presented and consequently of the criminal provisions incorporated in them to fight against environmental crime. There are many international environmental agreements sharing the same problems of enforcement.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

- The Basel Convention has established a **Compliance Mechanism** that first convened in 2003. It is:
 - “non-confrontational”,
 - “non-binding”,
 - “preventive in nature” in order to review collected information to monitor compliance and to assist Parties with achieving compliance.
- When Parties are found in non-compliance, they are given time to address the issue “**within reasonable time limits**”, but in the absence of effective remedial action the Secretariats brings the matter to the notice of the **Standing Committees** that are mandated to “find a solution”.



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Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

Illegal traffic occurs if the transboundary movement of hazardous wastes is taking place under the following conditions:

- **Without notification** pursuant to the provisions of the Convention to all States concerned;
- **Without the consent of a State concerned;**
- Through consent obtained by falsification, misrepresentation or fraud;
- When movement does not conform in a material way with the documents;
- Or when movement results in deliberate disposal of hazardous wastes in contravention of the Convention and of general principles of international law (Art. 9).



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Guardia Civil

**NEUMÁTICOS AL FINAL DE SU VIDA ÚTIL
CONVENIO DE BASILEA**

Detenidos/ Investigados	3
Legislación	Convenio de Basilea
Países de involucrados	Burkina Faso Congo
Provincias	Madrid, Valencia, Toledo
Seizure	40 Containers
Modus operandi	Neumáticos para reciclar que eran vendidos en el mercado de segunda mano de países subsaharianos

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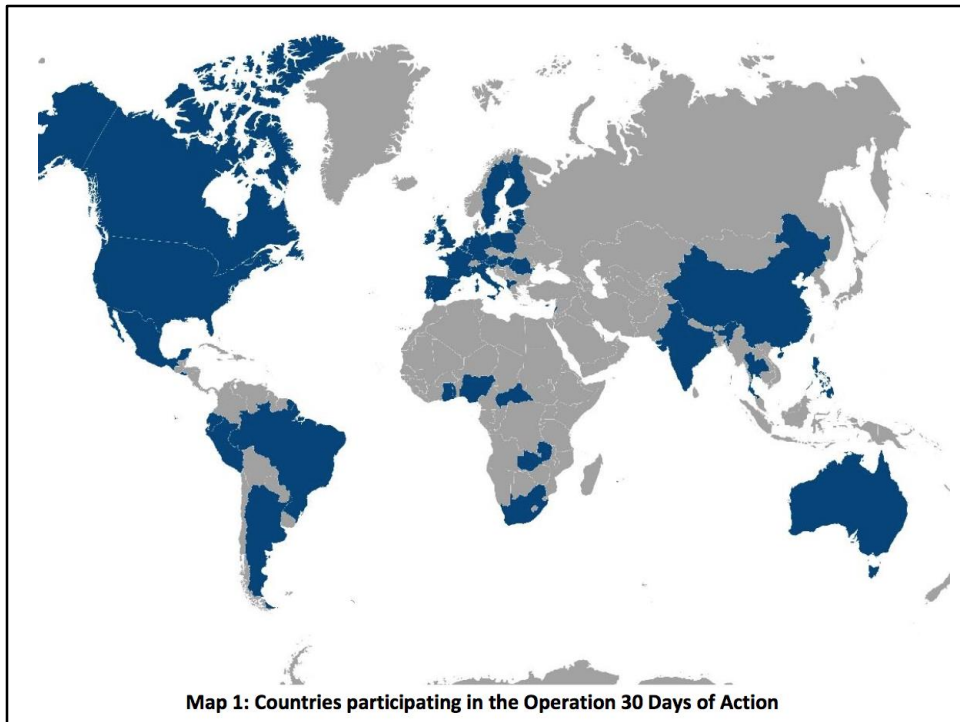
The Spanish Guardia Civil and its special group for the protection of nature SEPRONA,, with the support of Europol and Ameripol, dismantled a criminal group illegally trading used tyres in several countries across Africa, America and Europe. The gang could have obtained net profits amounting to nearly EUR 2 million.

The information is available at the Europol website:

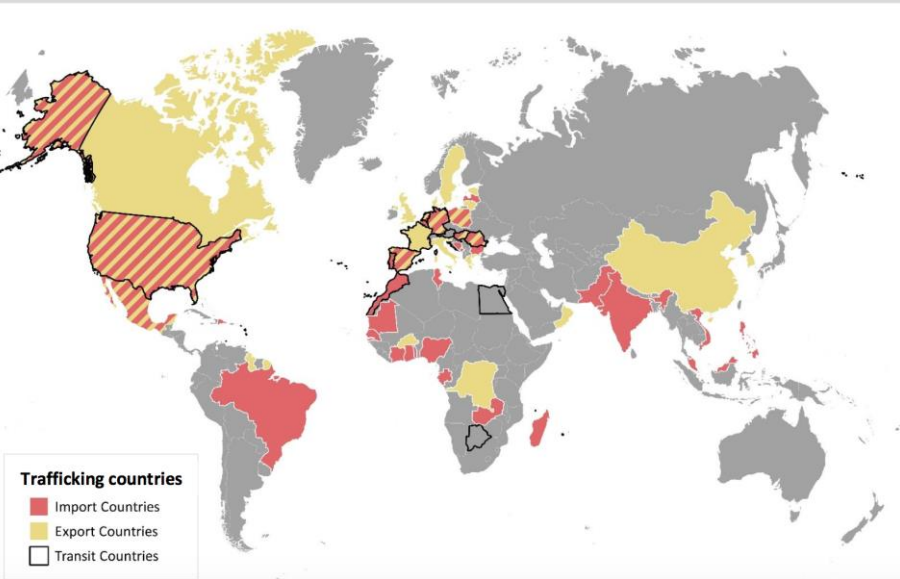
<https://www.europol.europa.eu/newsroom/news/illegal-waste-trafficking-how-to-make-eur-18-million-200-000-used-tyres>



- This INTERPOL operation contributed to gather information on
 - Illegal shipments of hazardous wastes across countries.
 - Illegal landfills of waste (hazardous and non-hazardous).
 - Irregular activities in recycling
- “The Operation aimed to be an 'umbrella project' including regular operational activities and specially targeted operations at the preference of the participating agencies. Each participating country determined and led its own self-funded operational activities based on the existing intelligence and reported the results back to INTERPOL during the Operation”.
- The Operation confirmed some known waste crime streams and revealed emerging trends, including the rise of the Middle East and Latin America both as import and export regions.

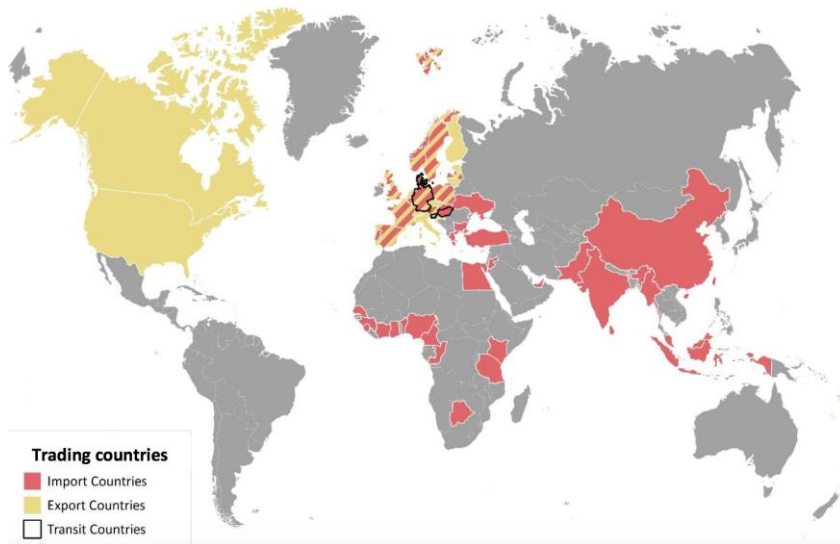


Import and Export countries in Waste Trafficking
Criminal Violations detected during Operation 30 Days of Action



Import and Export countries in Illicit Waste Trade

Administrative Violations detected during Operation 30 Days of Action





The slide features a dark grey header with the text "PROYECTO TECUM" in yellow. On the left, there is a vertical logo for "Guardia Civil" in yellow, with a small emblem below it. In the center is a circular logo with a blue border containing yellow stars, and the word "TECUM" in the center. To the right of the logos, the title "Tackling Environmental Crimes Through standardized Methodologies" is written in a large, bold, black font, with the words "Through" and "standardized" in a smaller font size. A red vertical bar is on the right side of the slide, and a red circle with the number "37" is in the bottom right corner.

The 'Tecum' project, led by the Italian Carabinieri, fights against criminal organisations that profit from waste and promotes standardized methodologies to fight waste crimes in Italy, Portugal, Romania and Spain.

A pilot project to identify best practices to fight illegal shipment of wastes.



Project TECUM focuses on the (transnational) organised crime dimension of environmental crimes. Supported by Europol, the project is also a multi-tool methodology to ensure substantial improvement in investigation capacities and raise awareness of this crime to institutions and civil society.

The working group has brought together experts from the fields of security, the judiciary, customs and border control or land transport from various EU countries such as Italy, Romania, Belgium, Holland, Spain, etc. with the aim of integrating environmental crime into the investigations carried out against organised crime, improving the effectiveness of early identification through risk analysis and the determination of indicators that allow connections between the two to be established

Information available at https://www.miteco.gob.es/es/actuaciones-seprona/notadeprensatecumfotos_tcm30-57521.pdf

Core case law on the WSR

(Please read alongside the text of the Regulation)

- C-624/17 Tronex
- C-241 and 242/12 Shell

.....

The Court has contributed with its case law to clarify the meaning of the more open terms of the Regulation



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C-624/17 Tronex

Environment — Waste — Shipments — Regulation (EC) No 1013/2006 — Article 2(1) — Directive 2008/98/EC — Article 3(1) — Concepts of 'shipment of waste' and 'waste' — Consignment of goods initially intended for retail sale, returned by consumers or become redundant in the seller's product range

Preliminary ruling (The Netherlands)

The ECJ ruled: The shipment to a third country of a consignment of electrical and electronic appliances, such as those at issue in the main proceedings, which had been initially intended for retail sale but which were returned by the consumer or which, for various reasons, were sent back by the retailer to its supplier, is to be regarded as a 'shipment of waste' within the meaning of Article 1(1) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, read in conjunction with Article 2(1) thereof, and Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, where that consignment contains appliances the good working condition of which has not been previously ascertained or which are not adequately protected from transport damage. Such **goods which have become redundant in the seller's product range and which are in their unopened original packaging, on the other hand, must not, without indications to the contrary, be regarded as waste.**

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The request of a preliminary ruling has been made in criminal proceedings against the company Tronex which had been charged with having shipped a consignment of waste from the Netherlands to Tanzania in breach of the WSR.

The question that needed to be discerned was whether the small household appliances that had been discarded from sale in Europe were intended to be transported for sale as second-hand goods or whether, on the contrary, if the requirement for their proper functioning could not be proved, they were to be transported as waste (WEEE, waste of electrical and electronic equipment).

The Advocate General Kokott concluded that “the shipment of a large consignment of electrical appliances bought from retailers or suppliers which have been returned by consumers is to be regarded as a shipment of waste within the meaning of the Waste Shipment Regulation, if it has not previously been established that the returned appliances are functional or the appliances are not appropriately protected against damage during transportation. Appliances which have become redundant and which are in unopened original packaging, on the other hand, are not, in the absence of any further evidence, to be regarded as waste”. (44 and 59)

C-241 and 242/12 Shell

Environment — Waste — Concept — Directive 2006/12/EC — Shipments of waste — Information from the competent national authorities — Regulation (EEC) No 259/93 — Discarding of a substance or object or intention or requirement to discard it

The ECJ ruled: Article 2(a) of Council Regulation ..., must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, a consignment of **diesel accidentally mixed with another substance is not covered by the concept of 'waste'**, provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market, which it is for the referring court to ascertain

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These requests for a preliminary ruling concern the interpretation of the concept “waste” within the meaning of the WSR and they have been made in the course of two sets of criminal proceedings brought against Shell, concerning the transport of a consignment of ultra light sulphur diesel unintentionally mixed with methyl tertiary butyl ether from Belgium to the Netherlands.

There are problems related with mixing different types of waste.

Case C-277/02: EU-Wood-Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (Germany)

Preliminary ruling

Environment - Waste - Regulation (EEC) No 259/93 on shipments of waste - Waste intended for recovery - Objections - Powers of the authority of dispatch - Recovery contravening the requirements of Article 4 of Directive 75/442/EEC or those of national provisions - Power of the authority of dispatch to raise such objections

In 1999, EU Wood Trading notified a shipment of wood waste for export for recovery to a company based in Italy. Analysis of the waste in the notification documents revealed that the waste had a higher concentration of lead and arsenic than accepted by the German competent authority, which therefore opposed the shipment.

The ECJ decided that, for the decision on the objection, the competent authority may refer to national rules on recovery treatment. It also considered that the shipment of waste should be assessed as a whole process.

"...the objections to a shipment of **waste for recovery** which the competent authorities of dispatch and of destination are empowered to raise may be based on considerations connected not only to the actual transport of the waste in each competent authority's area of jurisdiction **but also on the recovery planned for that shipment.**"



Case C-235/02: Criminal proceedings against Marco Antonio Saetti and Andrea Frediani

Directives 75/442/EEC and 91/156/EEC - Waste management -
Definition of waste - Petroleum coke

Preliminary
ruling
(Italy)

The Petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries **does not constitute waste** within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991

Case C-114/01: Proceedings against Avesta Polarit Chrome Oy, formerly Outokumpu Chrome Oy

Approximation of laws - Directives 75/442/EEC and 91/156/EEC - Meaning of waste - Production residue - Mine - Use - Storage - Article 2(1)(b) - Meaning of other legislation - National legislation outside the framework of Directives 75/442/EEC and 91/156/EEC

Preliminary ruling
(Finland)

The holder of leftover rock and residual sand from **ore-dressing** operations from the operation of a mine, **discards or intends to discard** those substances, which must consequently be classified as wasteunless he uses them lawfully for the necessary **filling in of the galleries** of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose must consequently be classified as waste ...

....national legislation must be regarded as 'other legislation' within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force

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Case C-116/01: SITA EcoService Nederland BV.
Formerly Verol Recycling Limburg BV v. Minister van
Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer

Preliminary ruling
(The Netherlands)

Environment - Waste - Regulation (EEC)
No 259/93 - Directive 75/442/EEC -
Treatment of waste in several stages -
Use of waste as fuel in the cement
industry and use of incineration residues
as raw material in cement manufacture
- Classification as a recovery operation
or as a disposal operation - Concept of
the use of waste principally as a fuel or
other means to generate energy

The calorific value of waste which is to be
combusted is not a relevant criterion for the purpose
of determining whether that operation constitutes a
disposal operation as referred to in point D10 of
Annex IIA to Directive 75/442, as amended by
Directive 91/156 and by Decision 96/350, or a
recovery operation as referred to in point R1 of
Annex IIB thereof.

**Member States may establish distinguishing
criteria for that purpose, provided that those criteria
comply with those laid down in the Directive**

**Where a waste treatment
process comprises several
distinct stages:**

**it must be classified as a
disposal operation or a recovery
operation, taking into
account only the first operation
that the waste is to undergo
subsequent to shipment**

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Case C-228/00: Commission of the European Communities v. Federal Republic of Germany

Failure of a Member State to fulfil obligations - Article 7(2) and (4) of Regulation (EEC) No 259/93 - Classification of the purpose of a shipment of waste (recovery or disposal)
- Incinerated waste - Point R1 of Annex II B to Directive 75/442/EEC - Concept of use principally as a fuel or other means to generate energy

...by raising unjustified objections to certain shipments of waste to other Member States to be used principally as a fuel, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of 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.

Case C-6/00: Abfall Service AG (ASA) v. Bundesminister für Umwelt, Jugend und Familie

Preliminary ruling
(Austria)

Environment - Waste - Regulation (EEC)
No 259/93 on shipments of waste -
Competence of the authority of dispatch
to scrutinise the classification of the
purpose of a shipment (recovery or
disposal) and to object to a shipment on
the ground of an incorrect classification -
Directive 75/442/EEC on waste -
Classification of deposit of waste in a
disused mine

**The deposit of waste in a disused mine does not
necessarily constitute a disposal operation**

The deposit must be assessed on a case-by-case
basis to determine whether the operation is a
disposal or a recovery operation within the
meaning of that Directive.

Such a deposit constitutes a recovery if its
principal objective is that the waste serve a
useful purpose in replacing other materials which
would have had to be used for that purpose

The competent authority of dispatch, ..., is
competent to verify whether a proposed
shipment classified in the notification as a
'shipment of waste for recovery' does in fact
correspond to that classification.

If that classification is incorrect, the authority must
oppose the shipment by raising an objection
founded on that misclassification within the
period prescribed by Article 7(2) of the
Regulation

Relevant national cases

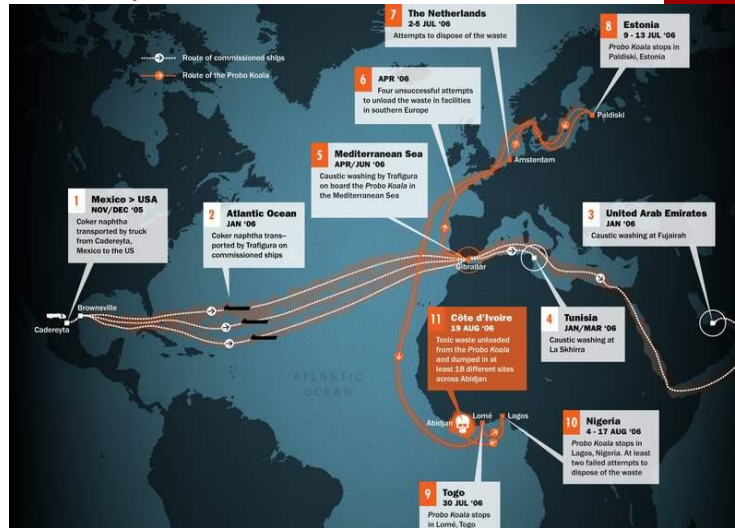


THE
PROBO KOALA
INQUIRY

conducted by Lord Fraser of Carmyllie PC QC

Relevant national cases

Source Amnesty International



The Trafigura case



- *Trafigura in the Netherlands*: on 23 July 2010, a Dutch court fined Trafigura one million euros for illegally exporting toxic waste.
- The ruling also included individual convictions of the captain of the ship involved and a Trafigura employee.
- However, this ambiguous verdict has been criticized: “the trial involved charges of concealing the ‘harmful nature’ of ship-borne waste as it transited through Amsterdam, rather than the actions of the company and its agents in Ivory Coast where the harm actually occurred”.
- The individual sentences reflect the lesser gravity of such offences: a five year suspended jail term for the Captain of the ship carrying the toxic waste, and a 25.000 euro fine for the employee in charge of operations at Amsterdam harbour.

The Trafigura case



- On the basis of **Article 18.1 of the WSR**, “**all exports of waste to ACP States shall be prohibited**”.
- Ivory Coast is one of these states. The EU Regulation is binding in its entirety and directly applicable in all Member States.
- Besides under the Basel Convention, the public prosecutor's office must prosecute the offences committed by Trafigura Beheer B.V. and others in Ivory Coast. This Convention prohibits the export of hazardous waste to developing countries when one must assume that the waste cannot be processed in a responsible way. Article 4.3 and 4 stipulate that the illegal export of hazardous waste is actionable and that State Parties are under an obligation to punish violation of this convention.
- The individual sentences reflect the lesser gravity of such offences: a five year suspended jail term for the Captain of the ship carrying the toxic waste, and a 25.000 euro fine for the employee in charge of operations at Amsterdam harbour.

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The Trafigura case



- The Dutch Department of Public Prosecutions conducted an investigation in Ivory Coast shortly after the dumping of waste in 2006. At the time, the Department of Public Prosecutions found that a lack of evidence and the difficult circumstances made prosecution impossible.
- Greenpeace Netherlands sought to compel the Dutch Department of Public Prosecutions to indict Trafigura for acts of illegal dumping, but on 15 April 2011, an Appellate court upheld the prosecutor's decision to refrain from filing charges, finding that prosecution was neither feasible nor opportune, in part because it was not evident that Ivory Coast would cooperate.
- In addition, the Netherlands had made considerable efforts to conduct an investigation, submitting requests to Ivory Coast for legal assistance.
- The **Department of Public Prosecutions has a certain amount of discretion in deciding whether or not to prosecute.**

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The Trafigura case



- Trafigura Netherlands has always argued that they sent the Probo Koala to Abidjan because “[u]nder Regulation 38 of the MARPOL Convention, to which Ivory Coast was a signatory, slops handling would be standard practice at a major oil port like Abidjan” .



The Trafigura case

- *Trafigura in Ivory Coast*: in 2007, an out of court settlement was reached with the government of Ivory Coast granting Trafigura immunity from prosecution, so Trafigura has never had to answer to the courts in Ivory Coast because the company paid the government €152 million, which resulted in the termination of the civil proceedings in which damages were claimed from the oil company, and Trafigura avoided criminal prosecution.
- Although Trafigura explicitly denies that the settlement involved agreements about protection from criminal proceedings. A number of Africans were prosecuted, with two people being condemned to prison sentences of five and twenty years.

The Trafigura case



Trafigura in Ivory Coast:

- For its part, Ivory Coast did not trigger the Basel Convention Non Compliance Procedure (NCP), but requested assistance from the Convention's Technical Cooperation Trust Fund, under which an *ad hoc* technical commission was established in order to assist that country in the assessment of the damage to human health and the environment arising from the dumping.
- After its in-country visit, the NCP commission found that it was 'unable, at that stage, to establish whether or not the discharging of waste from the Probo Koala constituted illegal transboundary movement of hazardous wastes as defined by the Basel Convention', but stated that: [w]ithout prejudging which international body is competent to rule on the case, serious lapses ha[d] occurred in the application of the relevant regulations, whether under the Basel Convention, the MARPOL Convention or the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa

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The Trafigura case



Trafigura in the UK

- Because the main company of Trafigura is London-based, a civil claim was brought in the UK on behalf of some of the victims, in 2009.
- Circumventing this new jurisdiction, Trafigura reached another settlement with no admission of liability. The company made another out-of-court settlement of \$50 million to Abidjan inhabitants who had suffered health problems after the dumping of the waste. This was the result of a class action brought by the solicitors Leigh Day.
- In September 2012, Amnesty International and Greenpeace Netherlands demanded that the British government open a criminal investigation into the dumping of toxic waste by Trafigura, after releasing their report, *The Toxic Truth*. **This report provides details on how existing laws aimed to prevent such tragedies were flouted, with several governments failing to halt the progress of the Probo Koala and its toxic cargo towards Abidjan.**
- The report further challenges the legality of the settlement in Ivory Coast that apparently allowed Trafigura to evade prosecution for its role in the dumping of the toxic waste. It also calls upon the Ivorian government to ensure that the victims receive full compensation. Further, it was called upon to reassess the legality of the agreement it made that apparently gave Trafigura sweeping immunity from prosecution.

Trafigura: Out of court settlements

Sept 2006 - Thousands in Ivory Coast report falling ill from waste in Abidjan

Oct 2006 - About 1,000 Ivorians sue Trafigura

Feb 2007 - Trafigura reaches \$160m out-of-court settlement with government of Ivory Coast

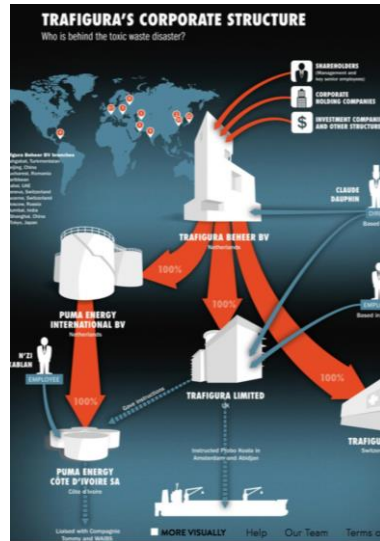
Oct 2008 - Ivory Coast court finds two people, not employees of Trafigura, guilty of dumping toxic waste in Abidjan

Sept 2009 - Trafigura agrees to pay \$50m to people in Ivory Coast who say they were poisoned by the waste

June 2010 - Dutch prosecutors accuse Trafigura of illegally exporting hazardous waste to Ivory Coast

Trafigura denied responsibility for the dumping of the waste and any deaths or injuries caused
Source BBC

Source Greenpeace - Visually



Spain: Just some months ago

Source: EUROPOL
Stolen Waste From Spain To Asia



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In this operation, 42 people were arrested for trafficking stolen waste from Spain to Asia.

The Spanish Civil Guard (Guardia Civil), supported by Europol and the Spanish Central Prosecutor Unit for Environment and Urbanism (Fiscalía de Medio Ambiente y Urbanismo), cracked down on a large criminal network involved in environmental crime and money laundering. The criminal group, was stealing waste and trafficking it to Southeast Asia and is believed to have generated about €16 million loss for the municipality of Madrid.

The investigation focused on a company, based in Madrid, which was specialised in waste management. Since 2015, the company was organising illegal collection of paper and paperboard in the city. This waste was then mixed with legally collected waste, in breach of the regulative framework, before being shipped to Southeast Asia, mainly to China, India, Indonesia and South Korea.

Information available at <https://www.europol.europa.eu/newsroom/news/42-arrested-for-trafficking-stolen-waste-spain-to-asia>

Recommended readings



- The Commission Staff Working Document Evaluation of Regulation (EC) N° 1013/2006 of the European Parliament and of the Council of 14 June 2016 on shipments of waste, SWD(2020) 27 final
- Final report of the Eighth round of mutual evaluations on environmental crime -Information and discussion at the Council – 2019, available at <https://data.consilium.europa.eu/doc/document/ST-14065-2019-INIT/en/pdf>
- Annex IC of the WSR on the Specific Instructions for Completing the Notification and Movement Documents

THANKS FOR YOUR ATTENTION

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